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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Honorable DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2022-001605

THE STATE,RESPONDENT,

v.

MICAH CHRISTIAN SYLVE BROWN,APPELLANT.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the court erred where it denied Mr. Brown counsel in his trial for murder and attempted murder, where Mr. Brown did not waive his right to counsel by affirmative request or by misconduct, since an accused has the fundamental right to counsel?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether trial judges in this state have discretion to cut off the supply of free-of-charge attorneys at some point, or whether trial judges must provide defendants as many appointed attorneys as they wish because of the Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF THE CASE

Appellant Micah Brown was indicted at the 2019 term of the Grand Jury for Richland County for two counts of murder and one count of attempted murder (2019-GS-40-01952, -01953, and -01951). Attorney Tracy Pinnock was originally appointed to represent Appellant, but Appellant moved to relieve her, and The Honorable Casey Manning granted his request.¹ Attorney Judah VanSyckel was then appointed from the list of Rule 608, SCACR, contract attorneys commissioned with Indigent Defense in Richland County to represent Appellant, but Appellant also moved to relieve him, and after multiple hearings before the Honorable Clifton Newman on July 11, 2022, August 15, 2022, and October 14, 2022, Judge Newman granted his request as well. Standby counsel Tivis Sutherland was appointed to sit with Appellant at his trial to counsel him on any procedural matters that may arise after Appellant declined Judge Benjamin's and Mr. Sutherland's offers to appoint Mr. Sutherland to full representation. Nov. 7-10, 2022 Tr. The case was prosecuted by Deputy Solicitor Dale Scott. Nov. 7-10, 2022 Tr. 1.

Appellant proceeded to trial by jury *pro se* from November 7-10, 2022, after which he was found guilty as charged. Nov. 7-10, 2022 Tr. 243. He was sentenced by the Honorable DeAndrea G. Benjamin to two concurrent terms of life imprisonment without parole for the two murders and 30 years' concurrent for the attempted murder. Nov. 7-10, 2022 Tr. 250. Appellant timely filed a notice of intent to appeal his convictions and sentences and subsequently submitted a Brief in support of his Appeal. This Brief of Respondent follows.

¹ See Designation of Matter Item # 3, Court Reporter's Email dated June 9, 2023. This email explains why no transcript of the initial hearing to relieve Ms. Pinnock exists. *See also* Designation of Matter Item # 2, September 19, 2019 Order Relieving Counsel.

STATEMENT OF FACTS

It was rainy on the night of Wednesday, November 7, 2018. 21-year-old Choatte Neal (co-defendant tried separately) called Taurus Williams² (the attempted murder victim) who he frequently paid to drive him around and asked him to take him to Appellant Micah Brown's house to buy weed and pick up some money around 8:00 P.M. Taurus picked up Choatte and they along with Jasmine Richardson (murder victim) and Brennan Montgomery (the other murder victim) drove 40 minutes to Hopkins, S.C. to the place where Appellant lived with his father. Once there, Appellant unusually told the group, "We got to go down the street to my people's house and get [the weed and money]." Appellant directed Taurus through two minutes of directions to 1300 Whispering Pines Lane in Richland County. It was remote dirt road. Nov. 7-10, 2022 Tr. 74-79, Tr. 183-186, Tr. 188; State's Exhibit 65 (aerial photo of the area).

Appellant had climbed into the middle back seat, so Choatte—sitting to the left of him—got out of the car to let him out. Appellant got out too then immediately turned and opened fire on Jasmine (front passenger), Brennan (sitting behind her), and Taurus (the driver). Jasmine got out and started running to the little park on the street, but Appellant chased her down and started beating her with his pistol, but then when it broke, his hands. Brennan sustained gunshot wounds inside the car but fell out fully to the ground after Choatte opened the car door to check on him. Taurus attempted to drive the now-empty Kia Forte away, but he wrecked it into some big rocks 150 to 200 yards down Whispering Pines Road. Appellant dragged Jasmine across the road to a tree line where he left her there in the dark. Tr. 102, Tr. 146, Tr. 187, Tr. 189-194.

² Taurus Williams was subpoenaed to testify at trial but did not appear and Judge Benjamin issued a bench warrant. He was not located while the trial was still going on. Nov. 7-10, 2022 Tr. 213-214.

Appellant and Choatte then walked the more than half a mile up a hill to his house at 708 Sharpe Road. Appellant's father Sylvester Brown thought it was unusual they came in the back door, and eventually gave Choatte (who Sylvester described as a very tall, light-skinned, and lanky young man) orange juice as he was acting like he was having a panic attack. Appellant asked to borrow his father's phone to locate his own phone with the Find My Phone app. Sylvester offered to give Appellant and Neal a ride, but Appellant declined, and the two young men walked the more than half mile back to the scene in the rain. Nov. 7-10, 2022 Tr. 80-87, Tr. 146-147, Tr. 176, Tr. 194-196.

