

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
The Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ANTHONY NICHOLAS ARGOE,

APPELLANT.

Appellate Case No. 2023-000223

**REPLY TO RETURN TO MOTION TO SUPPLEMENT
THE RECORD ON APPEAL**

Respondent hereby makes a Reply to Appellant’s Return to Respondent’s Motion to Supplement the Record pursuant to Rule 212(a)&(b), SCACR. For the reasons stated herein, Appellant’s arguments for opposing the Motion to Supplement the Record are without merit, and Respondent’s Motion to Supplement the Record should be granted or in the alternative the case should be remanded to Judge Murphy solely for a determination of whether Appellant’s motion to reconsider the denial of his right to represent himself was withdrawn and when.

Background

Appellant was indicted by the Dorchester County grand jury for murder. (2019-GS-18-1519). His case was called to trial on February 6, 2023, before Circuit Court Judge Diane Goodstein and a jury. Ashley D. Chisolm, Esquire, appointed counsel, represented Appellant. David Osborne and Mark Hinds represented the State. On February 9, 2023, the jury found

Appellant guilty of murder. (Trial Tr. 663, 11. 12-15). Judge Goodstein sentenced Appellant to life in prison. (Trial Tr. 669, 11. 6-11).

Appellant directly appealed to this Court raising 1 issue:

Whether the court erred by denying appellant's motion to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975) since the court's reasoning that self-representation was not a "wise choice" and not likely to lead to a successful result were not legitimate reasons to force appellant to be represented by counsel where appellant knowingly and voluntarily wanted to waive his right to counsel and to represent himself?

(Initial Brief of Appellant, p. 1).

Relevant Procedural Background

Prior to trial, several pre-trial hearings were held on Appellant's motion to relieve his appointed trial counsel, Ashley Chisholm, and/or to proceed *prose*. On **July 25, 2022**, a hearing was held on a motion to relieve Chisholm. Appellant's main complaints against Chisholm were that he would not subpoena bank records or provide him with discovery. Chisolm responded the bank records were irrelevant, and he provided discovery to Appellant when Chisolm received it. The motion to relieve counsel was denied by Judge Goodstein. (Previous Attachment I, July 25, 2022, Tr. 1-14).

On **September 16, 2022**, Circuit Court Judge Maite Murphy heard Appellant's motion to represent himself or relieve counsel. The hearing started with Chisolm informing the court they were there on Appellant's motion to represent himself or to relieve counsel. At this hearing, Appellant again complained that his appointed counsel had not provided discovery timely. Chisolm responded he provided discovery to Appellant when he received it from the State. At this hearing, after a colloquy between Appellant and Judge Murphy, and specific questions to Appellant about his knowledge of the law, Judge Murphy stated she did not think it was in Appellant's best interests or wise to represent himself and Appellant might want to retain his

own private counsel. Appellant indicated an interest in hiring his own attorney and stated he would look into the matter. Judge Murphy denied the motion to relieve counsel at the end of the hearing but she also held she believed Appellant needed representation in this matter so he could retain private counsel or Mr. Chisolm would represent him. (Attachment II., Sept. 16, 2022 Tr. 1- 11).

On **January 19, 2023**, Appellant again made a motion to represent himself this time before Judge Goodstein. (Attachment III., Jan. 19, 2023, Tr. 1-12). At the hearing, Chisolm stated that after consultation with Appellant, Appellant wanted to raise this issue again. Chisolm stated he believed in order to preserve this issue he needed to raise the issue again before trial. After hearing the procedural history of the case from Chisolm, including Chisolm's statement that Judge Murphy had denied Appellant's motion to represent himself in September, and Chisolm's other comments, Judge Goodstein, citing S.C.R.Crim.P. Rule 4(b), found she could not hear this motion because any order she issued would be void pursuant to Rule 4(b). She decided to treat the motion as a motion to reconsider the denial of Appellant's motion to represent himself by Judge Murphy and held only Judge Murphy could hear a motion to reconsider the denial of Appellant's motion to represent himself. (Id). At the conclusion of this hearing, all the parties at this January 19th hearing, including Appellant and Mr. Chisolm, and Judge Goodstein agreed on the record that a hearing would take place the following week before Judge Murphy on Appellant's motion to reconsider the denial of the motion to represent himself. (Id). Judge Goodstein stated on the record at this January 19th hearing that she would communicate with Judge Murphy and schedule an appropriate time for the motion to be heard. The other attorneys at this hearing agreed they would be available for the hearing in front of Judge Murphy. (Id.).

