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S.C. Supreme Court

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2015-000055

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Jerel Worthy,..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Does the record contain evidence to support the post-conviction relief court's finding that Petitioner made a knowing and voluntary waiver of counsel at his guilty plea and probation revocation hearings where Petitioner informed the court that he desired to represent himself and that he understood the dangers of self-representation?

## STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted at the October 2003 term of the Spartanburg County Grand Jury for two charges of distribution of crack cocaine and distribution within one-half mile of a school (2003-GS-42-3300, -3301, counts one and two). He was represented by James A. Cheek, Esquire. On June 2, 2004, Petitioner pleaded guilty before the Honorable J. Derham Cole to distribution of crack cocaine – third offense and distribution of crack cocaine within one-half mile of a school. Judge Cole sentenced Petitioner to confinement for a period of three years for distribution of crack cocaine – third offense and 15 years, suspended upon time served to five years of probation for distribution of crack cocaine within one-half mile of a school. Upon information and belief, Petitioner's community supervision was revoked for six months on September 18, 2009, and he subsequently had a portion of his probation revoked.

Petitioner was then indicted at the November 2010 term (amended at the May 2012 term) for possession of crack cocaine (2010-GS-42-6279). On May 14, 2012, Petitioner proceeded *pro se* and pleaded guilty as indicted before the Honorable Roger L. Couch. Judge Couch sentenced him to confinement for a period of three years and revoked Petitioner's probation in full, ordering him to serve 15 years. Petitioner did not appeal his pleas, sentence, or probation revocation.

Petitioner filed an application for post-conviction relief ("PCR") on March 12, 2013. The State made its Return on February 25, 2014. An evidentiary hearing into the matter was scheduled to be held before the Honorable R. Keith Kelly on November 5, 2014. Petitioner was present and represented by Leah B. Moody, Esquire. Assistant Attorney General Suzanne H.

White of the South Carolina Attorney General's Office appeared on behalf of the State. At the hearing, the State moved to dismiss all claims as either untimely or for failure to state a claim pursuant to Rule 12(b)(6), SCRPC. By written Order dated November 26, 2014, and filed December 2, 2014, Judge Kelly dismissed Petitioner's PCR action with prejudice.

## STANDARD OF REVIEW

This Court must affirm the PCR court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

## ARGUMENT

**The record contains sufficient evidence to support the PCR court's finding that Petitioner made a knowing and voluntary waiver of counsel at his guilty plea and probation revocation hearings where Petitioner informed the court that he wished to represent himself and that he understood the dangers of self-representation.**

The record contains substantial evidence of probative value to support the PCR court's finding that Petitioner's right to effective assistance of counsel was not violated where Petitioner explicitly stated his desire to proceed *pro se*. Petitioner argues his plea and probation revocation proceedings were unconstitutionally adjudicated in violation of his Sixth Amendment right to counsel. Petitioner alleges his actions did not amount to a valid waiver because "it was obvious that Petitioner wanted and needed an attorney" for both proceedings. Pet. 4. The PCR court found that the record "reflects that [Petitioner] made a knowing a voluntary waiver of counsel at his guilty plea and probation revocation." App. pp. 45-46. The record supports that finding.

Petitioner was entitled to proceed *pro se* to the same degree he would have been entitled to the effective assistance of counsel. See Farretta v. California, 422 U.S. 806 (1975) ("To force a lawyer on a defendant can only lead him to believe that the law contrives against him"). In South Carolina, "all persons charged with probation violations have a right to counsel and must be informed of this right. . . ." Turner v. State, 384 S.C. 451, 454, 682 S.E.2d 792, 793 (2009) (citing Barlet v. State, 288 S.C. 481, 843, 343 S.E.2d 620, 622 (1986); Rule 602(a), SCACR). However, this right does not arise from the Sixth Amendment, and a probationer, therefore, is not afforded the same constitutional protections as an accused. Id. at 454 n. 1, 682 S.E.2d at 793, n.1. Where a probationer desires to waive his right to counsel in a probation revocation proceeding, the presiding judge must ensure the probationer makes an "intelligent and competent waiver of counsel." Salley v. State, 306 S.C. 213, 215, 410 S.E.2d 921, 922 (1991)

(citing State v. Bateman, 296 S.C. 367, 373 S.E.2d 470 (1988)). To establish a valid waiver of counsel, [an accused must] be (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation. Bridwell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992) (citing Faretta, 422 U.S. 806).

