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**Feb 24 2025**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Horry County

Honorable Paul M. Burch, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

RODNEY NESMITH,

APPELLANT

APPELLATE CASE NO. 2023-001854

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FINAL BRIEF OF APPELLANT

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**STATEMENT OF ISSUE ON APPEAL**

Did the trial court err allowing appellant to represent himself at trial where although appellant was warned appellant did not understand the important right he waived by choosing to proceed *pro se*?

## STATEMENT OF THE CASE

On September 7, 2022, a Horry County grand jury indicted appellant for distribution of cocaine. R. 216-217. The Honorable Paul Burch heard motions on September 12, 2022. Appellant was represented by Nick O'Neil and the state was represented by assistant solicitor Pierce Haar. R. 1. Additional motions and a *Faretta*<sup>1</sup> hearing were held before the Honorable Robert Bonds on March 23, 2023.<sup>2</sup> At the conclusion of the hearing appellant's counsel Laura Hiller was relieved as counsel and asked to serve as standby counsel during trial. R. 10; 50, ll. 3-15. Appellant's trial was called before Judge Burch and a jury on November 27, 2023. R. 58. Appellant proceeded *pro se* with Ms. Hiller as standby counsel. Assistant solicitors, David Beamer and David Caraker represented the state. R. 58.

The jury found appellant guilty of distribution of cocaine. R. 207, ll. 3-9. Judge Burch sentenced appellant to twenty years' imprisonment. R. 211, ll. 1-6.

This appeal follows.

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<sup>1</sup> *Faretta v. California*, 422 U.S. 806 (1975).

<sup>2</sup> The transcript reflects a date of March 23, 2024, however the hearing was held the March prior to appellant's November 2023 trial.

### **STANDARD OF REVIEW**

“Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo.” *State v. Samuel*, 422 S.C. 596, 602, 813 S.E.2d 287, 490 (2018).

## ARGUMENT

The trial court erred allowing appellant to represent himself at trial where, although appellant was warned, appellant did not understand the important right he was waving by choosing to proceed *pro se*.

### **Relevant facts**

On September 15, 2022, appellant moved to relieve defense counsel Nick O’Neil. R. 1-8. Appellant contended Mr. O’Neil had not been honest with him during his representation and as a result the relationship and communication had broken down. R. 4-7. Appellant stated counsel was unhelpful in his attempts to recover his cell phone which law enforcement seized during his arrest. R. 5, ll. 1-22. He told the court counsel moved for a speedy trial without consulting him. R. 6, ll. 9-17; 7, ll. 18-24. Appellant contended he was not financially able to hire another attorney and requested one be appointed. R. 6, ll. 18-21. The court granted appellant’s motion to relieve Mr. O’Neil and continued the case until new counsel could be appointed. R. 6, l. 25—7, l. 3.

In November 2022, Laura Hiller was appointed as counsel. Ms. Hiller told the trial court appellant “ha[d] not been pleased” with her representation from the beginning. She stated appellant filed several *pro se* motions during that time. R. 16, ll. 10-25. On March 23, 2023, appellant moved to relieve Ms. Hiller as counsel and requested a continuance in his case. R. 15, ll. 1-9. Hiller told the court that in January her relationship with appellant and the communication with between them broke down. R. 16, l. 25—17, l. 10. Appellant explained that Ms. Hiller and he disagreed about his case and that they had not been speaking other than her advising he should plead guilty. R. 23, ll. 1-7; 24, ll. 2-10. Appellant told the court he would be better off without Hiller as counsel. R. 24, l. 24—25, l. 5. The court explained to appellant

that while he was guaranteed an attorney, he was not guaranteed the attorney of his choice and that the court was not inclined to appoint another attorney to him since he already had two attorneys appointed in his case. R. 25, l. 18—26, l. 4. Appellant responded that he would rather represent himself and agreed to waive his right to an attorney. R. 26, ll. 11-23. The court informed appellant that the case would not be continued, appellant responded that he was not prepared to proceed to trial. R. 27, ll. 4-13; 31, ll. 3-13. Appellant told the court that he and Hiller had not discussed any strategy for his trial and that the consequences in his case were severe. R. 27, l. 23—28, l. 6. At that point the state requested the court give appellant *Faretta* warnings and make findings of fact regarding appellant's ability to represent himself. R. 31, l. 22—32, l. 9.

