STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2014-002483

The State, Respondent,

vs.

John Henry Dial, Jr., Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court did not err in denying Appellant's appeal from the magistrate court because the Record demonstrates Appellant understood the dangers of self-representation.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The circuit court did not err in denying Appellant's appeal from the magistrate court because the Record demonstrates Appellant understood the dangers of self-representation.

Appellant contends the circuit court erred in failing to grant him a new trial because there was no evidence he was properly warned of the dangers of self-representation prior to proceeding to trial *pro se*. The evidence presented clearly indicates he knew he had a right to counsel and voluntarily waived that right to counsel. Further, the Record demonstrates he understood the dangers of self-representation and was aware of the requirements which would be placed on him during trial.

"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). A defendant may waive the right to counsel. "It is the trial court's responsibility to determine whether there was a knowing and intelligent wavier by the accused." State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009); see also, State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) ("It is beyond question that an accused person may waive counsel and represent himself. However, it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver."). "To effectuate a valid waiver, the accused must (1) be advised of the right to counsel and (2) be adequately warned of the dangers of self representation." Bryant, 383 S.C. at 414, 680 S.E.2d at 13 (citing State v. McLauren, 349

S.C. 488, 493 94, 563 S.E.2d 346, 348 49 (Ct. App. 2002)); see also, Faretta, 422 U.S. at 835.

Faretta requires a defendant "be made aware of the dangers and disadvantages of self representation so that the record will establish he knows what he is doing and his choice is made with eyes open." 422 U.S. at 835. "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." Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). If the trial court fails to explicitly address the disadvantages of proceeding *pro se*, as required by the second prong of Faretta, this Court may look to the record to determine whether petitioner had sufficient background to understand the dangers of self-representation or was apprised of his rights by some other source. See Watts v. State, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001). Factors this Court considers in determining if an accused had sufficient background to understand the disadvantages of self representation 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.

See State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992); see also, Bryant, 383 S.C. at 415, 680 S.E.2d 11 at 14.

First, the magistrate specifically indicated: "On November 1, 2010 Mr. Dial entered a plea of not guilty and requested a jury trial. He is advised of his right to be represented by an attorney either private or appointed but states he will represent himself." The magistrate noted on April 25, 2011 prior to jury selection, Appellant "again assures the court he wants to represent himself." (Magistrate's Return of Appeal; R. 13-14). These findings coupled with the fact Appellant began filling out the paperwork for an appointed attorney, but ultimately concluded he wished to represent himself, indicate he was aware of the dangers of self-representation. (Affidavit of Indigency and Application for Counsel; R. 120-123). Without transcripts of the hearings before the magistrate on November 1, March 18, and April 25, it is impossible to know exactly what wording was used to make Appellant aware of his right to counsel.[1] However, in responding to his Faretta challenge on appeal, the magistrate indicated all three hearings contained warnings to Appellant and ended with Appellant insisting on representing himself.

[1] It is Appellant's burden to provide the Court with the necessary Record on Appeal in order to evaluate the issues presented. See State v. Brockmeyer, 406 S.C. 324, 338, 751 S.E.2d 645, 653 (2013) (finding it impossible to evaluate the merits of an issue because the appellant failed to include the relevant material in the record on appeal); State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999) (finding appellant has burden of presenting an adequate record which is sufficiently complete to permit this Court to review lower court's actions).

Additionally, the Record clearly demonstrates Appellant had the requisite understanding to be able to properly represent himself. In looking at the Cash factors, Appellant was born in May 1977, making him almost 34 at the time of trial. (Incident Report; Affidavit of Indigency and Application for Counsel; R. 115; 120-123). The Record divulges no indication he had any physical or mental impairment which would have prevented or hampered his ability to proceed *pro se*. He acknowledged he was on probation from a prior conviction at the time of trial, so he clearly had some exposure to the legal system. (T.82; R. 96). In responding to several forms in which he indicated he wished to proceed *pro se*, Appellant indicated the charges against him were three counts of third degree assault; thereby demonstrating an awareness of the charges against him. (Jury Trial Request form; Pontiac Magistrate Court Trial Information and Plea Sheet; R.124; 125-126).[2]

Further, the Record demonstrates Appellant was able to fully participate in his trial. He conducted an opening statement, cross-examined the State's witnesses, objected to the admission of evidence, sought to bring in good character evidence, and presented his own witnesses, as well as, his own testimony. Prior to trial, Appellant recognized the importance of seeing the evidence the State had against him and this was ordered by the magistrate. Immediately prior to trial, Appellant sought to obtain copies of the victim and other statements in the possession of the State so he could use those statements at trial. (T.3-4; R. 17-18). Further, he cross-examined witnesses regarding their biases, sought to bring out alternate versions of the events, and tried to impeach witnesses using the statements he obtained prior to trial. He even asked that one witness not be excused

[2] These forms are completed in Appellant's handwriting so it is clear he was aware of the charges against him.

in the event he needed to recall the witness. (T.49-50; R. 63-64). In addition, he knew of the significance of the trial and the ability to present a defense because he acknowledged during a discussion with the court that he attempted to "read a little bit" before he came to trial. (T.65; R. 79). Finally, there is absolutely no evidence he was coerced or forced into proceeding *pro se* and all of his interactions with the court demonstrate a requisite knowledge of the proceedings and their significance.

Accordingly, even if the Record is insufficient to demonstrate Appellant was adequately warned of the dangers of proceeding pro se, his decision to proceed without representation was knowing and voluntary. The Record demonstrates a sufficient background and ability to make a valid waiver pursuant to the Cash factors. See State v. McLauren, 349 S.C. 488, 496, 563 S.E.2d 346, 350 (Ct. App. 2002). As a result, the circuit court properly denied Appellant's appeal, and Appellant's conviction and sentence should be affirmed.

Even if this Court disagrees with whether Appellant demonstrated the relevant knowledge and had sufficient background and ability to make a valid waiver pursuant to the Cash factors, the appropriate remedy is to remand for consideration of the voluntariness of his waiver by the magistrate court. See State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991) (finding "except in extraordinary cases where it is clear that a hearing on remand would serve no useful purpose, the remedy when the record fails to show a knowing and intelligent waiver of the right to counsel will be a remand for a Dixon hearing.").

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed or in the alternative remanded to the magistrate court.

Respectfully submitted,

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May 25, 2016

STATE OF SOUTH CAROLINA

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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May 25, 2016

STATE OF SOUTH CAROLINA

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert W. Mills, Esquire
1728 Main Street
Columbia, South Carolina 29201

I further certify that all parties required by Rule to be served have been served. This 25th day of May 2016.

Sally Ellison

SALLY ELLISON
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ALAN WILSON
ATTORNEY GENERAL

May 26, 2016

Robert W. Mills, Esquire
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RE: State v. John Henry Dial, Jr.
Appellate Case Tracking No. 2014-002483

Dear Mr. Mills:

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures

cc: Honorable Jenny A. Kitchings (original and 10 copies enclosed)
Victim Services