

STATE OF SOUTH CAROLINA
In The Supreme Court

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SC SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2014-002693

Jerod Keykendall Harris, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

ALICIA A. OLIVE
Assistant Attorney General
SC Bar #102089

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTIONS PRESENTED.....3

STATEMENT OF THE CASE.....4

STANDARD OF REVIEW5

ARGUMENTS

 I. This Court should deny review because the PCR judge made no findings regarding Petitioner's right to counsel and the issue is not preserved for this Court's review.6

 II. This Court should deny review because the PCR judge did not err in allowing Petitioner to proceed *pro se* at his PCR hearing where Petitioner had his appointed attorney removed seven months earlier and was admonished on the record that he would not be allowed to have another court-appointed attorney.7

 III. This Court should deny review because there is no Sixth Amendment right to counsel in a PCR proceeding and Faretta v. California and its progeny are inapplicable.....9

CONCLUSION.....10

QUESTIONS PRESENTED

- I. Should this Court deny review because the post-conviction relief judge made no findings regarding Petitioner's right to counsel and the issue is not preserved for this Court's review?
- II. Should this Court deny review because the post-conviction relief judge did not err in allowing Petitioner to proceed *pro se* at his evidentiary hearing where Petitioner had his appointed attorney removed seven months earlier and was admonished on the record that he would not be allowed to have another court-appointed attorney?
- III. Should this Court deny review because there is no Sixth Amendment right to counsel in a post-conviction relief proceeding and Faretta v. California and its progeny are inapplicable?

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 May 2011 term of the Spartanburg County Grand Jury for attempted murder (2011-GS-42-2429). Robert Hall, Esquire, represented Petitioner. On May 31, 2012, Petitioner pleaded guilty as indicted before the Honorable J. Mark Hayes, II. Pursuant to a negotiated sentence, Judge Hayes sentenced Petitioner to confinement for a period of fifteen years. Petitioner did not appeal.

Petitioner filed an application for post-conviction relief ("PCR") on November 5, 2012. Respondent made its Return on February 25, 2014, requesting that an evidentiary hearing be held. An evidentiary hearing was scheduled to take place on April 7, 2014, at the Spartanburg County Courthouse. Petitioner was present and represented by J. Brandt Rucker, Esquire. Suzanne H. White, Esquire, represented Respondent. At that time, Petitioner requested to relieve counsel and to continue the evidentiary hearing so that he could secure retained counsel. Respondent took no position on the matter.

The Honorable J. Derham Cole issued a written order dated July 18, 2014, granting the motion to continue and relieving counsel. (Supp. App. pp. 2-3). The order also stated that the court instructed Petitioner that if he chose to relieve his appointed counsel, the court would not appoint further counsel if Petitioner was unable to retain an attorney. (Supp. App. pp. 2-3).

A subsequent evidentiary hearing into the matter was convened on November 4, 2014, at the Spartanburg County Courthouse. Petitioner was present and proceeded *pro se*. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office represented Respondent. In a written order dated November 26, 2014, and filed December 2, 2014, the Honorable R. Keith Kelly denied and dismissed the matter with prejudice. (Supp. App. pp. 4-9).

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 should not reverse the PCR court unless the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010).

ARGUMENTS

I. This Court should deny review because the post-conviction relief judge made no findings regarding Petitioner's right to counsel and the issue is not preserved for this Court's review.

Initially, Respondent submits the issue of whether Petitioner waived his right to PCR counsel is not preserved for review. After the PCR judge files a written order granting or denying relief, "[e]ither party must timely file a Rule 59(e), SCRCPP, motion to preserve for review any issues not ruled upon by the court in its order." Al-Shabazz v. State, 338 S.C. 354, 364-65, 527 S.E.2d 742, 747 (2000) (citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) (issue must be raised to and ruled on by the PCR judge in order to be preserved for review); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992) (same)).

Here, the issue was not raised to or ruled upon by the PCR judge. When the PCR hearing commenced, the judge asked Petitioner if he was "going to represent [himself] in [the] matter" and Petitioner replied, "Yes sir. I'm going to have to, sir[.]" and stated he "was told [he] had to." (App. p. 42, lines 8-12). Respondent then told the judge that Petitioner "had an attorney that had been appointed" and that he "asked for that attorney to be relieved[.]" and that Judge Cole had "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." (App. p. 42, lines 15-19). Petitioner made no objection or indication that he did not wish to proceed without counsel. (App. pp. 42-52). The issue was not raised to or ruled upon by the PCR judge and his Order of Dismissal did not address or make any findings on the issue. (Supp. App. pp. 4-9). Additionally, Petitioner did not file a motion pursuant to Rule 59(e), SCRCPP, or otherwise request that the PCR judge reconsider his order. Accordingly, Respondent submits the issue was not preserved for appellate review.

II. This Court should deny review because the post-conviction relief judge did not err in allowing Petitioner to proceed *pro se* at his evidentiary hearing where Petitioner had counsel removed seven months earlier and was admonished on the record that he would not be allowed to have another court-appointed lawyer.