Appellant and Choatte came to 1300 Whispering Pines where they noticed that Taurus had dragged himself down the dirt road up onto the porch of the house. Appellant told Choatte, "Bro, you got to help me kill him." Choatte resisted, but eventually complied with Appellant's demand. The two found a metal rod in the yard and began to beat Taurus with it for quite some time, and only left after they thought he was dead. Appellant and Choatte then walked back up the hill to Appellant and his father's house where Appellant eventually told two people who had come over, "Yo, I just killed two people." Nov. 7-10, 2022 Tr. 195-196, Tr. 198, Tr. 201.

Dorasha Swain, the owner of the 1300 Whispering Pines house, saw Appellant and Choatte beating Taurus on her front porch security camera at approximately 10:30 P.M. and called the police. She was not home at the time. She saw Appellant in a black leather jacket with a grey hoodie on the video just like the ones his father had seen Appellant leave in. She also saw Brennan Montgomery lying in the middle of the road on his back on the video; he was barely conscious by the time law enforcement arrived and later died from three gunshot wounds to the head and chest. Jasmine Richardson died at the scene from multiple blunt force skull fractures and injuries to her head and upper body; she was found lifeless, face down in the mud. Taurus

was shot in the chest, shoulder, and head, and was severely beaten but somehow survived. Nov. 7-10, 2022 Tr. 59-69, Tr. 138-140, Tr. 157-174, Tr. 197; State's Exhibit 64 (security video).

Law enforcement executed a search warrant on Appellant's house and collected a damp gray hoodie and black leather jacket, a pistol grip, two LG cellphones, damp jeans with red and brown stains, and 6 spent .38 cartridge casings, along with a plethora of other items. A .38 H&K model handgun was found broken in two at the scene. After a Cellebrite report was run on the two cellphones, law enforcement discovered a conversation between Appellant and another person about a possible sale of the gun Appellant shot the victims with³ that spanned from October 13th to the day after the incident, November 8, 2018. Appellant told the other person on November 8th that he no longer had the gun. Nov. 7-10, 2022 Tr. 92-92, Tr. 96, Tr. 108-112, Tr. 116-120, Tr. 145; State's Exhibits 10-14 (photos of the gun); State's Exhibit 73 (chat messages.)

6'7" or 6'8" tall and lanky Choatte Neal was arrested on November 9th and was charged with two counts of murder and one count of attempted murder. Appellant was arrested a day later and after *Miranda* warnings were given, admitted to being on the porch and identified both Neal and himself in the porch security video. He also admitted to being in the car with the three victims. Choatte testified Appellant saw him in prison later and tried to get him to "come up with a story" that they had "shot [the victims] in self-defense because they tried to rob us." It turns out that Appellant had committed the murders and the attempted murder because "[t]hey got dubbed out," or kicked out of the Nine Trey gang that both Appellant and Choatte were members of. Tr. 198-203. Appellant called someone right after the murders and said, "It's done." Nov. 7-10, 2022 Tr. 147, Tr. 150-152, Tr. 198-203.

³ The gun's serial number was seen on a photo included in the conversation that matched the serial number of the gun found at the scene. Nov. 7-10, 2022 Tr. 130-133.

STANDARD OF REVIEW

“Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of fact and law which appellate courts review de novo.” *State v. Samuel*, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018); *United States v. Lopez-Osuna*, 242 F.3d 1191, 1198 (9th Cir. 2000). “In doing so, this Court must consider the defendant’s testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request.” *Samuel*, 422 S.C. at 602, 813 S.E.2d at 490; *United States v. Singleton*, 107 F.3d 1091, 1097 (4th Cir. 1997).

ARGUMENT

- I. The Honorable Clifton Newman rightly denied Appellant representation from an unlimited number of free-of-charge attorneys after Appellant moved to relieve the first two and numbers three and four were unavailable. Judge Newman and Judge Benjamin offered Appellant the services of a fifth attorney, but Appellant turned them down. The fifth one was stand-by counsel at trial anyway. Appellant therefore voluntarily, knowingly, intelligently waived his right to an appointed attorney.**

Appellant argues his Sixth and Fourteenth Amendment rights to counsel were violated when the Honorable Clifton Newman denied his motion to appoint yet another lawyer to his case after he moved to relieve the first two, the third and fourth were unavailable, and Appellant turned down the services of the fifth. The State disagrees and submits Appellant's argument is without merit. Defendants are entitled to the services of a free-of-charge attorney, but they do not have the right to an unlimited selection from which to choose from. This Court should affirm.

