

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

---

**RECEIVED**

**Dec 18 2024**

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

**S.C. SUPREME COURT**

Patrick Fant, III, Circuit Court Judge

---

2020-CP-23-04199

---

Mark Anthony Keys, ..... Appellant,  
v.  
The State, ..... Respondent.


---

NOTICE OF APPEAL

---

Mark Anthony Keys appeals the Honorable Patrick Fant's Order of Dismissal filed December 5, 2024.

This 18 day of December 2024.

  
Susannah Ross, Attorney at Law  
Bar # 11025  
330 E. Coffee St.  
Greenville, SC 29601  
susannah@rossenderlin.com  
(864) 242-0029  
Attorney for Appellant

Other Counsel of Record:  
Melody J. Brown, Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3970  
Attorney for Respondent

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS

Mark Anthony Keys, #381749, )  
 )  
 )  
Applicant, )  
v. )  
 )  
State of South Carolina, )  
 )  
 )  
Respondent. )  
\_\_\_\_\_ )

Case No.: 2020-CP-23-04199

**ORDER OF DISMISSAL**  
(With Prejudice)

24 DEC 5 PM 3:49  
Bribe Barrett ODCBULSC

This matter comes before the Court by way of an application for post-conviction relief filed September 11, 2020. The State filed a return and moved for a more definite statement and partial summary dismissal on April 15, 2021. An evidentiary hearing was convened on Thursday, October 10, 2024, at the Greenville County Courthouse. Applicant was present with his appointed counsel, Susannah C. Ross, Esq.<sup>1</sup> Melody J. Brown, Senior Assistant Deputy Attorney General, was present on behalf of Respondent. At the start of the hearing, the Court clarified with the parties if Applicant's amended allegations satisfied Respondent's motion for a more definite statement to which Respondent agreed. This Court received testimony from Applicant and the solicitor who prosecuted his case, Jennifer Tessitore, Esq. At the conclusion of the hearing, this Court took the matter under advisement.

After consideration of the testimony given at the hearing and after reviewing and considering the record, arguments presented by counsel, and the controlling case law, this Court

<sup>1</sup> Applicant was previously appointed Sarah Henry for his attorney. By motion filed January 3, 2024, Ms. Henry moved be relieved from appointment, which was granted on January 17, 2024. Ms. Ross was subsequently appointed on January 22, 2024.

advised the parties by email October 28, 2024, that it would find that Applicant failed to carry his burden of proof and was not entitled to any relief. At that same time, the court also requested that counsel for the State prepared a proposed order.<sup>2</sup> This Court now DENIES relief for the specific reasons set out in this order.

### PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a twelve-year sentence for assault and battery of a high and aggravated nature. The charges stemmed from the alleged restraint and severe beating inflicted upon his former girlfriend.

During its February of 2019 term, the Greenville County Grand Jury indicted Applicant for kidnapping (2018-GS-23-9868) and assault and battery of a high and aggravated nature (2019-GS-23-1286A). On October 14, 2019, Applicant appeared before the Honorable G. Thomas Cooper, Jr., for a hearing regarding his desire to represent himself in these matters. Assistant Solicitor Jennifer Tessitore of the Thirteenth Circuit Solicitor's Office was the assigned prosecutor. At the hearing, Ms. Tessitore asked the judge to review the *Faretta*<sup>3</sup> warnings with Applicant to ensure his understanding of the dangers of self-representation and that he was making a voluntary and knowing waiver of his right to counsel. Judge Cooper advised Applicant of the dangers of representing himself and his right to court-appointed counsel. (Oct. 14, 2019 Pre-trial Trans. 4-12). Applicant affirmed that he understood Judge Cooper's advisement. (Oct. 14, 2019 Pre-trial

---

<sup>2</sup> The proposed order was provided to counsel for Applicant prior to this Court's acceptance. Applicant's counsel was also allowed sufficient time to review the proposed order while this Court made its own detailed review. *See Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019) (providing a "proposed order should be transmitted to opposing counsel" for review and that counsel "should ... alert preparing counsel and the PCR court as to any deficiencies in the proposed order.").

<sup>3</sup> *Faretta v. California*, 422 U.S. 806 (1975).

Trans. 13). At the conclusion of that same hearing, Judge Cooper also denied Applicant's motion to dismiss, which was based upon Applicant's argument that the delay in his case's being called for trial violated his right to a fair and speedy trial, noting on the record that his trial was scheduled to be held in two days. (Oct. 14, 2019 Pre-trial Trans. 22).

