

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Spartanburg County
R. Keith Kelly, Circuit Court Judge

JEROD KEYKENDALL HARRIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-002693

PETITION FOR WRIT OF CERTIORARI

JOHN H. STROM
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INDEX

INDEX.....1

ISSUE PRESENTED2

STATEMENT3

ARGUMENT7

CONCLUSION11

ISSUE PRESENTED

Did the PCR court err in finding that Petitioner knowingly, voluntarily, and intelligently waived his right to PCR counsel where the PCR court failed to conduct a *Faretta*¹ hearing to ensure that Petitioner was aware of the dangers and disadvantages of self-representation?

¹ 301 U.S. 422 (1990).

STATEMENT

Indictment and Guilty Plea

On May 5, 2011, Petitioner was indicted for one count of attempted murder. App. 60 - 61. On May 31, 2012, Petitioner pled guilty as indicted before the Honorable Mark J. Hayes. App.4 - 21.

Robert Hall represented Petitioner and Assistant Solicitor Abel Gray represented the State. Pursuant to a negotiated plea agreement, Judge Hayes sentenced Petitioner to fifteen years imprisonment. App. 19, ll. 1-24.

PCR Application

On November 5, 2012, Petitioner filed an application for post-conviction relief alleging that, among other grounds, plea counsel was ineffective for failing to investigate his case and for providing Petitioner with erroneous advice resulting in an involuntary guilty plea. App. 22 - 28. The State filed a Return on February 25, 2014. App. 29 - 33.

PCR Waiver of Counsel Hearing

On April 7, 2014, a hearing was held before the Honorable J. Durham Cole. App. 34 - 39. Petitioner's court-appointed counsel, J. Brandt Rucker, was present and Assistant Attorney General Suzanne H. White represented the State.

PCR counsel informed the court that Petitioner wished to "have a private, retained attorney at this time." App. 36, ll. 8-11. Petitioner confirmed this and noted, "I didn't feel comfortable . . . that [PCR counsel] was in my best interest. . ." *Id.* at ll. 14-16.

The Court asked Petitioner:

Q: [D]o you understand that what you're asking me to do today is to terminate [PCR counsel's] representation of you?

A: Yes, sir.

Q: In other words, you've got a court-appointed lawyer, and if you terminate his services today, then you're telling me you don't want a court-appointed lawyer, you're going to hire somebody.

A: Yes, sir.

Q: . . . If I terminate his services today and I continue [the hearing] so you can hire a lawyer, do you understand in the future you're not going to get another court-appointed lawyer?

You'll either have to hire one or you'll be representing yourself.

A: Okay.

App. 36, ll. 19 - 37, ll. 12. Petitioner then again confirmed that he still wanted to relieve PCR counsel and attempt to secure private counsel. App. 37, ll. 15 - 38, ll. 3.

The court then relived counsel and ruled that “[Petitioner] is going to hire counsel. And he will not be permitted to have another court-appointed lawyer.” App. 38, ll. 1-2. The court never inquired about Petitioner's education level and never warned Petitioner about the hazards of self-representation.

PCR Hearing

On November 4, 2014, Petitioner's evidentiary hearing was held before the Honorable R. Keith Kelly. App. 40 - 53. Petitioner represented himself and Assistant Attorney General Suzanne White again represented the State. App. 40 - 53. Petitioner and plea counsel both testified at the hearing.

At the beginning of the hearing, the PCR court asked Petitioner if he was representing himself. App. 42, ll. 5-13. Petitioner replied that “I'm going to have to, sir. . . I was told I had to.”

Id. at ll. 10-12. The State then explained to the court:

And, Your Honor, just to clarify. He had an attorney that had been appointed in our last term. He asked for that attorney to be relieved. And Judge [Cole] informed him that, if he wanted to relieve his appointed attorney, he would not be allowed to have another appointed attorney, but he could retain an attorney or proceed *pro se*.

Id. at ll. 15-19.

Testimony of Petitioner

After being sworn, Petitioner then attempted to explain why he was entitled to post-conviction relief, “I had a lot of errors and was denied - I was denied due process under the law and under equal protection - the equal protection clause, you know, due to ah -- my -- my indictment wasn’t convened when they said it was convened.” App. 44, ll. 1-4. Petitioner argued that his indictment was “annulled”. *Id.* at ll. 5-13.