The Sixth Amendment to the United States Constitution provides criminal defendants the right to represent themselves at trial. U.S. Const. amend. VI. The Fourteenth Amendment applied the Sixth Amendment to the states and *Gideon v. Wainwright* ensured criminal defendants in this country the right to the assistance of counsel should they so choose. U.S. Const. amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335 (1963). A defendant must therefore relinquish the right to counsel voluntarily, knowingly, and intelligently, must be made aware of the dangers of self-representation through “*Faretta* Warnings”, and the record must show the defendant knew what he was doing and made the choice to proceed *pro se* with his eyes wide open. *Faretta v. California*, 422 U.S. 806, 807, 819 (1975); *Gardner v. State*, 351 S.C. 407, 410-411, 570 S.E.2d 184, 185-186 (2002). If a defendant proceeds to trial *pro se*, a trial court may appoint a “stand by counsel” to aid the accused in the event the defendant should wish to ask for help or in the event a court must terminate the self-representation because of deliberate serious and obstructionist misconduct on the part of the defendant. *Illinois v. Allen*, 397 U.S. 337, 346 (1970). However,

states cannot force lawyers upon defendants. *Faretta*, 422 U.S. at 820-821. If the above benchmarks are met, though, the court's procedure in appointing or relieving counsel will be upheld. *Id.*

In South Carolina, if a defendant cannot afford an attorney, counsel may be appointed for him. S.C. Constitution 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 both."); Rule 602, SCACR: Defense of Indigents; S.C. Code § 17-3-10 *et. seq.* If the criteria for indigency has been met, the county Public Defender's Office shall immediately thereafter enter upon the representation of the accused. Rule 602(c), SCACR. Once a lawyer is appointed or retained, that lawyer typically should continue representing an accused until a final judgment, but a trial court may relieve a lawyer upon written petition and for good cause. Rule 602(e)(1)(2), SCACR. Judges may also appoint private lawyers off the South Carolina Bar's list pursuant to Rule 608, SCACR. If a defendant does not have counsel, the defendant should be given ample opportunity to be fully heard and be given every opportunity to call and cross-examine witnesses.

A defendant may lose his right to counsel, however, by waiver, by conduct (or misconduct), or by forfeiture. *Prince v. State*, 301 S.C. 422, 423-424, 392 S.E.2d 452, 463 (1990); *State v. Boykin*, 324 S.C. 552, 556, 478 S.E.2d 689, 691 (Ct. App. 1996); *United States v. Goldberg*, 67 F.3d 1092, 1099 (3d Cir. 1995). If a defendant is warned ahead of time that waiver by conduct was possible, dismissing multiple appointed attorneys can be the functional equivalent of a voluntary and knowing waiver by conduct of the right to counsel, which is what occurred here. *Goldberg*, 67 F.3d at 1100; *United States v. Meeks*, 987 F.2d 575 (9th Cir. 1993). A waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009).

Appellant was not entitled to an unlimited number of free-of-charge attorneys or the appointment of counsel of his choice. *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983) (upholding the denial of a pro se motion for a continuance to allow his attorney—appointed 6 days earlier—more time for preparation and holding the Sixth Amendment did not guarantee a meaningful relationship between accused and counsel). “Not every restriction on counsel’s time or opportunity to investigate or consult with his client or otherwise prepare for trial violates a defendant’s Sixth Amendment right to counsel.” *Morris*, 461 U.S. at 11. Appellant, however, was provided an attorney through the most critical period of the proceedings up until trial: he had a lawyer through arraignment, indictment, investigation, and preparation. He then knowingly and intelligently waived his right to a lawyer by moving to relieve two then refusing the third appointment after Judge Newman warned him ahead of time that if he relieved a second attorney another one may not be appointed for him. *Osbey v. State*, 425 S.C. 615, 620, 825 S.E.2d 48, 50 (2019). A similar fact pattern was upheld in *United States v. Fazzini*, 871 F.2d 635 (7th Cir. 1989) (failure to cooperate with a fourth appointed attorney acted as a waiver of the right to counsel where the judge had warned him his conduct would result in him proceeding pro se.)

In this case, Public Defender Tracy Pinnock was appointed to represent Appellant according to the normal procedures, but Appellant moved to relieve her, and the Honorable Casey Manning granted Appellant’s motion on September 9, 2019. Appellant was unhappy with Ms. Pinnock because she did not deliver his discovery to him within thirty days of the motion to compel. (Appellant called it “his motion” at the hearing). July 11 Tr. 11. Appellant also was under the perception that she lied to him because of this. July 11 Tr. 4-5. Judge Manning then appointed Judah VanSyckel from the Rule 608, SCACR, list to represent Appellant. Appellant moved to relieve him, too, and a second hearing was held on July 11, 2022 before the Honorable

