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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Williamsburg County

Honorable George M. McFaddin, Circuit Court Judge

LEVERN MCCREA,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-001426

BRIEF OF PETITIONER

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ISSUE PRESENTED

The PCR court erred in granting the state's motion to alter or amend pursuant to Rule 59(e), SCRP when it reversed itself after initially granting post-conviction relief where the state presented no new arguments, and where petitioner was provided with no Faretta warnings by his attorneys or circuit court judges prior to representing himself at trial, and where petitioner's conduct did not result in a waiver of his right to representation.

STATEMENT

A Williamsburg County grand jury indicted petitioner on three offenses: murder, possession of a weapon during a violent crime, and misprison of a felony, on July 7, 2011. App. 1154 – 1155. Multiple hearings occurred prior to trial, and petitioner was represented by various attorneys through those proceedings.

A hearing was held on a motion to be relieved before the Honorable George C. James, Jr. in Williamsburg County on December 6, 2010. Cezar McKnight was relieved as counsel for petitioner. App. 1166 ll. 21 – 23. A hearing was held before the Honorable R. Cothran Ferrell on August 30, 2011.[1] A pre-trial hearing occurred before the Honorable Clifton Newman on October 12, 2011.[2]

On October 17, 2011, petitioner proceeded to a jury trial *pro se*. Kimberly Barr appeared on behalf of the state, and the Honorable W. Jeffrey Young was the trial judge. Petitioner was convicted of the murder and weapon charges. App. 689 ll. 4 – 10. Judge Young sentenced petitioner to a life sentence on the murder charge and five years' consecutive incarceration on the possession of a weapon charge. App. 698 ll. 10 – 19.

Petitioner filed a post-conviction relief application on July 9, 2012. App. 700. He filed an amendment to the application on or about October 22, 2012. App. 717. The state filed its Return on or about September 4, 2013. App. 729. Counsel for P

petitioner filed a motion for default in October 2014. App. 738.

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1 The undersigned believes the cover page on the transcript contains a scrivener's error regarding the date. This hearing likely occurred in 2011, not 2014.

2 The undersigned believes the cover page of this transcript also contains a scrivener's error regarding the date. Upon information and belief, this hearing likely occurred on October 12, 2011, not December 12. See App. 768; App. 849 ll. 15 – 16; App. 897 ll. 12 – 18.

In December 2014, Counsel for petitioner filed a Motion for Summary Judgment. App. 741. The state filed a memorandum in opposition to summary judgment in July 2015. App. 745. Counsel for petitioner filed a memorandum in support of the motion for summary judgment on or about November 10, 2015. App. 767.

By way of an order filed February 8, 2016, the PCR court denied both the default judgment motion as well as the motion for summary judgment. App. 778. Counsel for petitioner filed a Motion to Enforce Prior Order and Motion for Production of Documents on October 26, 2016. App. 810. The Honorable Brian M. Gibbons signed an order on November 23, 2016 finding that the solicitor's office and the assistant solicitor who participated in petitioner's trial were in violation of a discovery order. App. 813. Petitioner filed an amended application for post-conviction relief on or about May 5, 2017. App. 821. The state filed a pre-hearing brief in opposition to post-conviction relief. App. 824.

The parties appeared before the Honorable George M. McFaddin on June 1, 2018 for a post-conviction relief evidentiary hearing. App. 844. Lance Boozer represented petitioner; Julie Coleman appeared on behalf of the state. Petitioner, his previous attorneys, and assistant solicitor Kimberly Barr testified at the hearing. Numerous exhibits were admitted by both parties.

Post-hearing briefs were submitted by both sides. App. 1070; App. 1275. An Order granting post-conviction relief was signed by Judge McFaddin on or about October 29, 2019. App. 1076.

The state filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. App. 1105. A hearing was held on the state's motion before Judge McFaddin on December 20, 2019. App.

1110. An order granting the state's motion and thereby denying post-conviction relief was signed by Judge McFaddin in September 2020. App. 1136.

A petition for writ of certiorari was filed with this Court on August 18, 2021, and a return was filed on December 7, 2021. On December 7, 2023, this Court issued an order granting the petition as to Question I. This Brief of Petitioner follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue being raised. Appellate courts defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Questions of law are reviewed de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

ARGUMENT

The PCR court erred in granting the state's motion to alter or amend pursuant to Rule 59(e), SCRP when it reversed itself after initially granting post-conviction relief, where the state presented no new arguments, and where petitioner was provided with no Faretta warnings by his attorneys or circuit court judges prior to representing himself at trial, and where petitioner's conduct did not result in a waiver of his right to representation.