On October 16, 2019, Applicant proceeded to a jury trial with the Honorable Letitia H. Verdin presiding. At the conclusion of trial, the jury found Applicant guilty of assault and battery of a high and aggravated nature and not guilty of kidnapping. (Tr. 276). Judge Verdin sentenced Applicant to twelve years imprisonment with credit for time served. (Tr. 294).

Applicant did not appeal his conviction or sentence.

### **ALLEGATIONS**

In his initial application for post-conviction relief, Applicant alleged he is being held in custody unlawfully due to the following allegations paraphrased by Respondent as follows:

1. Was never served with an indictment;
2. Was not aware or informed of the dangers of self-representation;
3. Halfway through the trial discovered he was being tried for attempted murder;
4. Prosecution failed to disclose discovery;
5. Jury was not fairly composed.

(2020 PCR Application and attachments).

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to carefully considering the record and the arguments presented by counsel, this Court has also had the opportunity to consider the testimony presented at the PCR evidentiary hearing and has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. §17-27-80 (2003).

### *Dismissal of Claims One, Three and Five*

Initially, this Court dismisses the claims that Applicant was not served with the indictment and the claims challenging the composition of the jury. These matters could clearly have been raised at trial and were not. They may not be raised here. S.C. Code Ann. § 17-27-20 (B) limits the jurisdiction of the PCR court as follows: “This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.” S.C. Code Ann. § 17-27-20(B). Because a PCR action is not a substitute for those proceedings, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial and on direct appeal. This prohibition has long been recognized. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) (“Errors in a petitioner’s trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings.”); *see also Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) (“The Simmons rule gives effect to the Legislature’s clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.”). As Claims One and Five were available and could have been raised at trial, they are barred from review in this action.

This Court will also dismiss Ground Three for failure to provide a factual basis upon which relief could be granted. Applicant asserts that he was “tried for attempted murder,” but the record

clearly shows he was not. The jury was advised that the charges were “assault and battery of a high and aggravated nature and kidnapping.” (Tr. 261). Further, the jury was instructed on the elements of assault and battery of a high and aggravated nature (with the potential lesser offense of assault and battery first degree) and kidnapping. (Tr. 268-270). While there was a scrivener’s error (as noted at trial) on the verdict form, there was no question about the charges actually considered. (See Tr. 275-276). Claim Three is wholly without merit and is dismissed.

*Claim Two: Allegation of Faretta Warning Error and  
Involuntary Waiver of Right to Counsel*

Applicant contends that he was not warned of the dangers of self-representation and asserted in this PCR testimony that he did not want to represent himself. This Court finds his testimony not in the least credible considering the contemporaneous record showing his repeated insistence on self-representation and the adequate warnings given by Judge Cooper, and those earlier given by Judge Verdin.

A criminal defendant has the constitutional right to represent himself under both the federal and state constitutions.” *State v. Barnes*, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014); see U.S. Const. amend. VI; S.C. Const. art. I, § 14. A “defendant may waive his right to counsel, but he must do so knowingly and intelligently.” *Osbey v. State*, 425 S.C. 615, 619, 825 S.E.2d 48, 50 (2019) (citing *Faretta v. California*, 422 U.S. 806, 835 (1975)). “ To establish a valid waiver of counsel, *Faretta* requires the accused 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). Alternatively, if the colloquy is missing or insufficient, a reviewing “[c]ourt will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source.” *Id.* [T]he record [must] establish [the defendant] knows what he is doing and his choice is made with eyes open.” *Faretta*, 422 U.S. at 835 (internal quotation

marks omitted). However, “[t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge’s advice, but the defendant’s understanding.” *State v. Brewer*, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997) (citing *Graves v. State*, 309 S.C. 307, 422 S.E.2d 125 (1992)).

Here, in addition to the transcript of the October 14, 2019, pre-trial hearing with Judge Cooper which sets out a specific warning was given, (Oct. 14, 2019 Pre-trial Trans. 11-12), this Court has reviewed the contemporaneous waiver document that Applicant signed which also lists specific warnings. That signed “Faretta Warnings” form became Court’s Exhibit 1 at the trial. (Tr. 6-7 and 13). Further, Applicant had previously been given warnings when he appeared before Judge Verdin at a separate pre-trial proceeding. While the “Faretta Warnings” form was not signed by Applicant, Judge Verdin noted his appearance at the hearing and that he had indicated he did not wish to be screened for a court-appointed attorney. That form was also admitted and made a part of the record at trial as Court’s Exhibit 2. (Tr. 13).