When prompted by the court, Petitioner summarized that his indictment was “null and void.” App. 45, ll. 23 - 46, ll. 3. On cross-examination, Petitioner testified that plea counsel never explained the Grand Jury process to him or how a Grand Jury issues an indictment. App. 46, ll. 14 - 47, ll. 6.

Testimony of Plea Counsel

Petitioner asked plea counsel, “was you aware of the indictment being - being - that it wasn’t - that it wasn’t valid? App. 47, ll. 21-23. Plea counsel countered that he did not know how the indictment was invalid or defective. App. 48, ll. 8-21.

After a prolonged series of back-and-forth questioning with plea counsel, Petitioner eventually clarified that he was alleging that plea counsel failed to determine whether Petitioner was indicted within ninety days of the alleged attempted murder. App. 48, ll. 23 - 49, ll. 7.

Plea counsel stated that there was no such ninety day deadline for issuing an indictment. App.50, ll. 4-7. Petitioner responded that he disagreed with plea counsel, but ended his examination.

App. 50, ll. 4-7. During cross-examination, plea counsel stated that he did not believe that Petitioner's indictment was invalid. App. 51, ll. 1-18.

The hearing began at 9:58 a.m. and ended at 10:14 a.m.

Order of Dismissal

On December 2, 2014, the PCR Court denied Petitioner's application by written order. App. 54 - 58. The order specifically noted that Petitioner, "was advised that if he chose to relieve appointed counsel, he would be required to either retain an attorney or proceed *pro se*." App. 54, n. 1. The order summarily concluded that Petitioner had failed to prove plea counsel was ineffective for not challenging the validity of Petitioner's indictment. App. 56 -58.

ARGUMENT

The PCR court erred in finding that Petitioner knowingly, voluntarily, and intelligently waived his right to PCR counsel where the PCR court failed to conduct a *Faretta*² hearing to ensure that Petitioner was aware of the dangers and disadvantages of self-representation.

Introduction

At the April 7, 2014 hearing, the court failed to inform Petitioner of the risks and disadvantages of representing himself during his PCR evidentiary hearing. App. 36, ll. 8 - 38, ll. 2; *see State v. Boykin*, 324 S.C. 552, 556, 478 S.E2d 689, 690 (Ct. App. 1996) (a trial judge must determine if the waiver is the product of a knowing, voluntary, and intelligent decision). The court only explained that if Petitioner was unable to secure private counsel, he would have to represent himself. App. 37, ll.6-23.

The Court did not expound on the numerous risks that a *pro se* inmate faces by electing to represent himself. *See Wroten v. State*, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (“the ultimate test [for determining a valid waiver] is not the trial judge’s advice but rather the defendant’s understanding.”). Therefore, the PCR court erred in allowing Petitioner to represent himself because there was no evidence that Petitioner knowingly, voluntarily, and intelligently, waive his right to counsel. *Id.*

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). However, “[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.

² 301 U.S. 422 (1990).

255, 261, 584 S.E.2d 131, 134 (Ct. App. 2003) (citing *State v. Boykin*, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996)).

Specifically, a waiver is an intentional and voluntary relinquishment of a known right. *Maxwell v. Genez*, 350 S.C. 563, 571, 567, S.E.2d 496, 500 (Ct. App. 2002). The courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). To effectuate a valid waiver of the right to counsel, the two-pronged *Faretta* test must be met in which the accused 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) (citing *Faretta*, 422 U.S. 806).³

“[I]t is the responsibility of the trial judge to determine whether there has been an intelligent and competent waiver.” *State v. Bateman*, 296 S.C. 367, 369, 373 S.E.2d 470, 471 (1998) (citations omitted); *see also Boykin*, 324 S.C. 552, 478 S.E.2d 689 (a trial judge must determine if the waiver is the product of a knowing, voluntary, and intelligent decision). “While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, *the ultimate test* [for determining a valid waiver] *is not the trial judge’s advice but rather the defendant’s understanding.*” *Wroten*, 301 S.C. at 294, 391 S.E.2d at 576. (*emphasis added*).