Without waiving its argument that the issue is not preserved, Respondent submits the PCR judge did not err in allowing Petitioner to proceed *pro se* at his PCR hearing. There is no constitutional right to counsel in a post-conviction relief action. Pennsylvania v. Finney, 481 U.S. 551, 556-57 (1987); Richardson v. State, 377 S.C. 103, 105-06, 659 S.E.2d 493, 494-95 (2008) ("[T]here is no constitutional obligation to appoint counsel in a PCR matter in South Carolina."). However, "[a]n indigent applicant who is granted a [post-conviction relief] hearing has a statutory right to be represented by a court-appointed attorney," Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000) (citations omitted), "or a knowing, intelligent waiver of the right to counsel must be obtained." Richardson v. State, 377 S.C. at 106, 659 S.E.2d at 495 (citing S.C. Code Ann. § 17-27-60 (2003); Rule 71.1(d), SCRCP; Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992)). "A waiver is a voluntary and intentional abandonment or relinquishment of a known right." Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009). "Waiver requires a party to have known of a right and known that right was being abandoned." Id. at 496-97, 685 S.E.2d at 607. "The determination of whether one's actions constitute waiver is a question of fact." Id. at 497, 685 S.E.2d at 607.

Nevertheless, "a PCR applicant is not entitled to appointed counsel of choice." Id. Though he "*may* have the right to reject or discharge court-appointed counsel and proceed *pro se* or retain his own counsel, he does not have the right, without a showing of satisfactory cause to refuse or dismiss the counsel appointed and have other counsel appointed." Id. (citing State v. Jones, 270 S.C. 587, 243 S.E.2d 461 (1978)).

Here, Petitioner was appointed an attorney—he simply decided he preferred an attorney of his own choosing. J. Brandt Rucker, Esquire, was appointed as counsel for Petitioner at the outset of his PCR action. (Supp. App. p. 1). On the date that his evidentiary hearing was initially scheduled, Petitioner asked the court to relieve his appointed counsel so that he could hire private counsel. (App. p. 36, lines 14-16). At the hearing on Petitioner's motion to relieve counsel, his attorney stated the following to the court: "my client informs me that he would rather have a private, retained attorney at this time after thinking the case over. And that's all he's told me about that issue." (App. p. 36, lines 8-11). In support of his request, Petitioner simply said, "I didn't feel comfortable that Mr. Brandt Rucker was in my best interest, so I wanted to go ahead and get me a paid attorney." (App. p. 36).

At the same hearing, the court admonished Petitioner that if it granted Petitioner's motion to relieve counsel, he would not be appointed a second attorney. (App. p. 37, lines 5-11). Judge Cole informed Petitioner: "If I terminate [your attorney's] services today and I continue [the evidentiary 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." (App. p. 37, lines 6-11). The court asked him if he still wished to relieve his attorney, asked several more times if he understood, and informed him again that he would not receive another court-appointed attorney. (App. p. 37, lines 13-22). Petitioner indicated he understood. (App. p. 36, line 19-p. 37, line 25). The Court also issued a written order to that effect, which was filed July 21, 2014. (Supp. App. pp. 2-3). Petitioner did not object to or attempt to appeal that order.

Petitioner's PCR hearing occurred on November 4, 2014, which was seven months after the April 7, 2014, hearing in which Judge Cole granted Petitioner's request to remove appointed

counsel. There is no indication in the record that Petitioner ever requested another attorney or otherwise indicated that he did not wish to proceed with his PCR hearing without counsel. Furthermore, at the hearing before Judge Cole, Petitioner gave no specific reason for his desire to relieve counsel, but only said "he didn't feel comfortable that Mr. Brandt Rucker was in [his] best interest[.]" (App. p. 36).

Respondent submits that by asking the Court to relieve his court-appointed counsel and indicating that he understood he would not be allowed to receive a second court-appointed attorney but would be required to either retain counsel or proceed *pro se*, Petitioner waived his statutory right to PCR counsel. Accordingly, the PCR judge did not err when he allowed Petitioner to proceed *pro se* at his PCR hearing.

III. This Court should deny review because there is no Sixth Amendment right to counsel in a post-conviction relief proceeding and Faretta v. California and its progeny are inapplicable.

Petitioner argues that the PCR court erred in failing to conduct a hearing to determine if Petitioner knowingly, voluntarily, and intelligently waived his right to PCR counsel pursuant to Faretta v. California, 422 U.S. 806 (1975). However, Faretta involved the waiver of the Sixth Amendment right to counsel. Id. at 807. The Sixth Amendment is not implicated in this case because PCR is a collateral proceeding and there is no constitutional right to counsel in such proceedings. Richardson, 377 S.C. at 105-06, 659 S.E.2d at 494-95. Accordingly, Faretta and its progeny are not triggered in this case. Therefore, the PCR judge did not err in failing to conduct a hearing pursuant to Faretta to determine if Petitioner knowingly, voluntarily, and intelligently waived his right to PCR counsel.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

ALICIA A. OLIVE
Assistant Attorney General
S.C. Bar No. 102089

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

March 2, 2016.

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Spartanburg County
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge
Appellate Case No. 2014-002693

JEROD K. HARRIS, #255423,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

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:

**John H. Strom, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211**

This 2nd day of March, 2016



ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

March 2, 2016

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SC SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: Jerod K. Harris v. State of South Carolina
Appellate Case No.: 2014-002693

Dear Ms. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Alicia A. Olive
Assistant Attorney General
SC Bar No. 102089

AAO/ah
Enclosures

cc: John H. Strom, Esquire