The court stated that it was his understanding appellant wished to represent himself because he believed he could do a better job than Ms. Hiller. The court went on to declare that appellant likely needed an attorney, but he could represent himself if he wished. R. 33, l. 19—34, l. 12. The court told appellant that he was not entitled to have another attorney appointed, although he could hire one. The court further stated appellant's case would be continued for sixty days. R. 34, l. 23—35, l. 11.

The court began a colloquy with appellant regarding appellant's right to represent himself. First the court asked appellant if he understood the nature of his charges and the consequences. Appellant told the court he understood. R. 39-40. The court gave the following warnings to appellant:

THE COURT: However, I must inform you of the following, and these are basically what is the *Faretta* rights that we talked about a few moments ago. Mr. Nesmith, self-representation can be dangerous, and you have the right to have the assistance of a lawyer at all stages of the proceedings. If you cannot afford a

lawyer, a lawyer can be appointed to represent you. Do you understand that?

APPELLANT: Yes, Your Honor.

THE COURT: Criminal defense is a highly specialized and technical area of the law. Do you understand that, Mr. Nesmith?

APPELLANT: Yes, sir.

THE COURT: There may be certain factual, legal, or other defenses to the charge you are facing, and if you choose to proceed without the services of a licensed attorney, you may not be aware of any certain defenses. Do you understand that?

APPELLANT: Yes, Your Honor.

THE COURT: There may be issues related to the conduct of the trial or a guilty plea that could arise in the future that you may not be aware of, and it would be your attorney's responsibility to be aware of those issues and how to properly address them before the Court and, if necessary, preserve these issues for appellant review. Do you understand that?

APPELLANT: Yes, Your Honor.

THE COURT: There may be collateral consequences of a conviction or a plea that you are not aware of; including, but not limited to, you could face increased penalties for subsequent offenses, suspension of your driver's license, restriction of the right to possess firearms and/or ammunition, or your immigration status may be affected. Do you understand that?

APPELLANT: Yes, Your Honor.

THE COURT: If you exercise your right to proceed without the services of a lawyer, you are responsible for complying with all applicable rules of court, including the Rules of Evidence, procedural rules, and proper behavior before the judge and/or jury. Do you understand that?

APPELLANT: Yes, Your Honor.

THE COURT: Mr. Nesmith, you understand that if you waive a court-appointed lawyer, you are responsible for hiring a private attorney, if you want one? You understand that, Mr. Nesmith,

because you, in fact, actually have had two court-appointed lawyers, and you are asking me to relieve the court-appointed lawyer, and you want to proceed and represent yourself. However, you do retain the right to move forward and to request or hire a court-appointed lawyer. That is what you want to do, correct?

APPELLANT: Yes, sir.

R. 46-48. The court appointed Ms. Hiller as standby and continued appellant's case for sixty days. R. 49, l. 20—50, l. 10.

At trial appellant represented himself with Ms. Hiller as standby.

### **Discussion**

“It is well-established that an accused may waive the right to counsel and proceed *pro se*.” *State v. Brewer*, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997); *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

*Faretta* requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation. *Faretta v. California*, 422 U.S. 806 (1975); *Bridwell v. State*, 306 S.C. 518, 413 S.E.2d 30 (1992). In the absence of a specific inquiry by the trial judge addressing the disadvantages of proceeding *pro se*, this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source. *Prince v. State*, 301 S.C. 422, 392 S.E.2d 462 (1990); *Wroten v. State*, 301 S.C. 293, 391 S.E.2d 575 (1990). “The burden is on the state to demonstrate the validity of a defendant's waiver of his right to counsel.” *State v. Dial*, 429 S.C. 128, 133, 838 S.E.2d 501, 504 (2020) (citing *Brewer v. Williams*, 430 U.S. 387, 404 (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 trial judge has the responsibility to ensure that the accused is informed of the

dangers and disadvantages of self-representation, and makes a knowing and intelligent waiver of the right to counsel.” *State v. Brewer*, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997).