A hearing on Appellant's motion to reconsider the denial of his motion to represent himself was scheduled before Judge Murphy for **January 30, 2023**. (Attachment IV. [e-mails

between defense counsel and Judge Murphy). Appellant withdrew his motion to reconsider the denial of his motion to represent himself in the 2 weeks following the January 19, 2023, hearing before Judge Goodstein and before January 30, 2023. This is based on Respondent's conversations with Deputy Solicitor David Osborne and defense counsel Ashe Chisolm who tried the case and Mr. Chisolm's e-mails to Judge Murphy withdrawing the said motion. (Attachment IV. [e-mails between defense counsel and Judge Murphy and Judge Murphy's acknowledgment of the same]). Further, **it is clear from the January 19, 2023, hearing transcript that a hearing was going to take place before Judge Murphy the following week or shortly thereafter.** (Attachment III., Jan. 19, 2023, Tr. pp. 1- 12). The record shows something happened between January 19, 2023, and February 3, 2023, as a result of which no hearing on Appellant's motion to reconsider the denial of his motion to represent himself was held. (Attachment III., Jan. 19, 2023, Tr. 1-12; IV. pp. 1-2, & V. Feb. 5, 2023, Tr. pp. 1-19). Mr. Chisolm's e-mail correspondence with Judge Murphy shows that **Appellant withdrew his motion to reconsider the denial of his motion to represent himself on Thursday, January 26, 2023.** (Attachment IV). Judge Murphy responded accordingly and informed Mr. Chisolm to notify the appropriate Clerk of Court so the roster could be adjusted, and she would also do the same. (Attachment IV. [e-mails between defense counsel and Judge Murphy]).

The next hearing on any motion occurred on **February 3, 2023**, before Judge Goodstein. (Attachment V., Feb. 3, 2023, Tr. 1-19). This was the Friday before trial. The February 3, 2023, hearing was regarding a motion by defense counsel himself to be relieved because Appellant had *allegedly* physically threatened defense counsel during a meeting in preparation for trial. (Id.). Judge Goodstein, the trial judge, heard and denied that motion. (Id.). Judge Goodstein did not hear any motion regarding Appellant representing himself or a motion to reconsider the denial of a motion to represent himself. That was not mentioned at this hearing. (Id.).

The trial began on **February 6, 2023**, before Judge Goodstein with Chisolm representing Appellant. Prior to the trial beginning before the jury, Appellant again *moved to have counsel Mr. Chisolm relieved*. (Trial Tr. 104-08). (Attachment VI). Appellant **did not** move to represent himself. (Trial Tr. 104-08). Appellant claimed Mr. Chisolm threatened him but claimed it occurred **before** the February 3, 2023 hearing. (Trial Tr. 104-08). Appellant had no explanation why he did not notify Judge Goodstein of this *at the February 3rd hearing*. Judge Goodstein denied the motion. (Trial Tr. 104-08). The trial then began before the jury at the conclusion of which Appellant was found guilty of murder. (Trial Tr. pp. 1,109, 663, 669). Appellant raises no error on appeal from the trial itself. (IBOA).

The Motion Before this Court

Based on the sole issue raised in Appellant's brief and the procedural history set forth above, Respondent previously moved this Court to supplement the record pursuant to SCACR, Rule 212(a)&(b). Appellant's motion to reconsider Judge Murphy's denial of his motion to represent himself was withdrawn by Appellant after the January 19, 2023, hearing before Judge Goodstein, and the hearing before Judge Murphy that all parties agreed was going to occur did not occur because of Appellant's withdrawal of the motion to reconsider the denial of the motion to represent himself. (Attachment IV. [e-mails between counsel and Judge Murphy]). Thereafter, Appellant proceeded to trial with appointed counsel Chisolm and after a full jury trial was convicted of murder.

Respondents Specific Reply to Appellant's Assertions in his Return

In his Return, Appellant *alleges* it would be improper to supplement the record with matters that were not before the lower court. Appellant is wrong that these matters were not before the lower court. It is clear these matters were before the lower court. Rule 212(a), SCACR.

The transcript of the January 19th hearing shows all parties agreed, including Judge

Goodstein, the hearing was being scheduled to take place so Petitioner's motion to reconsider the denial of his motion to represent himself could be heard by Judge Murphy. The e-mails between counsel Chisolm and Judge Murphy show Appellant knowingly, voluntarily, and intelligently withdrew the motion to reconsider by his own choice. Appellant now admits the e-mails are real and he withdrew the motion to reconsider so that the hearing scheduled on January 30th before Judge Murphy did not take place.

Therefore, Respondent properly moved this Court pursuant to Rule 212(b), SCACR that it should grant the motion to supplement the record with Attachment IV. the e-mails between defense counsel and Judge Murphy regarding the withdrawal of the motion to reconsider Judge Murphy's denial of Appellant's motion to represent himself. Alternatively, Respondent properly moved this Court that it should require "a report of the ... hearing, or any matter relative thereto, to be made by the trial judge "... and "[t]hese matters shall become part of the Record on Appeal" pursuant to Rule 212(a), SCACR. See also Rule 212(a), SCACR ("The appellate court may require copies of all or any part of the transcript of proceedings *or other matter* which was before the lower court... to be sent up for its inspection or consideration.")(emphasis added).

