

 ORIGINAL

RECEIVED

JUL - 2 2015

S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Darlington County
Thomas A. Russo, Circuit Court Judge

WARREN K. SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELATE CASE NO. 2014-002426

JOHNSON PETITION FOR WRIT OF CERTIORARI

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT OF THE CASE3

ARGUMENT7

 Relevant Facts7

 Discussion8

CONCLUSION11

PETITION TO BE RELIEVED AS COUNSEL.....12

ISSUE PRESENTED

Whether the PCR court erred in finding plea counsel effective where she failed to file an appeal and a rational defendant would have wanted to appeal the plea court's failure to apply the standard set forth Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975), in its denial of Petitioner's request to waive counsel and proceed *pro se*?

STATEMENT

Procedural History

On August 25, 2011, the Darlington County grand jury indicted Petitioner for petit larceny, kidnapping, first degree burglary, and first degree assault and battery. App. 126 – 127, 129, 131 – 132, and 134 – 135. On May 3, 2012, the Darlington County grand jury indicted Petitioner for armed robbery arising from the same alleged events. App. 137 – 138.

On May 7, 2012,¹ Petitioner appeared before the Honorable J. Michael Baxley. App. 1. The case was originally set for trial that afternoon, but was called for a motion to relieve counsel and then a guilty plea. App. 3 – 4. Petitioner was represented by Chelsea McNeill, and the State was represented by assistant solicitor Kendall Burch. App. 1. Judge Baxley denied Petitioner's motion to relieve counsel McNeill and proceed *pro se*. App. 5, l. 13 – 6, l. 24. The Court then accepted Petitioner's guilty plea to the indicted offenses, with the exception of armed robbery. The court reduced the armed robbery charge to common law robbery, also known as strong arm robbery, due to Petitioner's disagreement that he used a brick. App. 19, l. 5 – 25, l. 15.

At sentencing, counsel McNeill told the court that Petitioner was forty-eight years old and that despite his criminal record, this was his first violent offense. She indicated that his actions on the date of the incident were an anomaly caused by drug use. Despite their "communication breakdown," she believed he had a kind heart. She requested a minimum sentence, so that Petitioner would have an opportunity to rejoin his family. App. 25, l. 22 – 27, l. Petitioner apologized to the court and the victim. He expressed that the State had offered him fifteen years

¹ The cover page of the guilty plea transcript is dated August 29, 2012. App. 1. However, page 3 of the transcript indicates that the hearing commenced on May 7, 2012. App. 3. There was evidence at the guilty plea hearing that Petitioner was indicted for armed robbery the week prior to appearing for trial, such that May 7, 2012 appears to be the correct date of the plea hearing. App. 20, ll. 2-15.

when he was represented by a private attorney, Jim Cox, and that he did not know why Mr. Cox was no longer representing him. He asked the court for mercy. App. 29, ll. 4-7. Judge Baxley sentenced Petitioner to concurrent sentences of thirty days for petit larceny, ten years for first degree assault and battery, fifteen years for common law robbery, twenty-five years for first degree burglary, and twenty-five years for kidnapping. App. 33, l. 18 – 34, l. 18.

No direct appeal was filed.

First PCR Application and Hearing (2012-CP-16-732)

On August 28, 2012, Petitioner filed his application for post-conviction relief (“PCR”) alleging involuntariness of his plea and ineffective assistance of counsel. App. 37 - 43. The State filed its Return on January 17, 2013. App. 44 – 48. 841-43. Petitioner filed an amended PCR application on April 26, 2013. App. 49 – 54.

On July 16, 2013, an evidentiary hearing was held before the Honorable R. Ferrell Cothran Jr. Petitioner was represented by Parker E. Howle, and the State was represented by Assistant Attorney General Karen C. Ratigan. App. 55. Petitioner and plea counsel McNeill both testified at the hearing.

At the PCR hearing, Petitioner testified that he was originally represented in his case by Jim Cox. Cox had negotiated a fifteen year plea agreement on his behalf, which was to run concurrent to a seven year sentence for a probation violation. He never received an explanation as to why he was appointed a public defender when he paid Cox to represent him. App. 59, ll. 8 – 60, l. 12. He never rejected the fifteen year offer. Petitioner attempted to have counsel McNeill relieved so that he could represent himself but the plea judge denied his motion. Counsel McNeill told the plea court that the fifteen year offer had been rejected. App. 62, l. 5 – 63, l. 16; App. 64, l. 23 – 65, l. 2. When asked why he did not tell the plea judge that he thought he had accepted the fifteen year offer,

Petitioner responded that he did not know that he could raise an objection to that. App. 71, ll. 3 – 72, l. 6. He further testified that counsel McNeill did not advise him of his right to appeal. App. 65, ll. 9-14.

