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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Circuit Court Judge

Appellate Case No.: 2014-002483

The State .... Respondent

v.

John Henry Dial Jr. .... Appellant

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

DID THE CIRCUIT COURT ERR BY NOT REVERSING THE CASE AND REMANDING IT FOR A NEW TRIAL WHEN THE TRIAL COURT ERRED BY FAILING TO WARN THE APPELLANT OF THE DANGERS OF PROCEEDING TO TRIAL WITHOUT AN ATTORNEY PURSUANT TO FARETTA V. CALIFORNIA?

STATEMENT OF THE CASE

The Appellant, John Henry Dial, Jr., was arrested for three counts of Assault and Battery 3d degree on August 25, 2010. The Appellant requested a jury trial on November 1, 2010 with a pretrial hearing occurring on March 18, 2011. Jury selection for the case occurred on April 25, 2011 and the case went to trial before the Pontiac Magistrate Court jury on April 26, 2011. The jury returned a verdict of guilty on two counts of Assault and Battery 3d degree and not guilty on one count of Assault and Battery 3d degree. An appeal to Richland County Circuit Court was timely filed on April 29, 2011.

A hearing was held before the Honorable G. Thomas Cooper, Circuit Court Judge for Richland County on January 17, 2014. An Order denying the appeal was issued on June 2, 2014 and received on June 16, 2014 by attorney for the Appellant. A timely Motion to Alter Judgment Pursuant to SCRCP 59(e) was filed on June 26, 2014. An order denying the Motion to Alter Judgment was issued on October 9, 2014 and received by the attorney for the Appellant on October 20, 2014. The Notice of Appeal was timely filed.

STATEMENT OF THE FACTS

The Appellant was charged in the Pontiac Magistrate Court with three counts of Assault and Battery 3d degree arising out of the allegations that he sprayed pepper spray on the victims, David Hutchinson, Shelby Hutchinson and Cherish Douglas. The case was called before a jury on April 26, 2011. The Appellant proceeded pro se at the jury trial. The trial court advised him of his right to be represented by an attorney but did not proceed further by advising him of the dangers of proceeding without an attorney. (Return of Appeal p. 1)

The State called David Hutchinson, Cherish Douglas, Shelby Hutchinson and Wendy Bass to testify. The Defense called Sam Green, John Dial, Sr. and the Appellant, John Dial, Jr. to testify. The Appellant testified that he did not spray the individuals with pepper spray. (Trial Transcript p. 67 l. 13, p. 68 ll18-19, p.70 l. 17). After deliberation, the jury found the Appellant guilty of two of the charges of Assault and Battery 3d degree. An appeal to Richland County Circuit Court was timely filed on April 29, 2011. This appeal followed after the denial of appeal by the Circuit Court.

ARGUMENT

THE CIRCUIT COURT ERRED BY NOT REVERSING THE CASE AND REMANDING IT FOR A NEW TRIAL WHEN THE TRIAL COURT ERRED BY FAILING TO WARN THE APPELLANT OF THE DANGERS OF PROCEEDING TO TRIAL WITHOUT AN ATTORNEY PURSUANT TO FARETTA V. CALIFORNIA

The Appellant proceeded to trial in this case without an attorney and he did not make a knowingly and intelligent waiver of his Sixth Amendment right to counsel. After reviewing the transcript of the trial and the Return of Appeal, it is apparent that Magistrate Judge Surles failed to fully advise the Appellant of the dangers of self representation pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Judge Surles states in the Return of Appeal that he advised the Appellant of his right to an attorney on November 1, 2010 and March 18, 2011 and that Appellant assured the court that he wanted to represent himself on April 25, 2011. (Return of Appeal p. 1) However, there is no mention of an advisement of the dangers of self representation.

"Faretta allows an accused to waive his right to counsel if he is (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) as quoted in In re Christopher H. 359 S.C. 161, 596 S.E.2d 500 (S.C. App. 2004). In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the appellate court] will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source. To determine if an accused has sufficient background to comprehend the dangers of self-representation , courts consider a variety of factors 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 the accused knew the nature of the charge(s) and of the possible penalties;

(4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation;

(5) whether the accused 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 the accused knew of the legal challenges he could raise in defense to the charge(s) against him;

(9) whether the exchange between the accused and the court consisted of merely *pro forma* answers to *pro forma* questions; and

(10) whether the accused's waiver resulted from either coercion or mistreatment. Gardner v. State, 351 S.C. 407, 412-13, 570 W.E.2d 184, 186-87 (2002).

The Return of Appeal and Transcript are silent on these factors and, therefore, this court does not have the ability to determine whether the Appellant had sufficient background or was apprised by any other source of the dangers of self-representation. In the Magistrate's Return on Appeal, Magistrate Surles states that Appellant was advised of his right to an attorney but is silent on the issue of whether he was warned of the dangers of self representation. (Return of Appeal p. 1). During the trial, objectionable information was

introduced without objection by the Appellant. The opening statement of the prosecuting officer included a statement that the Appellant was on probation. (Trial Transcript p. 17 ll. 11-12). Since the Appellant did not have counsel, there was no objection to this prejudicial statement. Also, no curative instruction was given to the jury by the trial court. Furthermore, objectionable hearsay evidence which was not a statement against interest of the accused was introduced during the testimony of David Hutchinson. (Trial Transcript p. 22 ll. 1-3). The witness also raises bad character evidence of the accused. (Trial Transcript p. 28 ll. 11-15). The Appellant being on probation is again raised by witness Wendy Bass. (Trial Transcript p. 44 ll. 15-19). Also, the Appellant attempted to produce good character evidence and was denied this opportunity by the trial court. (Trial Transcript p. 60 ll. 1-19, p. 62 l. 20-p. 63 l.4, p.65 ll. 6-13). Clearly, legal issues arose during the trial where the *pro se* Appellant was disadvantaged by being unrepresented by counsel. The objectionable evidence and statements clearly prejudiced the Appellant. Appellant was denied his Sixth Amendment right to counsel since he was not advised of the dangers of self-representation and the record is silent as to the factors to determine whether the Appellant had sufficient background to comprehend the dangers of self-representation.

CONCLUSION

For all the foregoing reasons, the Appellant now asks that the judgment against him be reversed and that his case be remanded for a new trial.

Respectfully submitted,

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This 1st day of July, 2015

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PROOF OF SERVICE

I certify that I have served the INITIAL BRIEF OF APPELLANT and the DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD OF APPEAL on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on July 1, 2015 addressed to:

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