Relevant facts

At the PCR evidentiary in his case, petitioner correctly summarized his claim as to this issue: "I was not advised of my right to counsel or warned of the dangers of pro se representation and was ultimately denied the assistance of counsel at my five-day trial." App. 869 ll. 2 – 5. A review of the record bears out this assertion. Throughout the multiple hearings that occurred in petitioner's case prior to trial, he was neither advised of his right to counsel or adequately warned of the dangers of self-representation.

Petitioner was first arrested on or about March 30, 2010. App. 870 ll. 10 – 19. Petitioner hired counsel, Charles Barr. App. 870 l. 23 – 871 l. 7. Counsel Barr represented petitioner for approximately three months. Id. Petitioner's next attorney was a family member of the victim and did not perform any legal services for petitioner. App. 875 l. 15 – 876 l. 6. After that, Cezar McKnight was appointed to represent petitioner. App. 876 ll. 7 – 19. Counsel McKnight was relieved from representing petitioner in December 2010 after serving as his attorney for approximately five months. App. 879 ll. 7 – 11. During the time Counsel McKnight represented petitioner, he never advised petitioner about "the advantages and disadvantages of proceeding *pro se*." App. 881 ll. 10 – 15.

Following Counsel McKnight, petitioner's final attorney was Henry Anderson. App. 881 ll. 22 – 24. Counsel Anderson was appointed soon after Counsel McKnight was relieved and represented petitioner for approximately nine months. App. 881 l. 25 – 882 l. 13.

Petitioner testified in congruence with the record that he never received any Faretta warnings:

> Q: All right. At that [hearing on June 22, 2011], were the dangers of *pro se* representation or the disadvantages and advantages of proceeding *pro se* -- was that ever explained to you at that hearing?
>
> A: No, sir. At no time was there ever any [colloquy] of any voir dire given to me during that hearing.

App. 893 ll. 4 – 9.

No Faretta warnings were given, by either the judge or petitioner's attorney, prior to the circuit court relieving Counsel Anderson from petitioner's case. App. 896 l. 25 – 897 l. 11. Petitioner plainly testified at his PCR evidentiary hearing that he was unable to afford private counsel even though he wished to have representation. App. 896 ll. 21 – 24.

Furthermore, Judge Newman, at a hearing immediately prior to trial, did not offer to appoint petitioner an attorney or provide him with stand-by counsel. App. 897 l. 12 – 898 l. 8. As before, no Faretta warnings were provided.

Even at trial, petitioner was not advised of his right to counsel and the dangers of self-representation. App. 900 l. 18 – 901 l. 12. Petitioner was never given proper Faretta warnings. App. 922 l. 6 – 21.

Petitioner had never represented himself before. App. 922 l. 25 – 923 l. 5. Although multiple judges presided over hearings before petitioner, none ever inquired into his background, education, or life history, according to petitioner. App. 923 ll. 13 – 21. At trial, the only conviction mentioned to the judge during sentencing was a 1993 possession of cocaine with

intent to distribute. App. 695 ll. 6 – 12. During cross-examination at his PCR evidentiary hearing, petitioner stated that he was a maintenance technician. App. 936 ll. 19 – 23. Petitioner noted that he never received his GED. App. 937 ll. 12 – 13. He did not take any classes while at the county jail awaiting trial. App. 938 ll. 12 – 14.

The assistant attorney general elicited testimony helpful to petitioner's case:

Q: The three attorneys we're discussing today - - Charles Barr, Cezar McKnight, and Hank Anderson - - did any of them ever warn you of what might happen if you had them relieved?

A: No, ma'am.

Q: Did they ever say that you might end up stuck representing yourself?

A: No, ma.am.

Q: Did they ever tell you that representing yourself is not a good idea?

A: No, ma'am.

App. 940 ll. 7 – 17.

Counsel Barr testified that petitioner never expressed any interest in representing himself at trial. App. 953 ll. 11 – 13. Counsel Barr further clarified that he never spoke about applicable defenses with petitioner. App. 956 ll. 8 – 15. When questioned by PCR counsel, Counsel Barr's remarks mirrored the previous assertions by petitioner:

Q: Did you or did any judge, while you were representing him, explain the dangers of proceeding *pro se*, for not having a lawyer?

A: No, sir.

App. 955 ll. 1 – 4.