Clifton Newman. July 11 Tr. 1-33. Trial was scheduled to proceed at that point on October 31, 2022. Appellant was unhappy because Mr. VanSyckel had encouraged him to take the State's 50-year plea offer even though Appellant was facing multiple life without parole sentences. July 11 Tr. 5-6. He was in his early 20's (23 to be exact) at the time of the hearing. July 11 Tr. 19. Appellant was also unhappy because Mr. VanSyckel told him their best strategy was to stall as much as possible. July 11 Tr. 10. Judge Newman took the matter under advisement after stating he didn't "appoint lawyer after lawyer" –

You know, the State provides a lawyer free of charge and if the defendant does not want the lawyer that the State provides, the defendant can hire his own lawyer or he can represent himself, but he can't pick and choose saying I like this lawyer, I don't like this one, I want that one, I don't like that one. We don't go in this endless cycle of I don't like what this lawyer is telling me, I don't like what this one is telling me, this one is not working enough, et. cetera.

July 11 Tr. 9-10.

Judge Newman interpreted the miscommunications between Mr. VanSykel and Appellant to be misunderstandings and not lies. July 11 Tr. 16. Appellant then insisted the "system [was] corrupt. The only person who is really on your side is a paid lawyer, not no state paid lawyer . . . the system is corrupt people" July 11 Tr. 21. Judge Newman asked him who he wanted to take his case because "you can't get along with Pinnock and you can't get along with VanSyckel, [so] you won't be able to get along with another one either." July 11 Tr. 21-22. "I'm convinced no one will satisfy you." July 11 Tr. 26. Appellant said he did not know, and Judge Newman said, "I just want to know what's on your mind. I don't have to agree with your choice." July 11 Tr. 23-24. Appellant then pointed out two public defenders in the courtroom, but one was retiring and the other was moving, so they were unavailable to represent Appellant. July 11 Tr. 24-25.

A third hearing was held on August 15, 2022 regarding whether to relieve Mr. VanSyckel. Trial was two and a half months away by that point. Appellant again insisted he

wanted counsel relieved and said he would rather represent himself than take the plea offer. August 15 Tr. 5-6. Judge Newman told Appellant he would have to represent himself if VanSykel was relieved, and Appellant insisted that counsel be relieved. August 15 Tr. 6-7. Judge Newman granted Appellant's request but told Appellant that he would have to represent himself or hire a lawyer because "[y]ou will not get another free lawyer." August 15 Tr. 7. Appellant said, "I ain't representing myself, bruh." August 15 Tr. 12. Judge Newman then told Appellant standby counsel from the Public Defender's Office would be appointed. August 15 Tr. 12.

Right before trial, a fourth hearing was called by the solicitor on October 14, 2022 to make sure "everyone was on the same page that . . . Mr. Brown [would be] representing himself on these charges." October 14 Tr. 3. Judge Newman appointed Tivis Sutherland as standby counsel and advised Appellant of the dangers of self-representation. "He did not want to have a lawyer that was provided to him, so he has to represent himself." October 14 Tr. 4-5.

A fifth hearing was held before the Honorable DeAndrea Benjamin on November 10, 2022, where Appellant was read the full *Faretta* warnings and was encouraged to utilize stand-by counsel's expertise. Nov. 7-10, 2022 Tr. 8-18. Stand-by counsel Tivis Sutherland offered to fully represent Appellant at trial, but he declined. *Id.* at 10. Judge Benjamin then told Appellant yet again that he had the right to an attorney and that the court was willing to fully appoint Mr. Sutherland to represent him, but Appellant declined again. *Id.* The court found he had the constitutional right to proceed without an attorney and the trial began. *Id.* at 17-18.

Here, Appellant was advised of his right to counsel and was adequately warned of the dangers of self-representation as the Constitution requires. His actions of relieving two attorneys, being offered the appointment of his choice but being unable to come up with one, and then refusing the judge's selection of a third constituted a waiver of the right to counsel by conduct.

Appellant also was given the opportunity to hire his own attorney, but he did not do so; he was never denied the right to counsel.

Defendants are entitled to lawyers in this state, but no constitutional rule, statute, or case indicates trial judges are required to entertain endless motions to relieve counsel and then appoint unlimited free-of-charge attorneys to indigent defendants. Appellant knew he was proceeding *pro se* with his eyes wide open because Judge Newman had warned him that would happen if he chose to relieve his second lawyer. Judge Newman gave Appellant a few weeks to think about it, and Appellant chose to relieve Mr. VanSyckel anyway knowing full well he would likely not be appointed another attorney. Judge Newman extended the grace of appointing stand-by counsel even after that. Judge Benjamin and stand-by counsel Tivis Sutherland even then offered Appellant the appointment of a third free-of-charge attorney but Appellant turned him down. The State and the two trial judges complied with and ensured Appellant was accorded his constitutional rights, but they also understood that constitutional rights are waivable by intentional abandonment and relinquishment of those known rights. This Court should affirm.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgments, convictions, and sentences of the lower court be affirmed.

Respectfully submitted,

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