

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

OCT 14 2014

THE STATE,

SC Court of Appeals

RESPONDENT,

V.

ANTHONY JACKSON,

APPELLANT

APPELLATE CASE NO. 2012-213445

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Opinion No. 2014-UP-348

PETITION FOR REHEARING

Appellant Anthony Jackson (“Jackson”) petitions this Court for rehearing on both issues in his appeal. Respectfully, the Court misapprehended Jackson’s arguments and erred its decision.

Issue 1 – Right to Self-Representation

The Court correctly understood that the right to self-representation is a fundamental right, but erred in concluding that the lack of controlling authority for this exact situation equated to discretion for the trial judge to postpone Jackson’s exercise of his fundamental right. This does not constitute an adequate reason to deny appellant relief. The opinion does not contain any authority

for the proposition that a defendant's right of self-representation may be impaired because of a lack of precedent. This reasoning is similar to the good-faith exception to the exclusionary rule in Fourth Amendment cases, which exists to regulate the behavior of police officers. See Davis v. United States, 131 S.Ct. 2419 (2011). Such reasoning does not apply to judges or how they ensure the rights of litigants are protected.

The cases cited by the Court do not support the proposition that when the right to self-representation has been asserted, it can be postponed. In Nelson v. Alabama, 292 F.3d 1291 (11th Cir. 2002), the defendant sent the trial judge a letter informing the court that he wished to represent himself at a capital sentencing proceeding. Id. at 1294. The trial judge allowed the defendant to represent himself without conducting a Faretta hearing. Id. The issue on appeal was whether a Faretta hearing was required, not the postponement of the defendant's right to self-representation. Id. at 1295. At no point did the Court force a lawyer upon the defendant. Id.

United States v. Frazier-El, 204 F.3d 553 (4th Cir. 2000) does not concern postponement of the right to self-representation, but a complete denial. In Frazier-El, the trial judge denied the defendant's request to proceed *pro se* because of the defendant's vacillation and dilatory tactics. Id. at 560. The court found the defendant was more interested in "a manipulation of the system than an unequivocal desire to invoke his right of self-representation." Id. The defendant told the court he wanted a new attorney who would argue the court lacked jurisdiction over him because he was a member of the "Moorish Science Temple." Id. Jackson never made any such frivolous statements, his request to represent himself was unequivocal and ultimately granted, albeit too late.

Much of the language in Swan v. Commonwealth, 384 S.W.3d 77 (Ky. 2012) supports appellant's position. The court stated, "Perhaps more importantly, once a defendant invokes his

right to proceed *pro se*, in whole or part, the trial court is required to hold the Faretta hearing and allow the defendant to exercise the right, if at all possible.” Swan at 93. The defendant in Swan did not make an unequivocal assertion of his right to represent himself and he abandoned the claim. Id. at 94. At no point of the proceedings did the court force an attorney on the defendant after an unequivocal assertion of the right to self-representation. Id.

Even more supportive of Jackson’s case is State v. Madsen, 229 P.3d 714 (Wash. 2010). In Madsen, the trial court deferred the defendant’s first request to represent himself to give him the opportunity to consult with another attorney. Madsen at 716. The opinion does not reflect that any proceedings were held after this deferral and the next hearing, which was held for the express reason of determining the defendant’s right to proceed *pro se*. Id. In fact, the Madsen court’s holding was that the trial court **erred in deferring ruling** at this hearing after the defendant’s second request because the defendant’s request was unequivocal. Id. at 718-19. The court’s holding, which runs expressly counter to the language quoted in the opinion, was:

Although the trial court’s duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. **The value of respecting this right outweighs any resulting difficulty in the administration of justice.**

Id. at 719 (emphasis added).

In appellant’s case, the Court acknowledged, as it must, that Jackson made an unequivocal assertion of his right to represent himself. This right was denied by the trial judge during critical stages of the proceeding. The opinion failed to address appellant’s analogy that the portions of the trial during which a lawyer was forced upon Jackson were critical stages. A defendant has a guaranteed right to be present at a critical stage of a criminal proceeding when his presence bears on his opportunity to defend his case. Id. at 106. This right extends to voir

dire and jury selection. United States v. Tipton, 90 F.3d 861, 872 (4th Cir. 1996). It also extends to pretrial hearings where witnesses are questioned. United States v. Hamilton, 391 F.3d 1066, 1071 (9th Cir. 2004) (holding suppression hearing where government presented the testimony of a police officer was a critical stage); People v. Williams, 726 N.E.2d 641, 643-44 (Ill. Ct. App. 2000) (“A hearing at which evidence is presented against a defendant involves substantial rights and therefore entitles a defendant to be present); McGinnis v. State, 430 S.E.2d 618, 621-22 (Ga. Ct. App. 1993) (“Therefore, we hold that it constitutes prejudicial error to conduct an evidentiary suppression hearing in the defendant’s absence.”). The right to be present extends to post-indictment lineups and therefore logically extends to a Biggers hearing. See United States v. Wade, 388 U.S. 218, 236-37 (1967) (holding constitutional right to be present extends to post-indictment lineups).