Counsel McKnight told the PCR court that petitioner never behaved poorly when they would meet together. App. 961 ll. 7 – 8. Counsel McKnight claimed to have told petitioner "he who represents himself has a fool for a client, and if you go out there on this murder charge,

you're gonna get hammered." App. 963 ll. 18 – 22. Much like Counsel Barr, McKnight testified that petitioner "never told [him] that he wanted to represent himself." App. 965 ll. 6 – 15. Although Counsel McKnight may have informally mentioned how petitioner probably should not represent himself, the two never had a detailed, thorough conversation about the pitfalls of self-representation:

> Q: Other than that, did you explain to him, "Look, there are things that I do and know about - - such as rules, such as technicalities, such as procedural issues - - that you have to abide by in court that you don't know about if you're representing yourself"? Did you go into that kind of detail with him?
>
> A: I did not go into that kind of detail.

App. 971 ll. 17 – 23.

Like witnesses before him, Counsel McKnight confirmed that the circuit court never advised petitioner of the dangers of proceeding *pro se*. App. 971 l. 24 – 972 l. 4.

Counsel Anderson also substantiated the running assertion that petitioner was never advised of the dangers of proceeding *pro se*. App. 987 ll. 8 – 17. Neither Judge King nor Counsel Anderson advised petitioner. Id.; App. 988 ll. 2 – 5. Counsel Anderson did not serve as stand-by counsel for petitioner at trial. App. 990 l. 14 – 991 l. 5.

Discussion

A defendant in a criminal case "has the right to the assistance of counsel." State v. Justus, 392 S.C. 416, 419, 709 S.E.2d 668, 670 (2011) (citing U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 340-41, 83 S.Ct. 792, 794, 9 L.Ed.2d 799, 802-03 (1963)). The defendant may waive his right to counsel, but he must do so knowingly and intelligently. Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, 581 (1975). For a knowing and intelligent waiver to occur, the defendant must be "(1) advised of his right to

counsel; and (2) adequately warned of the dangers of self-representation." Prince v. State, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) (citing Faretta, 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 581-82).

By definition, "A waiver is a voluntary and intentional abandonment or relinquishment of a known right." Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (citing Eason v. Eason, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009)), opinion clarified on other grounds, 386 S.C. 274, 688 S.E.2d 120 (2009). "Waiver requires a party to have known of a right and known that right was being abandoned." 385 S.C. at 496-97, 685 S.E.2d at 607. Any waiver, therefore, including a waiver of counsel "by conduct," must be knowing and intelligent. For a waiver to be "knowing and intelligent," the defendant "should be made aware of the dangers and disadvantages of self-representation." Faretta, 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 581-82; Prince, 301 S.C. at 423-24, 392 S.E.2d at 463. The burden is on the state to demonstrate the validity of a defendant's waiver of his right to counsel. Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424, 439-40 (1977); see United States v. Cash, 47 F.3d 1083, 1088 (11th Cir. 1995) ("On direct appeal, the government bears the burden of proving the validity of the waiver.").

The Faretta and Prince requirement applies to any waiver, whether the waiver is alleged to be by "affirmative, verbal request" or "by conduct." United States v. Goldberg, 67 F.3d 1092, 1100-01 (requiring Faretta warnings for a valid waiver by conduct); State v. Jones, 772 N.W.2d 496, 505 (Minn. 2009) ("The same colloquy required for affirmative waivers must also be given before a defendant can be said to have waived his right to counsel by conduct." (citing Goldberg, 67 F.3d at 1100)).

In Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002), this Court held the Faretta and Prince requirement of warning the defendant of the dangers of self-representation applies to waiver by conduct. The PCR court found the petitioner's conduct amounted to a waiver of his right to counsel. 351 S.C. at 410, 570 S.E.2d at 185. This Court explained the petitioner knew he might lose his right to counsel if he failed to obtain counsel prior to his guilty plea. 351 S.C. at 410-11, 570 S.E.2d at 185-86. This Court nonetheless reversed, however, finding, "petitioner was not adequately apprised of the dangers of self-representation." 351 S.C. at 412, 570 S.E.2d at 186.

A similar result was reached in a recent opinion from this Court which offers favorable authority to petitioner's argument and shows that the PCR court erred. Robert Osbey was charged with three drug offenses and pled guilty without counsel. Osbey v. State, 425 S.C. 615, 617-18, 825 S.E.2d 48, 49 (2019). Unlike the matter *sub judice*, the plea court found that Osbey waived his right to counsel by his conduct:

> I find ... that you have knowingly waived your right to counsel by your conduct, having known and been advised that you could have an appointed lawyer but you needed to contact the public defender's office so that they could accept your application. And in a year's time... you failed to do that. So, you have waived your right to counsel.