When confronted with Court’s Exhibit 2 at the PCR hearing, Applicant clearly did not wish to acknowledge that he had been present. This Court finds his assertion not credible. First, the form notes he “appeared in court,” (Court Exhibit 2); second, Applicant did not object to the introduction of the document at trial, (Tr. 13), and third, the prosecutor for the charges, Ms. Tessitore, credibly testified at the PCR hearing that she had noted the appearance in her records. This Court is firmly convinced that Applicant was present, was advised of his right to counsel and generally as to the dangers of self-representation both by Judge Verdin and then subsequently also warned by Judge Cooper. Moreover, the transcript shows that Applicant assert to Judge Verdin immediately before trial that he signed the warnings sheet from Judge Cooper’s hearing and was “very aware” of same. (Tr. 7). Consistent with the assertion, Applicant did not request counsel or

express any reservation regarding his choice to represent himself. (*See* Tr. 7). This alone supports a knowing and intelligent waiver. Yet there is even more in the record to support the knowing and intelligent waiver of the right to counsel.

Before Judge Cooper, Applicant asserted, “I’m representing myself in this ... matter.” (Tr. 6). And far from expressing a failure to advise of the right to counsel, Applicant criticized the number of times the counsel decision was discussed. (Tr. 7-8). The record shows that Applicant’s resolve was unquestionably firm and consistent. Further, he advised Judge Cooper that he was “representing [himself] because [he] had attorneys in the past,” and they favored plea bargaining which he did not wish to do. (Tr. 9-10). Judge Cooper, as the “Faretta Warnings” form suggests, advised of the right to counsel, the specialized knowledge required at trial, the danger of missing defense without counsel’s aid, that there could be collateral consequences if that may affect his life as well as the conviction itself, and that he would be obligated to follow the rules of court. (Tr. 11-12).

In sum, the record fully and fairly supports that Applicant was thoroughly warned about the dangers of self-representation and his right to counsel. Further, the record also supports that Applicant understood his right to counsel along with the warnings on the dangers of self-representation not only by his answers, but also by the fact that he had been previously represented by counsel in other proceedings. Applicant has failed to show any hint of an involuntary or unknowingly made waiver of his right to counsel. Consequently, this Court denies relief.

*Claim Four: Allegation the State Failed to Disclose Discovery*

Applicant contends that he was not provided discovery prior to his trial. This Court finds his testimony not credible. First, the trial record shows that the prosecutor for the charges, Ms. Tessitore, stated on the record during the October 14, 2019, hearing with Judge Cooper, “We

provided discovery to [Applicant] on July 24th of 2019, although he's filed no motions." (Oct. 14, 2019 Pre-trial Trans. 13). Further, at the PCR hearing, Ms. Tessitore identified a copy of the "discovery affidavit" signed by her investigator – a form she used in her normal course of practice to ensure discovery is delivered. (Respondent's Exhibit 2). That form shows a signature that appears to be Mr. Keys. Notably, the form is dated July 24, 2019, which is consistent with the assertion in the pre-trial transcript. Moreover, Ms. Tessitore also identified a copy of her July 3, 2019, letter which specifically listed out 21 items of discovery, with descriptions and numbers of pages, that were released in discovery. (Respondent's Exhibit 1). Applicant has failed to carry his burden of proof to demonstrate any withholding of discovery. As the prosecutor stated on the record at the pre-trial hearing before Judge Cooper, even though he failed to file proper requests, discovery was still provided to him. (See Tr. 13). Applicant is due no relief.

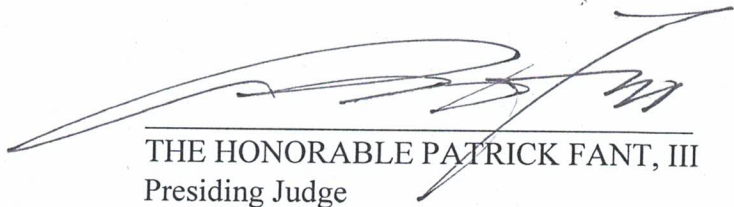
**CONCLUSION**

For the above stated reasons, this Court finds that Claims One, Three, and Five are dismissed for the reasons cited above. On Claims Two and Four, this Court finds and concludes that Applicant failed to carry his burden of proof. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

**IT IS THEREFORE ORDERED:**

Applicant's application for post-conviction relief is denied and dismissed with prejudice.

AND IT IS SO ORDERED this 3<sup>rd</sup> day of December, 2024.

  
THE HONORABLE PATRICK FANT, III  
Presiding Judge

Greenville, South Carolina.

Copy mailed to  
Attorney General MB/Susannah Ross  
on 12 / 5 / 2024.