STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2009-147686

The State, Respondent,

vs.

Jermaine T. Fuller, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not abuse his discretion in allowing Appellant to proceed *pro se*. Further, the issue is not preserved for review on appeal.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court did not abuse his discretion in allowing Appellant to proceed *pro se*. Further, the issue is not preserved for review on appeal.

Appellant contends the trial court erred in allowing him to represent himself on charges of armed robbery, kidnapping, entering a bank with intent to steal, conspiracy, and possession of a firearm during the commission of a violent crime. The issue is not preserved for review on appeal. Further, at a separate hearing prior to trial, the Honorable Lee S. Alford thoroughly questioned Appellant pursuant to Faretta v. California, 422 U.S. 806 (1975), and Appellant was properly allowed to proceed *pro se* at trial.

Preservation

First, the issue is not preserved for review on appeal. Appellant fired his retained counsel and indicated he planned to obtain counsel. At a pretrial hearing, Appellant still had not obtained counsel. (10/23T. 2-3; R.2-3). Judge Alford indicated Appellant's case was proceeding to trial with or without an attorney, and Appellant indicated he intended to represent himself. (10/23T.4; R. 4). When trial began approximately three weeks later before the Honorable John C. Hayes, III, Judge Hayes reminded Appellant he was previously before Judge Alford and was informed of the dangers of self-representation. Judge Hayes asked if he wished to have stand-by counsel appointed and Appellant indicated affirmatively. (11/16T.4-5; R. 23-24). There is no indication Appellant ever requested the court appoint counsel or that he asked to reconsider the waiver of his right to counsel. Additionally, Appellant did not raise the issue of an invalid waiver in a motion for a new trial after trial ended. Accordingly, this Court should find the issue is

not properly preserved for review on appeal. See State v. Pride, 372 S.C. 443, 447, 641 S.E.2d 921, 923 (Ct. App. 2007) (questioning preservation of issue when not raised in a motion for a new trial based on invalid waiver of counsel); State v. Cabrera-Pena, 350 S.C. 517, 535, 567 S.E.2d 472, 481-82 (Ct. App. 2002) (citing State v. Hyatt, 132 N.C.App. 697, 513 S.E.2d 90, 94 (1999) ("[T]o obtain relief from a waiver of his right to counsel, a criminal defendant must move the court for withdrawal of the waiver")); see also, State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (to be preserved for appeal, issue must be raised to and ruled on by trial court); State v. Byram, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (failure to raise constitutional issues at trial results in waiver on appeal).

Merits

On the merits, the issue also fails. "The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975). A defendant may waive the right to counsel. "It is the trial court's responsibility to determine whether there was a knowing and intelligent wavier by the accused." State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009). "To effectuate a valid waiver, the accused must (1) be advised of the right to counsel and (2) be adequately warned of the dangers of self-representation." Id. (citing State v. McLauren, 349 S.C. 488, 493-94, 563 S.E.2d 346, 348-49 (Ct. App. 2002)); see also, Faretta, 422 U.S. at 835. "A defendant may surrender his right to counsel through (1) waiver by affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture." State v. Thompson, 355 S.C. 255,

262, 584 S.E.2d 131, 134 (Ct. App. 2003). 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, 424, 392 S.E.2d 462, 463 (1990) (citing Faretta). "The trial judge must determine whether there is a knowing and intelligent waiver by the defendant. If the trial judge fails to address the disadvantages of appearing *pro se*, as required by the second prong of Faretta, 'this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source.'" Thompson, 355 S.C. at 262, 584 S.E.2d at 135 (quoting Prince, 301 S.C. at 424, 392 S.E.2d at 463) (internal citations omitted).

Faretta requires a defendant "be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open." 422 U.S. at 835. "While a specific inquiry by the trial judge expressly addressing the disadvantages of a pro se defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding." Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). If the trial court fails to explicitly address the disadvantages of proceeding pro se, as required by the second prong of Faretta, this Court may look to the record to determine whether petitioner had sufficient background to understand the dangers of self-representation or was apprised of his rights by some other source. See Watts v. State, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001).

Factors this Court considers in determining if an accused had sufficient background to understand the disadvantages of self-representation include:

(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.

See State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992); see also, Bryant, 383 S.C. at 415, 680 S.E.2d 11 at 14.