Id. at 618, 825 S.E.2d at 49-50

Osbey filed a PCR application alleging that he did not knowingly and voluntarily waive his right to counsel. Id. at 618, 825 S.E.2d at 50. The PCR court found that a valid waiver had occurred. Id. A footnote in the opinion pointed out: "The key to waiver by conduct is misconduct occurring *after an express warning has been given* to the defendant about the defendant's behavior and the consequences of proceeding without counsel." 425 S.C. 615, 620,

825 S.E.2d 48, 51, n. 1 (citing Com. v. Means, 454 Mass. 81, 907 N.E.2d 646, 658 (2009) (emphasis in Osbey)).

Because the plea court did not mention to Osbey the dangers of self-representation, the Court examined the record to determine if a factual basis existed for the waiver. Id. at 620, 825 S.E.2d at 51. Osbey had two prior convictions for drug offenses and violated probation and parole once each. Id. at 620-21, 825 S.E.2d at 51. This Court found "this is an insufficient basis on which to find Osbey **actually understood the dangers of self-representation.**" (emphasis added).

This Court relied on Prince v. State which found no valid waiver because the record "[did] not demonstrate petitioner was sufficiently aware of the dangers of self-representation to make an informed decision to proceed *pro se*." 301 S.C. 422, 392 S.E.2d 462 (1990). This Court held that the PCR judge erred in finding a valid waiver of counsel. Id.

The concurrence and first footnote in Osbey raised valid concerns that exist in both criminal cases in general as well as petitioner's case. In their Return, the state will undoubtedly point to the letters petitioner wrote to his attorneys. As seen in petitioner's testimony at the PCR evidentiary hearing, however, he was frustrated. He raised valid concerns about the inconsistent responses he was receiving. App. 882 l. 18 – 884 l. 2; App. 889 l. 12 – 890 l. 23. Additionally, the fact remains that petitioner was never warned about the dangers of self-representation. Multiple opportunities existed for those warnings to be provided, yet they never were.

Justice James' concurrence in Osbey discusses the practical considerations, particularly the timing, of Faretta warnings in cases such as this one. Although Osbey had obviously not been published at the time of petitioner's trial, it was binding authority at the time of the Rule

59(e) hearing in petitioner's case. App. 1110. The PCR court therefore erred in finding that petitioner's conduct waived his right to representation.

The PCR court's Order Granting Respondent's Motion to Reconsider, Alter, or Amend Pursuant to Rule 59(e), SCRCP, and Denying Post-Conviction Relief was flawed in that it overlooked Osbey and other cases dealing with waiver by conduct. App. 1136. Instead, the PCR court relied on non-binding authority in order to circumvent this state's jurisprudence.

The PCR court ruled:

> Applicant did receive the proper Faretta warnings by way of various statements and warnings made during the myriad of hearings throughout Applicant's case, and that these Faretta warnings, along with Applicant's consistent and extreme behavior, support a finding of waiver by conduct.

App. 1141.

Simply put, petitioner received no Faretta warnings. Motions to be relieved do not Faretta warnings make. The PCR court relied upon United States v. Goldberg, 67 F.3d 1092 (3rd Cir. 1995) which admittedly was cited in Osbey. App. 1141. However, the PCR court misapprehended the very language from Goldberg it cited: "Once a defendant has been warned that his misconduct will thereafter be treated as a waiver of his right to counsel, any subsequent misconduct is treated as a waiver by conduct." App. 1141 – 42. Candidly, petitioner was not warned that his alleged misconduct would be treated as a waiver of his right to counsel. The PCR court therefore substituted its own interpretation of what transpired while seemingly ignoring the record before it.

The PCR court wrote that Faretta requires that the accused be "(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." App. 1142. In the very next paragraph, however, the PCR court found "the record clearly establishes Applicant was

aware of his right to counsel." App. 1142. The passive voice illustrates a hole in the state's theory and the PCR court's logic: petitioner was never **advised** of his right to counsel.

During a motion hearing before the Honorable Howard P. King on June 22, 2011, petitioner was told that he does not get his choice of appointed counsel. App. 10 ll. 16 – 17; App. 34 ll. 20 – 21; App. 37 ll. 3 – 4. Judge King also noted how petitioner was not trained in the law. App. 38 ll. 21 – 23. During that entire hearing, however, petitioner was not advised of his right to counsel or the dangers of self-representation, nor was that information conveyed during a previous hearing to have his attorney relieved on December 6, 2010. App. 1156. Furthermore, the circuit court had the opportunity to advise petitioner of the same on October 12, 2011, immediately before trial. App. 1212. Those statements were not made by the circuit court judge at that time.