Although a specific inquiry by the judge expressly addressing the disadvantages of a *pro se* defense is preferred, **the ultimate test is not the trial judge's advice but the accused's understanding.** *Wroten v. State*, 301 S.C. 293, 391 S.E.2d 575 (1990) (emphasis added). “In the absence of an inquiry by the judge, courts look to the record to determine if the accused had sufficient background to understand the disadvantages of self-representation.” *State v. Cash*, 309 S.C. 40, 42, 419 S.E.2d 811, 813 (Ct. App. 1992).

*Cash* provides ten factors courts have considered in determining whether the accused had sufficient background to understand the disadvantages of self-representation including:

(1) the accused's age, educational background, and physical and mental health; (2) whether the accused 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 accused and the court consisted merely of pro forma answers to pro forma questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment. *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065–1067 (11th Cir.1986); *see also Strozier v. Newsome*, 926 F.2d 1100 (11th Cir.1991) (restating the factors noted in *Fitzpatrick* ), cert. denied, 502 U.S. 930, (1991).

*Cash* at 43, 419 S.E.2d at 813.

It is true the trial court warned appellant against proceeding without an attorney at trial. However, it is also clear from the facts and circumstances in this case that appellant's choice to waive his right to counsel was not made with understanding.

There is very little evidence in the record that appellant *understood* the risks of proceeding *pro se*. There is no evidence in the record regarding appellant's age, educational background, or physical and mental health. During sentencing it was revealed appellant had two prior drug convictions. R. 208, l. 17-25.

The exchange between appellant and the court consisted of the court speaking to appellant without inquiring save to end each statement with "do you understand." Appellant answered each question of the court with "yes, your honor" or yes, sir." Appellant never indicated verbally that he did not understand the nature of the charges against him or the possible penalty. Nevertheless, the record reflected he and Hiller had a difficult time communicating, and therefore it was unlikely Hiller was able to convey to appellant the difficulty of self-representation in his case.

Appellant was not attempting to delay his case or manipulate the proceedings. Appellant had legitimate reasons for both requests to relieve counsel. Prior to being represented by Hiller appellant was represented by Mr. O'Neil. Appellant moved before the court to have O'Neil relieved. His given rationale was that O'Neil had been dishonest with him and had moved for a speedy trial without consulting him. His reason for moving to have Hiller relieved was that she was not prepared for trial and instead was trying to persuade appellant to plead guilty

The court appointed Hiller as standby counsel for appellant but failed to inquire if appellant was aware of trial procedures other than telling him that he have to comply with them. This statement without any further explanation, respectfully, meant nothing. Appellant's lack of understanding was made evident at trial where appellant was unable to conform to those standards and rules and was held in contempt by the trial court. R. 165-172.

Appellant could not know what standard a lawyer was held to or that he would be required to comply with certain procedural and evidentiary rules without being explicitly told. Accordingly, appellant could not have understood the gravity of this decision or the disadvantages of self-representation.

**CONCLUSION**

Based on the forgoing argument, appellant's convictions should be reversed, and the case remanded to Horry County Court of General Sessions for a new trial.



Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of February, 2025.

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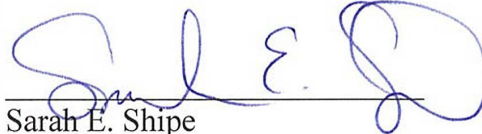
**Feb 24 2025**

**SC Court of Appeals**

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Final 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 24<sup>th</sup> day of February, 2025



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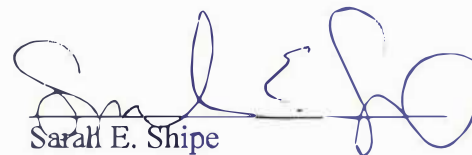
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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Brian H. Gibbs, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 4th day of September, 2024.



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**From:** [Warren, Kaylynn](#)  
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**Subject:** 2023-001854 The State v. Rodney Nesmith  
**Date:** Monday, February 24, 2025 12:07:00 PM  
**Attachments:** [2023-001854 The State v. Rodney Nesmith Final Brief of Appellant.pdf](#)

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Good Morning,

Attached for service in the above-referenced case is the Final Brief of Appellant which will be filed today, February 24, 2025, with the Court of Appeals via email filing.

Respectfully,

Kaylynn

**Kaylynn Warren**

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