“[P]articipation by standby counsel without the defendant’s consent should not be allowed to destroy the jury’s perception that the defendant is representing himself.” McKaskle v. Wiggins, 465 U.S. 168, 178 (1984). “The defendant’s appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear *pro se* exists to affirm the accused’s individual dignity and autonomy.” Id. The trial judge told the jury that Jackson would represent himself and they could not make any adverse inference from that fact. R. 147 ll. 9 – 13. Despite his ruling that Jackson would represent himself and informing the jury of this ruling, the trial judge then had Fox participate in voir dire instead of Jackson. R. 148, l. 2 – 88, l. 20. Jackson did not speak during voir dire. R. 148, l. 2 – 155, l. 20. At no point did the trial judge ask Jackson whether he wanted to represent himself during voir dire. R. 148, l. 2 – 155, l. 20. Without obtaining Jackson’s assent on the record, Judge Cottingham said, “All right, Mr. Fox, I’ve permitted you to sit here and assist the defendant in the selection of the jury only, but do you have any further

inquiry?” R. 154, l. 17 – 19. Fox then proposed an additional voir dire question. R. 154, ll. 20 – 23.

After voir dire, the trial judge told the jury, “And the defendant is representing himself, I’ve asked Mr. Fox to assist in the selection of the jury process and the defendant is agreeing to that; is that correct? R. 155, ll. 13 – 16. Fox (not Jackson) replied, “Yes, Your Honor.” R. 155, l. 17. The trial judge did not obtain Jackson’s consent to Fox selecting the jury on the record. Fox then exercised Jackson’s strikes and selected the jury. R. 155, l. 18 – 165, l. 18. The trial then began and Jackson made his opening statement and examined the State’s witnesses. R. 179, l. 11 – 180, l. 8. This sequence destroyed the appearance that Jackson was representing himself before the jury.

“To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment.” Faretta v. California, 422 U.S. 806, 820 (1975). “The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.” Id. at 819-20. The trial judge’s refusal to allow Jackson to represent himself during critical stages of this trial is a structural error. State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 549-50 (2014) citing McKaskle. The Court should grant rehearing on this issue and reverse Jackson’s conviction.

Issue 2

Respectfully, the Court failed to analyze the implied threat in the detective’s statement that “There’s a difference, okay?” The detective’s statement necessarily implies that there will be a difference in how Jackson would be treated if he spoke to police compared to if Jackson exercised his right to remain silent. Jackson began incriminating himself immediately after this threat. While police officers may inform suspects that news of their cooperation will be relayed to the solicitor, they may not threaten consequences for the refusal to cooperate. In State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990), the court held that the sheriff’s admission that Osborne would be charged

with withholding information or giving the police officer a false statement if she was not forthcoming mandated suppression of her confession. Osborne was told “you don’t have to say anything, but if you withhold evidence, you can be charged with a crime.” State v. Osborne, 301 S.C. at 366, 392 S.E.2d at 179. See also State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990).

In Rochester, the Supreme Court held that a confession “may not be extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence.” Rochester at 200, 391 S.E.2d at 246-47 (internal quotations omitted). The Court found that a polygraph examiner telling the defendant it would be in his best interest to tell the truth was neither a threat nor a promise. This was nonetheless a factor to consider when determining whether appellant’s statement was a knowing, intelligent, and voluntary tendered confession under the totality of the circumstances. See State v. Hook, 348 S.C. 401, 559 S.E.2d 856 (Ct. App. 2001); State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987).

In Hook, this Court held that the defendant’s statement to his probation officer was inadmissible because his agent expressly threatened to revoke the defendant’s probationary sentence unless he told the truth. This Court noted that statements given pursuant to threats or under inherently coercive circumstances are not admissible. See Mincey v. Arizona 437 U.S. 385, 398, 399 (1978); Minnesota v. Murphy 465 U.S. 420, 427 (1984).

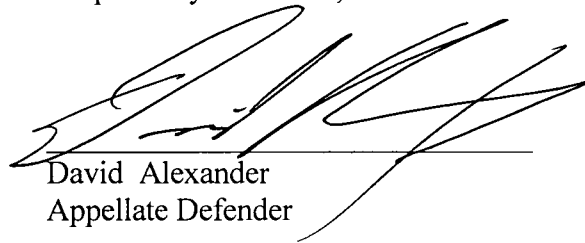
The officer’s assertion that there would be a “difference” if Jackson failed to cooperate meant that he would be treated more harshly. Jackson clearly felt threatened by this statement. This “difference” in treatment is similar to the threats of consequences in Osborne and Hook. The fact that it was a threat can be seen from its consequences. Immediately after Detective Clothier made this threat, Jackson began making incriminating statements. Detective Clothier’s threat was not

“slight” and its existence compels the suppression of Jackson’s statement. This Court should grant rehearing and reverse.

CONCLUSION

For the foregoing reasons, and the reasons stated in the briefing before this Court and at oral argument, this Court should grant rehearing, reverse appellant’s conviction, and order his statement suppressed.

Respectfully submitted,



David Alexander
Appellate Defender

This 14th day of October, 2014.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Jennifer Ellis Roberts, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Anthony Jackson, #138454, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 14th of October 2014.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 14th day
of October, 2014.

David Munder (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.