The PCR court suggested that then-Judge James' remarks on December 6, 2010 that petitioner could not continue to "play this game of being dissatisfied ... and provoking a change in lawyer" was somehow tantamount to being advised of the dangers of proceeding *pro se*. App. 1150. The PCR court's finding that "the record clearly establishes Applicant received sufficient Faretta warnings by way of colloquies between the trial court and Applicant during various hearings throughout the duration of Applicant's case" is belied by the actual text of the hearing transcripts. App. 1151. In one sentence, the PCR court finds that petitioner "clearly had a sufficient background to make a waiver of his right to counsel" yet then two sentences later finds "Applicant waived his right to counsel by his conduct, and therefore, was not denied his right to counsel." App. 1151.

Petitioner never waived his right. The Appendix before this Court does not show an on-the-record waiver, nor did petitioner's conduct result in a waiver. Petitioner's age, single

conviction, and education level do not establish that he was well-trained in the law. Thus, he never understood the actual dangers of self-representation.

A defendant may waive his right to counsel and proceed *pro se*. State v. McLauren, 349 S.C. 488, 563 S.E.2d 346, 348 (Ct. App. 2002). The waiver, however, must be made knowingly and intelligently. Id. at 493, 563 S.E.2d at 348. The record must establish the defendant knows what he is doing and his choice is made with eyes open. Faretta 422 U.S. at 835. Thus, "[t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the [circuit court's] advice, but the defendant's understanding." McLauren, 349 S.C. at 493, 563 S.E.2d at 348. "In the absence of a specific inquiry by the [circuit court] addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, the appellate court will look to the record to determine whether [a defendant] had sufficient background or was apprised of his rights be some other source." Id. at 494, 563 S.E.2d at 349.

South Carolina courts consider the following series of factors "in determining if [a defendant] had sufficient background to understand the disadvantages of self-representation":

> (1) the [defendant's] age, educational background, and physical and mental health; (2) whether the [defendant] 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 [defendant] and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the [defendant's] waiver resulted form either coercion or mistreatment.

State v. Cash, 309 S.C. 40, 42-43, 419 S.E.2d 81, 813 (Ct. App. 1992).

Petitioner never received his GED. App. 937 ll. 12 – 13. At the time of trial, he was forty-six years old. App. 938 ll. 15 – 18. His prior conviction was a plea, not a trial. App. 938

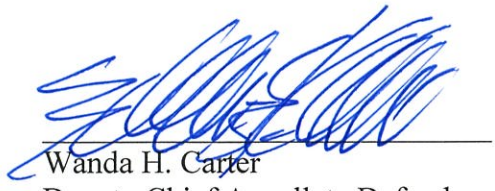
ll. 18 – 22. One of the only conversations regarding the nature of the offense was a *pro forma* discussion between petitioner and counsel for the state at the PCR evidentiary hearing. App. 939 l. 16 – 940 l. 6. None of petitioner's attorneys testified that they advised him of the possible penalties. Additionally, outside of Counsel McKnight's quip about "a fool for a client," no formal discussions occurred about the difficulty of self-representation in this particular case occurred. Petitioner outright testified that his actions were not done to delay or manipulate the proceedings. App. 923 ll. 6 – 9. The state never presented any evidence to the contrary. Petitioner asserted justifiable reasons for being frustrated with some of his attorneys, as mentioned. No stand-by counsel was provided, either.

Critically, petitioner was never told that he would have to comply with the rules of procedure. Given the opportunity to cross-examine petitioner on this factor, the state elected to skip it. As to factor 8, Counsel Barr testified that he never spoke about applicable defenses with petitioner. App. 956 ll. 8 – 15. As to factor nine, there were no meaningful conversations between petitioner and the court. Regarding the final factor, petitioner felt forced to represent himself. App. 897 ll. 8 – 11.

None of petitioner's attorneys adequately advised him in accordance with Faretta. Furthermore, he was never warned by a circuit court judge, either. The Cash factors are not satisfied, and petitioner did not waive his right based on his conduct. The PCR court erred in denying relief.

CONCLUSION

Based on the foregoing, petitioner respectfully requests that this Court reverse the PCR court and remand for a new trial.



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This 30th day of January, 2024.