In the instant case, the Judge Alford conducted a very thorough Faretta inquiry prior to allowing Appellant to proceed *pro se* at trial. (10/23T.4-10; R. 4-10). The court explained Appellant's right to an attorney and to have one appointed if he could not afford an attorney. (10/23T.4; R. 4). He explained:

> An attorney would most likely represent you better than you can represent yourself because an attorney is trained in the rules of court, rules of evidence, courtroom procedure, and the common law and statutory criminal laws of South Carolina.
>
> An attorney would be able to explain to you the charges and punishment you face.
>
> . . . .

> An attorney would be able to tell you if there are any legal defenses that might be available to you if you were [to] go to trial.
>
> . . . .
>
> And even if you decide to plead guilty instead of going to trial, an attorney may be able to negotiate with the Solicitor to either get the charges you face or possible sentences you face reduced.

(10/23T.4-5; R.4-5). Afterward, Appellant acknowledged he understood the benefit of having counsel. (10/23T. 5; R. 5). The court then questioned Appellant about his background, including the fact he obtained a GED, the fact he has owned his own business and been involved in real estate, and the fact he has been involved with the criminal justice process including several prior guilty pleas. Appellant also indicated he represented himself on prior occasions. (10/23T. 6-7; R. 6-7).

The court then provided one last admonition to Appellant:

> Let me give you this explanation, Mr. Fuller. Of course, you can represent yourself in a jury trial. A jury trial is difficult to represent yourself when you don't know the rules and how to proceed. The court can advise you as to the procedures, but the court cannot represent you, cannot be your attorney and tell you what to say or tell you what to present.
>
> . . . .
>
> And tell you how to ask questions or any of those kinds of things. The court cannot be your attorney. The court can advise you as to procedure, what you need to do and what the procedures are, but the court can't advise you about the law and procedure in court and that kind of thing. Do you understand that?
>
> . . . .
>
> My advice to you is that you'd be better off to take the public defender and work with a public defender and help him or her, as the case may be, to prepare your defense and that would be my recommendation to you because it's very difficult in my experience over the years that I've been in this job for a person to represent themselves. Most often what happens is they get frustrated and lost during the course of the trial, but you have a right to do that. I'm not

> telling you you don't have that right because you do, but I think that you'd be better off with an attorney. I tell everybody that.

(10/23T.8-9; R. 8-9). Throughout the warnings, Appellant represented he understood and maintained his desire to proceed *pro se*. The court ensured Appellant's waiver of his right to counsel was knowing and voluntary. Accordingly, the court adequately made Appellant aware of the dangers and disadvantages of self-representation, and the record clearly establishes he knew what he was doing and his choice was made with eyes open.

Appellant contends because the trial court did not specifically inform him of the total sentence he faced, Appellant's waiver of his right to counsel was not knowing or voluntary. The trial court ensured Appellant understood the dangers of self-representation. Further, during the colloquy, the assistant solicitor put on the record a plea deal indicating the mandatory minimum appellant faced for the charges was 10 years and, if he accepted the plea, the maximum he faced was 30 years. The assistant solicitor noted, without a plea, appellant faced 100 years on the charges. (10/23T.16; R. 16). As a result, Appellant was informed of all the dangers of self-representation as well as the possible sentences he faced as a result of whether he accepted a plea or proceeded to trial.

Even if the specific inquiry is found to be insufficient, the overall record indicates Appellant had sufficient background to understand the disadvantages of self-representation. In looking at the ten factors set forth in Cash, including Appellant's background, his history with the criminal justice system, and the appointment of standby counsel, all demonstrate Appellant knew and understood the dangers of self-representation, and he knowingly and voluntarily waived his right to counsel. (10/23T.6-8; 11/16T. 4-5; R. 6-8; 23-24). Accordingly, the warning given by Judge Alford, as well

as Appellant's background and the appointment of stand-by counsel, make it clear Appellant knowingly and voluntarily waived his right to counsel. Therefore, the trial court did not err in allowing Appellant to proceed *pro se*.

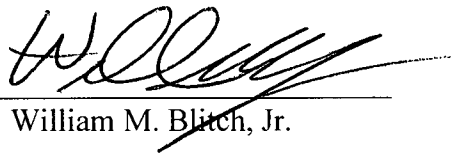
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

BY: 
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 30, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2009-147686

The State, Respondent,

vs.

Jermaine T. Fuller, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: _____
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

October 4, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2009-147686

The State, Respondent,

vs.

Jermaine T. Fuller, Appellant.

PROOF OF SERVICE

I, SALLY ELLISON, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 4th day of October, 2013.

Sally Ellison

SALLY ELLISON
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727