Plea counsel McNeill testified that the Fourth Circuit public defender's office was appointed to represent Petitioner on August 16, 2011. Another public defender was assigned to the case in September, and counsel McNeill took over the case on October 6, 2011. Their first meeting together was in April 2012. App. 77, 2-17. Counsel McNeill contacted Cox's office and was advised that he represented Petitioner on a prior probation violation matter and a bond hearing in the present case, but said that it was her "understanding" that Cox was not retained for the case in chief. She also understood that a fifteen year offer was made at the time of Petitioner's probation revocation hearing, while he was represented by Cox, and the State took his failure to accept it that day as a rejection. Counsel McNeill said "I know that he [Petitioner] did not understand he was rejecting it but the State took it as a rejection." App. 75, l. 2 – 76, l. 18; App. 81, l. 12-14; App. 82, ll. 7-9. App. 76, ll. 4-18. She communicated with the solicitor, but the solicitor adamantly refused to extend any offer. Plea counsel admitted that her relationship with Petitioner was strained because of his frustration that Cox was not representing him and that the fifteen year offer was no longer available. This was compounded when the State indicted him for armed robbery less than one week before trial. App. 77, l. 18 – 78, l. 21.

Order of Dismissal (2012-CP-16-732)

Judge Cothran's Order of Dismissal denying Petitioner's PCR application was filed September 9, 2013. App. 86 – 93. He ruled that trial counsel's representation was not deficient and found that Petitioner did not make any averment that he was represented by a private attorney, Jim Cox, to the judge at the plea hearing. He further found that Petitioner failed to meet his burden

of proving that he was entitled to a review of his direct appeal issues and “failed to articulate [why] a rational defendant would have wanted to appeal in this situation...” App. 91.

PCR counsel did not file a timely Notice of Appeal on Petitioner’s behalf.

Second PCR Application and Hearing (2013-CP-16-942)

Petitioner filed a subsequent PCR application on November 20, 2013, asserting that his original PCR counsel, Howle, was ineffective in failing to file a timely notice of appeal. App. 94 – 108. The State filed its Return on May 30, 2014. App. 109 - 113. An evidentiary hearing was held on July 21, 2014 before the Honorable Thomas A. Russo. Petitioner was represented by Tristan M. Shaffer, and the State was represented by Assistant Attorney General Joshua L. Thomas. App. 114. The parties placed a consent agreement on the record in light of that fact that Howle filed an untimely Notice of Appeal from the Order of Dismissal, resulting in its dismissal. The parties agreed that based on the circumstances, Petitioner should be given an opportunity to appeal from Judge Cothran’s Order. App. 117 – 119.

Order Granting Belated PCR Appeal Pursuant to Austin (2013-CP-16-942)

On September 12, 2014, Judge Russo entered an Order Granting Appeal Pursuant to Austin v. State, finding that the Notice of Appeal filed by Howle was untimely such that Petitioner requested and was denied an opportunity to seek appellate review. He accordingly granted Petitioner’s request for a review of his PCR action pursuant to Austin. App. 121 – 124.

Petitioner is filing his Petition for Writ of Certiorari pursuant to Austin v. State at the same time as this Petition.

ARGUMENT

The PCR court erred in finding plea counsel effective where she failed to file an appeal and a rational defendant would have wanted to appeal the plea court's failure to apply the standard set forth Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975), in its denial of Petitioner's request to waive counsel and proceed *pro se*.

Relevant Facts

Guilty Plea Hearing

Prior to the commencement of the plea hearing, Petitioner made a motion to relieve his public defender, McNeill, and proceed *pro se*. Petitioner cited McNeill's inexperience and negativity as reasons that it was in his best interest to proceed without her. App. 4, ll. 10-15; App. 5, l. 17 – 6, l. 5.

Without asking any further questions of Petitioner, the trial court denied the motion, stating:

All right, sir. Well, I will tell you that even though you are saying that she is quote "new" that Ms. McNeill has represented multiple people in this Court, and has been a public defender --- working in The Public Defender's Office in places other than Darlington County as well, so she has some experience. Not to mention a law degree, as well as the ability to represent you. And, Mr. Smith, she would be able to represent you better than you would yourself, because you simply have not had the benefit of going through law school, being in this Court as often as she has.

I am going to respectfully deny your motion, and let her remain with you during the course of this hearing.

App. 6, ll. 6-20.

PCR Hearing and Order of Dismissal

At the PCR hearing, Petitioner testified that he attempted to have counsel McNeill relieved as counsel so that he could represent himself but the plea judge denied his motion. App. 62, l. 5 – 63, l. 9; App. 64, l. 23 – 65, l. 2. When asked why he did not tell the plea judge that he thought he had accepted the fifteen year offer, Petitioner responded that he did not know that he could raise an

objection to that. App. 71, ll. 3 – 72, l. 6. He further testified that plea counsel McNeill did not advise him of his right to appeal. App. 65, ll. 9-14.

