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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Diane Schafer Goodstein, Circuit Court Judge
Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY NICHOLAS ARGOE,

APPELLANT

APPELLATE CASE NO. 2023-000223

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The state concedes the judge's colloquy and her ruling that appellant would not be allowed to represent himself did not comply with *Faretta*. The state's argument that appellant waived his request for self-representation is unsupported factually and legally.

The state conceded that the colloquy between appellant and Circuit Court Judge Murphy did not comply with the requirements of Faretta v. California, 422 U.S. 806 (1975). FBOR at 3. In response to appellant's motion to represent himself or relieve counsel, Judge Murphy stated she did not think it was in appellant's best interest or wise for him to represent himself and that he may wish to retain private counsel. FBOR at 3. It is hard to imagine a scenario where a defendant's decision to represent himself is ever a "wise one," but that is not the standard under Faretta.

The state acknowledges that appellant again moved to represent himself before trial in front the eventual trial judge, Judge Goodstein. However, Judge Goodstein ruled that Judge Murphy had already denied appellant's motion to represent himself and that she could not, essentially, overrule Judge Murphy's denial of appellant's motion to represent himself. FBOR at 4-5.

While the state acknowledges that the Faretta inquiry in this case was insufficient as a matter of law, the state incorrectly asserts that all parties "including Argoe and defense counsel," agreed a motion to reconsider hearing would be held before Judge Murphy and was scheduled, but that petitioner "with the assistance of counsel failed to follow through." FBOR at 9-10.

The state then argues that appellant Argoe waived or abandoned his request to represent himself because a motion to reconsider hearing was never held before Judge Murphy. The assertion that a motion to reconsider Judge Murphy's ruling was scheduled, and that appellant

did not follow through is without support in the record. Further, even if appellant "failed to follow through" on scheduling a motion to reconsider hearing before Judge Murphy it certainly does not mean he abandoned or waived his request to represent himself rather than having defense counsel represent him. There is no requirement that a motion to reconsider be scheduled and heard on every major motion and ruling in a case. The record in this case simply does not support that tenuous assertion of waiver or abandonment of appellant's right to represent himself.

The record in this case shows that Judge Murphy denied appellant's request to represent himself after a Faretta inquiry the state concedes was inadequate. On January 19, 2023, defense counsel Chisholm and appellant again moved before the trial judge, Judge Goodstein that appellant be allowed to represent himself at trial. This was essentially an attempted motion to reconsider, as stated in appellant's brief at 8. After informing Judge Goodstein about what had occurred during the motion to represent himself by appellant before Judge Murphy, Judge Goodstein ruled under Rule 4(b), SCRCrimP, that she could not alter Judge Murphy's ruling that appellant could not represent himself. The judge said that any future motion to reconsider would have to be heard by Judge Murphy. R. 32, l. 21 – 34, l. 9.

No time for a motion to reconsider hearing before Judge Murphy was ever set, and appellant did not waive or abandon his request to represent himself by not demanding that Judge Murphy, who was not the trial judge, hear a motion to reconsider the ruling that appellant could not represent himself.

In fact, a couple of weeks later, on February 3, 2023, another pretrial hearing was held before the Honorable Diane S. Goodstein. At this hearing, defense counsel moved to be relieved as appellant's attorney, since they did not get along and defense counsel Chisholm reminded Judge Goodstein that appellant had previously moved to relieve counsel and to represent himself.

Judge Goodstein denied the motions. Chisholm told Judge Goodstein that while he did not take a position one way or another previously on appellant's motion to represent himself, that he was essentially joining appellant in his motion to represent himself and for Chisholm to be relieved. R. 45, l. 7 – 46, l. 14.

At the conclusion of this hearing, the judge ruled that defense counsel Chisholm and James Adams would represent appellant at trial and that Adams would serve as a buffer between appellant and Chisholm. Plainclothes police officers would be in the courtroom if any trouble occurred. R. 49, l. 24 – 55, l. 2. Again, appellant would not be allowed to represent himself despite his defense attorney joining in his motion.

When appellant's case was called to trial on Monday, February 6, 2023, before Judge Goodstein, appellant again moved to relieve Chisholm. Appellant once again stated that he did not want defense counsel Chisholm to represent him, and his last attempt to have Chisholm removed had occurred the week before. The judge told appellant she had seen him the previous Friday and she now asked him: "Why didn't you say something about it on Friday?" Appellant said he did not have his paperwork with him that Friday, and the judge summarily denied the motion. R. 69, ll. 20-23. Where the judge saw appellant on Friday, for how long, and under what circumstances is unclear from this record.

Appellant was insistent throughout this pre-trial process that he wanted defense counsel Chisholm relieved and that he wanted to represent himself. Most respectfully, appellant never waived his constitutional right to represent himself, and waiver is certainly not apparent from this record. Instead, it is wholly absent.

In State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014), our Supreme Court held that a defendant has a constitutional right to represent himself under both the federal and state

constitutions. Further, Johnson v. Zerbst, 304 U.S. 458 (1938), has long stood for the proposition that courts indulge every reasonable presumption against waiver of a fundamental constitutional right, and courts do not presume acquiescence in the loss of fundamental rights. [1] "A defendant makes an intelligent waiver when he 'knows what he is doing and his choice is made with eyes open.'" Adams v. United States ex. rel. McCann, 317 U.S. 269, 279 (1942); Reed v. Ozmint, 374 S.C. 19, 28, 647 S.E.2d 209, 214 (2007).

Here, the record does not show that appellant waived or abandoned his request to represent himself. As seen, a hearing on a motion to reconsider Judge Murphy's ruling that appellant could not represent himself after an insufficient Faretta colloquy was never set. Further, the state's attempt to have this Court rule that appellant waived or abandoned his fundamental right under the federal and state constitutions to represent himself by not demanding and getting Judge Murphy in court on a motion to reconsider her denial of his right to self-representation flies in the face of the principle there is no presumption or assumption of the waiver of a fundamental constitutional right. State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014) (a defendant has the right under the federal and state constitutions to represent himself).

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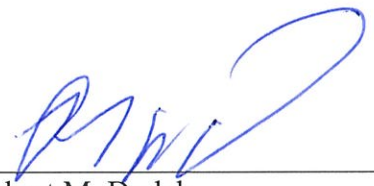
[1] Johnson was overruled on other grounds by Edwards v. Arizona, 451 U.S. 477 (1981).

CONCLUSION

By reason of the arguments in the Brief of Appellant and in this Reply Brief, appellant's convictions should be reversed and his case remanded to the Dorchester County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of February, 2024.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Reply Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 18th day of February, 2025.

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APPELLATE CASE NO. 2023-000223

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies true copies of the Final Reply Brief of Appellant in the above-referenced case have been served upon J. Anthony Mabry, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 18th day of February, 2025.

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