Finally, in the absence of a specific inquiry by the trial judge addressing the disadvantages of proceeding *pro se*, appellate courts will look to the record to determine whether a petitioner had

³ A notable exception to this general rule requiring a contemporaneous objection is found when the record does not reveal a knowing and intelligent waiver of the right to counsel. *State v. Cash*, 304 S.C. 223, 403 S.E.2d 632 (1991). A *pro se* defendant cannot be expected to raise this issue without the aid of counsel. *State v. Rocheville*, 310 S.C. 20, 24, 425 S.E.2d 32, 35 (1993).

sufficient background or was apprised of his rights by some other source. *State v. Bridwell*, 306 S.C. 518, 413 S.E.2d 30 (1992). If, on appeal, this Court does not find the waiver of counsel was knowing and voluntary, the court will remand for a new trial. *Id.*

In Petitioner's case, the trial judge at the April, 2014 hearing never warned Petitioner of the dangers and disadvantages of proceeding *pro se*. App. 36, ll. 19 - 37, ll. 12. The court's singular focus was on admonishing Petitioner that if he failed to secure private counsel, he would have to represent himself as the court would not appoint another attorney. *Id.*

The court did not inform Petitioner of the hazards of self-representation. This was in error; the trial court has a duty to explain to Petitioner the risks of proceeding *pro se*. *Prince v. State*, 301 S.C. at 424, 392 S.E.2d at 463.

Since the trial court did not undertake a specific inquiry regarding the disadvantages of proceeding *pro se*, this Court must now determine, based on the record, whether Petitioner made a knowing, voluntary, and intelligent waiver of the right to PCR counsel. *Bridwell*, 306 S.C. 518, 413 S.E.2d 30. There is no evidence in the record that Petitioner was "apprised of his rights by some other source." *Id.*

It is also clear from the record that Petitioner did not have a sufficient background or experience to understand the dangers of self-representation absent an instruction from the court. *Id.* Petitioner did not graduate from high-school and does not have a GED. App. 11, ll. 3-8. In addition, during his guilty plea, counsel referenced that Petitioner suffers from unspecified mental health problems. App. 17, ll. 2-17.

Petitioner's original PCR application contained multiple grammatical errors. App. 22 - 27. Further, his attempted questioning of plea counsel on the validity of his indictment - the sole

issue he presented at the hearing - was full of legal malapropisms and completely ineffectual. App. 47, ll. 15 - 50, ll. 7.

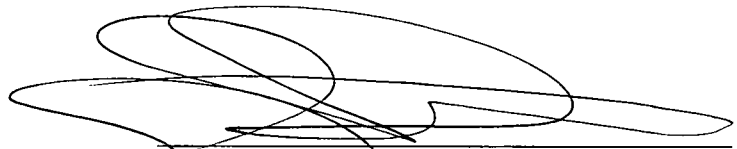
In sum, there was no evidence petitioner was aware of the hazards of proceeding *pro se*. The transcript of Petitioner's **sixteen minute** PCR hearing illustrates exactly the kind of dangers that *pro se* litigants face and underscores the crucial importance of trial court's providing an adequate warning.

Accordingly, this Court should reverse the denial of Petitioner's PCR application and remand the case for a new trial as the PCR court erred in finding that Petitioner's waiver of counsel was knowingly, voluntarily, and intelligently made. App. 54, n. 1; *High v. State*, 300 S.C. 88, 386 S.E.2d 463 (1989) (this Court will not uphold PCR judge's finding if there is no evidence to support it).

CONCLUSION

Based on the foregoing reason, Petitioner, Jerod K. Harris, respectfully requests that his petition for writ of certiorari be granted to allow full briefing on the issue.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line. The signature is somewhat stylized and overlaps the line.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of October, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
R. Keith Kelly, Circuit Court Judge

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PETITIONER,

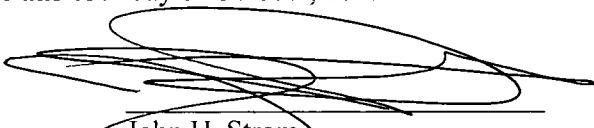
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APPELLATE CASE NO. 2014-002693

CERTIFICATE OF SERVICE

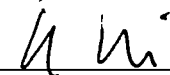
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Alicia Olive, Esquire this 13th day of October, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of October, 2015.


_____(L.S.)
Notary Public for South Carolina

My Commission Expires: May 12, 2025.