Judge Cothran made two findings in the Order of Dismissal that were unsupported or contradicted by the record. First, he found that Petitioner did not make any averment that he was represented by a private attorney, Jim Cox, to the judge at the plea hearing. App. 91. However, this is directly contradicted by Petitioner's statements prior to sentencing that Cox was his lawyer when the fifteen year offer was made and that he did not understand why Cox was no longer representing him. App. 29, ll. 4-7. Further, even plea counsel's testimony corroborated that Petitioner was represented by Cox at some point such that Cox took part in negotiating a fifteen year plea offer on Petitioner's behalf. App. 75, l. 2 – 76, l. 18; App. 78, ll. 18-21. Second, Judge Cothran found that Petitioner failed to meet his burden of proving that he was entitled to a review of his direct appeal issues and "failed to articulate a rational defendant would have wanted to appeal in this situation..." App. 91. However, both the plea transcript and Petitioner's testimony reflected that Petitioner made a request to relieve McNeill as counsel and proceed *pro se*. This request was summarily denied by the trial judge. App. 4, ll. 10-15; App. 5, l. 17 – 6, l. 20; App. 62, l. 5 – 63, l. 9; App. 64, l. 23 – 65, l. 2.

Discussion

Even if the plea court thought it unwise, the Petitioner's request to represent himself at the plea hearing should have been granted absent a finding that Petitioner's decision was not knowing, intelligent, and voluntary. The plea court's paternalistic decision to protect Petitioner from the potential pitfalls of self-representation was contrary to Petitioner's constitutional right to represent himself and mandated reversal. See State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014). Further, the plea court's failure constitutes a structural defect, such that it would not

have been subject to a harmless-error analysis on appeal. See State v. Rivera, 402 S.C. 225, 247, 741 S.E.2d 694, 705 (2013) (“[D]espite the strong interests upon which the harmless-error doctrine is based, there are certain constitutional rights which are so basic to a fair trial that their infraction can never be treated as harmless error. These are structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards and which affect the framework within which the trial proceeds, rather than simply an error in the trial process itself.” (internal quotations omitted) (citing Arizona v. Fulminante, 499 U.S. 279, 306–08, 111 S.Ct. 1246 (1991))). Plea counsel should have recognized the meritorious constitutional basis for Petitioner’s appeal and consulted with him about the filing of a direct appeal. Her failure to do so constituted ineffective assistance of counsel.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). “Where allegations of ineffective assistance of counsel are made, the question becomes, ‘whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.’ ” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668).

First, the applicant must demonstrate counsel’s representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88. “Under this prong, ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’ ” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). Second, the applicant must demonstrate he was prejudiced by counsel’s

performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S.Ct. 1029, 1036 (2000).

A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions. State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010). So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta.² State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010). In Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975), the United States Supreme Court held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so, and that the state may not force a lawyer upon him when he insists that he wants to conduct his own defense. In the recent case of State v. Barnes, this court explained that:

Recognizing that it may be to the defendant's detriment to be allowed to proceed *pro se*, his knowing, intelligent and voluntary decision must be honored out of that respect for the individual which is the lifeblood of the law. Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel.

407 S.C. at 35-36, 753 S.E.2d at 550 (internal citations and quotations omitted).

² Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975).

This violation of Petitioner's constitutional rights would have mandated reversal. See id. As such, there is no question that "a rational defendant would have wanted to appeal." See Roe, 528 U.S. at 480, 120 S.Ct. at 1036. Despite this, plea counsel made no mention of Faretta at the plea hearing and failed to advise Petitioner of this meritorious basis for appeal after the hearing. Thus, based on the testimony at the PCR hearing and the plea hearing transcript, Petitioner met his burden of showing that plea counsel's representation was deficient and that he was prejudiced by such deficiency. He is accordingly entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Petitioner Warren K. Smith respectfully request this Court grant certiorari to allow full briefing on this issue.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of July, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DARLINGTON COUNTY
THOMAS A. RUSSO, CIRCUIT COURT JUDGE

WARREN K. SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002426

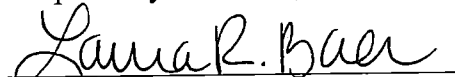
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Warren K. Smith states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. She has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on July 21, 2014. In her opinion seeking certiorari from the order of dismissal is without merit.
3. She has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve her as counsel for Warren K. Smith.

Respectfully submitted,



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

This 2nd day of July, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Darlington County

Thomas A. Russo, Circuit Court Judge

WARREN K. SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELATE CASE NO. 2014-002426

CERTIFICATE OF SERVICE

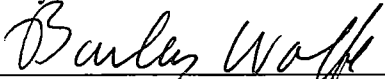
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Joshua L. Thomas, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Warren K. Smith at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 2nd day of July, 2015.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 2nd day
of July, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021.