"The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding." State v. McLauren, 349 S.C. 488, 493, 563 S.E.2d 346, 348 (Ct. App. 2002) (citing State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997)). If the trial judge fails to make a "specific inquiry . . . addressing the disadvantages of proceeding *pro se*, this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." Bridwell, 306 S.C. 518, 413 S.E.2d 30 (citing Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990); Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990)).

In McLauren, the South Carolina Court of Appeals noted that courts have considered a list of factors "in determining if an accused had sufficient background to understand the disadvantages of self-representation[.]" 349 S.C. 488, 563 S.E.2d 346. These factors 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.

McLauren, 349 S.C. 488, 494-95, 563 S.E.2d 346, 349 (citing State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992)).

The record contains ample evidence of probative value to support Judge Kelly's findings. The record reflects that when Petitioner appeared *pro se* at his 2012 guilty plea and probation revocation hearing, Judge Couch engaged in the appropriate inquiry and either explicitly or implicitly considered most, if not all, of the factors outlined in McLauren.

Judge Couch informed Petitioner he had the right to a lawyer, (App. p. 8), and asked Petitioner: "are you asking that you be allowed to proceed today without an attorney?" (App. p. 9). Petitioner replied he was. (App. p. 9). Judge Couch also told Petitioner to let him know if he changed his mind at any time during the proceeding. (App. p. 9). Judge Couch also asked if Petitioner understood what kinds of things lawyers do to help people and whether he needed to explain it. (App. p. 9, lines 11-15). Petitioner indicated he understood and that he did not need Judge Couch to explain it. (App. p. 9, lines 11-15).

The record reflects that Petitioner understood by entering a guilty plea that day he was also violating probation (App. p. 12, lines 8-18). Judge Couch also asked if Petitioner was asking to go forward "both on this charge and the probation matter" that day and Petitioner said yes. (App. p. 12, lines 19-21). Petitioner also affirmed he understood he was not represented by counsel on either the charge or the probation matter. (App. p. 12, lines 22-24).

Judge Couch asked Petitioner about his age and level of education. Judge Couch asked Petitioner about his occupation and Petitioner informed him that he had worked as a painter and landscaper. (App. p. 10, line 10). Petitioner told Judge Couch that he was 40 years old and had made it through the eleventh grade, though he did not receive his GED. (App. p. 9). He asked Petitioner if he had ever been represented by counsel before, and Petitioner said yes. (App. p. 9,

lines 8-10). Further, the record shows Petitioner had numerous convictions on his record dating back to 1991. (App. p. 17, line 20-p. 18, line 2).

Judge Couch also explained the nature of the charges and potential penalties Petitioner faced, both on the possession charge as well as for the probation revocation, and Petitioner agreed that he understood. (App. p. 12, line 25-p. 13, line 15). Judge Couch then asked one more time whether he still felt he could handle the plea himself and he said yes. (App. p. 13, lines 19-23).

The record contains strong evidence that Judge Couch made the appropriate inquiry and considered the appropriate factors in determining whether Petitioner knowingly and voluntarily waived his right to counsel. There is also ample evidence in the record that Petitioner was fully aware of his right to counsel and of the charges against him, the nature of the proceedings, and the dangers of proceeding without counsel. The record further reflects that Petitioner knew he would be proceeding *pro se* for both the guilty plea and the probation revocation. Petitioner never indicated that he wanted an attorney, or that he was not prepared to proceed with the probation revocation hearing. Rather, Petitioner made verbal affirmations of his desire to proceed *pro se* with both hearings.

Accordingly, the record contains ample evidence of probative value to affirm the PCR court's finding that Petitioner made a knowing and voluntary waiver of counsel at his guilty plea and probation revocation proceedings. Therefore, this Court should deny the Petition for Writ of Certiorari.

**CONCLUSION**

For the foregoing reasons, the State submits that this Court should deny the Petition. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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*December 11*, 2015

STATE OF SOUTH CAROLINA  
In The Supreme Court

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Certiorari to Spartanburg County  
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge  
Appellate Case No. 2015-000055

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JEREL WORTHY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Wanda H. Carter, Esquire  
SC Commission of Indigent Defense  
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This 11<sup>th</sup> day of December, 2015

  
ASHLEY HAWORTH  
LEGAL ASSISTANT