

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Kristi Lea Harrington, Circuit Court Judge

RECEIVED

NOV 29 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

JOSHUA JAMES PARKER,

APPELLANT

APPELLANT CASE NO. 2015-001287

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

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

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in sentencing Appellant for a third offense criminal domestic violence when a prior criminal domestic violence offense used for enhancement was uncounseled and Appellant did not knowingly, voluntarily and intelligently waive his right to counsel?

STATEMENT OF THE CASE

In March of 2015, the Berkeley County Grand Jury indicted Parker for criminal domestic violence third offense, Indictment #2015-GS-08-0329. On June 1, 2015, Parker proceeded to jury trial before the Honorable Kristi Lea Harrington. Cody Groeber, David Schwacke and Chad Shelton represented Parker at trial. Elizabeth Sigal and Wilton McNeely prosecuted the case. The jury returned with a verdict of guilty. Judge Harrington sentenced Parker to five years suspended upon the service of one year with probation for four years. A timely notice of intent to appeal was served on June 9, 2015. This appeal follows.

ARGUMENT

The trial judge erred in sentencing Appellant for a third offense criminal domestic violence when a prior criminal domestic violence offense used for enhancement was uncounseled and Appellant did not knowingly, voluntarily and intelligently waive his right to counsel.

Prior to sentencing Appellant objected to the judge sentencing him for a third offense criminal domestic violence when a prior criminal domestic violence conviction from 2008 was uncounseled and Appellant did not knowingly, voluntarily and intelligently waive his right to counsel. (R. pp. 225-249). During the hearing the State introduced a waiver of right to have appointed counsel or services of the public defender, dated March 10, 2008. (State's Exhibit #5, R. p. 260). Appellant did not deny that his signature appeared on that waiver. (R. p. 246, lines 3-6). Instead, Appellant argued that the waiver of right to have appointed counsel or services of the public defender did not qualify as a knowing, voluntary and intelligent waiver of the right to counsel pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). (R. p. 246, lines 7-12).

At the time of trial¹ the South Carolina criminal domestic violence law, S.C. Code § 16-25-20(A), provided that it was unlawful to cause physical harm or injury to a person's own household member or offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril. The statute provided that a third or subsequent offense was a felony carrying a mandatory minimum sentence of one year but not more than five years. S.C. Code §16-25-20(B)(3). A second offense, however, was a misdemeanor carrying a fine not less than two thousand five hundred dollars nor more than five

¹ S.C. Code §16-25-20 was amended on June 4, 2015.

thousand dollars and a sentence of not less than a mandatory minimum of thirty days nor more than one year.

The State argued that the current conviction was a third offense because Appellant had a 2008 conviction for criminal domestic violence and a 2010 conviction for criminal domestic violence. Appellant did not challenge the 2010 conviction. (R. p. 246, line 15 – p. 247, lines 1-15). Appellant challenged the 2008 conviction and argued the current conviction should be considered a second offense for sentencing purposes. (R. p. 247, lines 11-15).

The trial judge found the conviction should be treated as a third offense and sentenced appellant to five years suspended upon the service of the mandatory minimum one year with four years probation. Pursuant to the statute, the conviction was classified as a felony. The trial judge stated:

I find Mr. Parker waived his rights in front of Judge Summey on March 10, 2008. There has been no indication, no testimony that that was not his signature. And Ms. Simmons indicated that the procedures that they followed were very thorough. I have heard nothing that would indicate that he did not voluntarily and intelligently waive his right. So we will be treating this – the State has proven the prior conviction and the defendant has not proved that it was constitutionally defective or otherwise invalid by the preponderance of the evidence.

The trial judge erred.

In Watts v. State, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001), the South Carolina Supreme Court wrote:

In order to waive the right to counsel, the accused must be (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990) (citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). It is the trial judge's responsibility to determine whether there is a competent, intelligent waiver by the defendant. State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) (citing Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). If the trial judge fails

to address the disadvantages of appearing *pro se*, as required by the second prong of Faretta v. California, “this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source.” Prince, 301 S.C. at 424, 392 S.E.2d at 463 (citing Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990)).

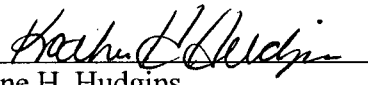
While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding. If the *record demonstrates* the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied. Wroten, 301 S.C. at 294, 391 S.E.2d at 576 (citing Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir.1986)) (emphasis added).

In the present case there was not a record from the 2008 proceeding. (R. p. 228, line 12 – p. 229, lines 1-21). In an attempt to re-create the record, the State called the senior clerk from the magistrate's office to testify as to how the magistrate judge generally advises defendant's of their rights. (R. pp. 230-241). As noted above, the State introduced the waiver of right to have appointed counsel or services of the public defender, dated March 10, 2008, and signed by Appellant. (R. p. 235, line 23 – p. 236, lines 1-13). Neither the general testimony from the clerk nor the signed waiver of right to have appointed counsel or services of the public defender qualified as a knowing, voluntary and intelligent waiver of the right to counsel pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The record in the present case does not demonstrate that Petitioner's decision to represent himself was made with an understanding of the risks of self-representation.

CONCLUSION

Based on the above argument, the petition should be granted to allow further briefing on the issue.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of January, 2016.

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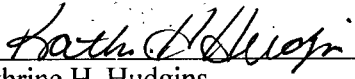
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Joshua James Parker states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Kristi Lea Harrington, which was held on June 3-4, 2015, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Joshua James Parker.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of January, 2016.

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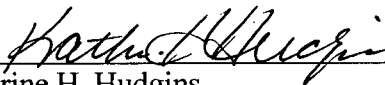
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment and sentencing sheet;
- (2) Trial transcript;
- (3) State's Exhibit #5 – Waiver of Right to have Appointed Counsel or Services of the Public defender;
- (4) Defendant's Exhibit #4 – Case history;
- (5) Defendant's Exhibit #5 – Faretta Warnings, Waiver of Right to Counsel, Defendant's Rights and Checklist (Exhibits F, G, H and I).

I certify that this designation contains no matter which is irrelevant to this appeal.

January 29th, 2016


Kathrine H. Hudgins
Appellate Defender

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

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 29th, 2016



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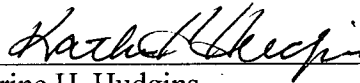
V.

JOSHUA JAMES PARKER,

APPELLANT

CERTIFICATE OF SERVICE

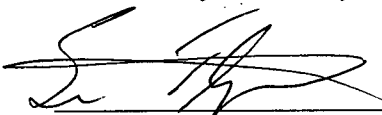
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Joshua James Parker, #364292 at Palmer Pre-Release Center, 2012 Pisgah Road, Florence, SC 29501, this 29th day of January, 2016.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of January, 2016.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.