Further, because the sole issue raised on appeal is an alleged error of Judge Murphy in denying Appellant's motion to represent himself, it is critical that this Court have the correct record in this matter and what occurred regarding the motion to reconsider that ruling. It would be a grave injustice for this Court to consider this matter without having the entire record including whether Appellant in fact withdrew his motion to reconsider the prior ruling which was scheduled for a motion hearing on **January 30, 2023**.

Respondent has no objection to Appellant's request for a remand, **but only** for the purposes of establishing the fact of the withdrawal of the motion before Judge Murphy. Since trial counsel did not provide any additional information to the trial court, Judge Murphy, other than his clear

intent to withdraw the request for hearing/reconsideration, it would be inappropriate for counsel or any party to shape the record post-trial on information not before the lower court. (See discussion below). That is a matter for collateral proceedings.

Further, counsel for appellant does not contest that the e-mail was sent to Judge Murphy or that the hearing for reconsideration of the denial of his motion was cancelled by Appellant, but Judge Murphy can confirm receipt and cancellation of the requested hearing. Basically, the remand should be only for a narrow basis, not to allow counsel to post-hac give a reason for his withdrawal that may not have been his basis for withdrawal at the time. (See discussion below).

In reply to counsel's affidavit, the same must be rejected for the same reasons. Further, the record does not support counsel's claim that Appellant always wanted to represent himself. From the record, it is clear that Appellant was represented by a different attorney before trial counsel Chisolm. (Attachment II., Sept. 16, 2022 Tr. 8-9). Appellant did not move to relieve his first attorney. That attorney left employment voluntarily. (Id.) And, at the first hearing, before Judge Goodstein, Appellant only wanted to fire his attorney, Mr. Chisholm, he did not want to represent himself. (Previous Attachment I, July 25, 2022, Tr. 1-14). At the second hearing, before Judge Murphy, the motion was phrased as a motion to represent himself or relieve counsel Chisholm. (Attachment II., Sept. 16, 2022 Tr. 1- 11). While there was discussion about both, at the end of this hearing, Appellant expressed an interest in retaining private counsel and stated he was going to look into that. (Attachment II., Sept. 16, 2022 Tr. 1- 11). At the third hearing, before Judge Goodstein, appellant specifically stated he wanted to represent himself and asked Judge Goodstein to reconsider Judge Murphys' earlier ruling. (Attachment III., Jan. 19, 2023, Tr. 1-12). Judge Goodstein stated she could not hear the motion because of the S.C.R.Cr.P., Rule 4, but she would set up a hearing before Judge Murphy, the appropriate Judge who must hear the motion.

(Attachment III., Jan. 19, 2023, Tr. 1-12). All parties, including Appellant and counsel Chisolm, agreed there would be a hearing before Judge Murphy for her to reconsider Appellant's motion to represent himself. In fact, counsel Chisolm stated on the record that he believed in order to preserve the issue for appeal a motion for reconsideration must be heard before trial. (Attachment III., Jan. 19, 2023, Tr. 1-12). After that hearing was scheduled before Judge Murphy, Appellant chose of his own volition to withdraw that motion and proceed with trial counsel Chisolm. (Attachment IV.). On January 3rd, counsel Chisolm moved to have himself relieved because Appellant had threatened him. Judge Goodstein denied the motion. (Attachment V., Feb. 3, 2023, Tr. 1-19). At trial, after jury selection, Appellant moved to fire trial counsel Chisolm. **He did not move to represent himself.** (Attachment VI, Trial Tr. 104-08). He moved to fire trial counsel for allegedly threatening him. (Attachment VI, Trial Tr. 104-08). Judge Goodstein denied that motion noting Appellant did not mention the threat which allegedly occurred before the January 3rd hearing at the January 3rd hearing. (Attachment VI. Trial Tr. 104-08; See also Attachment V.). As a result, based on the record in this case, this Court should reject counsel's affidavit as it is not supported by the record already before the Court.

CONCLUSION

Having made a Reply to Petitioner's Return to the Motion to Supplement the Record, this Court should grant the Motion to Supplement the Record with Attachment IV., the e-mails between counsel and Judge Murphy regarding withdrawing the scheduled motion to reconsider the denial of Appellant's motion to represent himself. Or, in the alternative, this Court should remand for Judge Murphy to issue a Report regarding what occurred with regard to the motion to reconsider the denial of Appellant's motion to represent himself, which Report would be made part of the

record. Or this Court could remand to Judge Murphy to hold a hearing only on whether the motion scheduled for January 30th was withdrawn by Appellant and when.

Respectfully Submitted,

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By: s/J. Anthony Mabry

J. ANTHONY MABRY
ATTORNEYS FOR RESPONDENT

September 4, 2024.

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SC Court of Appeals

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PROOF OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to J. Anthony Mabry, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Reply to Return to Motion to Supplement the Record on Appeal has been forwarded to Appellant's counsel, Robert M. Dudek, Esq., Esq., via email today, September 4, 2024 to RDudek@sccid.sc.gov and to his assistant at kwarren@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 4th day of September, 2024.

s/ Donna D'Alessio
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