

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Calhoun County
Court of General Sessions
Maité Murphy, Circuit Court Judge

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Respondent
SC Court of Appeals

The State of South Carolina,

v.

Jerry McKnight, Sr.,

Appellant,

Appellate Case No.: 2015-000559.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

1. Did the trial court err in denying Mr. McKnight's request to discharge his trial counsel because the trial judge thought it "would not be good thing for [him] to proceed without an attorney," when well-established precedent precludes consideration of the wisdom of a criminal defendant's choice?

(FBOA, p. 1).

RESPONDENT'S COUNTER STATEMENT OF ISSUE ON APPEAL

Whether the trial judge abused her discretion in declining to imply a waiver of the right to counsel where Appellant requested only to dismiss appointed counsel for lack of preparation, but did not request to represent himself?

STATEMENT OF THE CASE

A Calhoun County grand jury indicted Appellant, Jerry McKnight, Sr., (“Appellant”), in January 2015, charging him with the murder of Kymmarrah Randolph; possession of a firearm by a person convicted of a violent crime; and, kidnapping. (R. pp. * [indictments]). Appellant stood trial with his brother and co-defendant, Bryant McKnight, on March 2-6, 2015, before the Honorable Maite Murphy and a jury. The jury convicted Appellant as charged. (Tr. p. 826, lines 7-15).¹ Judge Murphy sentenced Appellant to life imprisonment for murder; thirty (30) years for kidnapping; and, five (5) years on the firearm conviction. (Tr. p. 834, line 20 – p. 835, line 9).

This appeal follows.

¹ Bryant McKnight was convicted of murder and kidnapping for his part in the crime. (Tr. p. 826, lines 1-6). Judge Murphy sentenced him to life for murder and thirty (30) years for kidnapping. (Tr. p. 835, lines 10-15). Bryant McKnight also appealed to this Court. His appellant counsel filed an *Anders* Brief on March 28, 2016. (Appellate Case No. 2015-000569).

RESPONDENT'S STATEMENT OF FACTS

The victim, Kymmarra Randolph ("Randolph") was kidnapped, shot and killed on the night of February 13, 2015. At the time of her murder, Randolph had been romantically linked with Appellant's brother Bryant McKnight ("Bryant"). Bryant lured Randolph to accompany him that evening which eventually led to Randolph being taken to an isolated area where Appellant and Bryant repeatedly shot her in the face and chest.

Trial testimony showed Bryant and Appellant had at some point become suspicious of Randolph as having been involved in a home invasion at their mother's home. The home invasion occurred approximately two weeks prior to the murder. Bryant told friend Stephon Green ("Green") that money and drugs were taken during the robbery. (Tr. p. 289, lines 6-22). Appellant and Bryant both indicated they would kill whomever had committed the home invasion. (Tr. p. 229, lines 15-25; p. 290, lines 2-5; p. 332, lines 6-19). Bryant reasoned that Randolph, who had been at the home before the robbery and "probably knew where everything was" in the home, had played some role in the home invasion. (Tr. p. 229, lines 8-12; p. 290, lines 6-17). Randolph's mother testified that, though she did not believe it to be true, there were rumors in the community that implicated her son, the victim's brother. (Tr. p. 103, line 9 – p. 104, line 21).

At the time of her death, Randolph lived with Tameka Williams ("Williams"). Williams testified that the afternoon of February 13, 2015, Randolph told Williams she was waiting for "B" to pick her up. Williams knew that Bryant was who she was referring to by the nickname "B." (Tr. p. 111, lines 6-25).

Jamaal Pearce ("Pearce"), a friend to Bryant, testified that he and Bryant, along with another friend, James Keller ("Keller"), went to Williams' home around 4:30 pm, picked up

Randolph then went back to Keller's home. (Tr. p. 154, line 10 – p. 156, line 24). Pearce testified they “smoked a blunt together.” (Tr. p. 157, lines 22-24). The group began to disperse around the time Keller's grandfather returned to the home. (Tr. p. 158, line 15 – p. 159, line 3; p. 192, line 8 – p. 193, line 2; p. 202, lines 4-23). Bryant left with Randolph on foot. (Tr. p. 159, lines 4-5). Bryant called his cousin Jonathan McKnight (“McKnight”) at approximately 6:00 pm to come give him a ride, since he did not have a car, which McKnight did. (Tr. p. 217, line 16 – p. 218, line 22).

McKnight testified that after eventually picking up Bryant and Randolph about ten or fifteen minutes after the call, he drove to Bryant's grandmother's house (also Appellant's aunt) where he picked up Appellant. (Tr. p. 219, lines 2-21).

At approximately 7:00 pm, Bryant sent a text to Green and indicated he was thinking of killing the girl he was with. (Tr. p. 293, lines 5-23).

When in McKnight's car, Appellant asked to be taken to a girlfriend's house. He then began giving directions to McKnight which led the group down a rural stretch of South Carolina Highway 6 in Calhoun County. Appellant eventually asked McKnight to stop so Appellant could urinate. (Tr. p. 220, line 21 – p. 222, line 7). Appellant exited the car, but went to the back passenger door and asked Randolph to get out of the car. When Randolph refused, Appellant forcibly removed her, dragged her to the rear of the vehicle, “and opened fire.” (Tr. p. 222, line 16 – p. 223, line 1). After emptying his gun, Appellant handed the gun to Bryant. McKnight testified, “Bryant unloaded and reloaded again and shot a couple of more times.” (Tr. p. 223, lines 14-17). Appellant then moved the body into the woods off of the highway. (Tr. p. 224, lines 5-6). Appellant and Bryant returned to the car and McKnight took them back into town to a convenience store. (Tr. p. 224, lines 7-25). Bryant got out at the store, and McKnight

saw Bryant place Randolph's personal belongings into a trash bag. (Tr. p. 225, lines 9-13). McKnight then drove Appellant back to McKnight's grandmother's home. (Tr. p. 225, lines 13-16). Appellant began to visit McKnight regularly to ensure his silence. (Tr. p. 226, line 22 – p. 227, line 18).

Bryant texted Green again, this time asking for a ride. It was Green that Bryant was meeting at the convenience store at approximately 7:30 pm that evening. Bryant also asked Green to take him to Pearce's home. (Tr. p. 295, line 8 – p. 297, line 10).

Pearce testified Bryant called him after 8:00 pm and then showed up at Pearce's house. (Tr. p. 160, line 22 – p. 161, line 8). Bryant told Pearce that he "had to smoke that girl." (Tr. p. 161, lines 17-23). Pearce understood "smoked" to mean that Bryant had shot her. (Tr. p. 162, lines 1-11). Pearce testified he knew Bryant had a gun the night of February 13, 2015, because he had shown the gun to Pearce as they were going to pick up Randolph. (Tr. p. 165, line 22 – p. 166, line 9). (See also Tr. p. 190, line 6 – p. 191, line 14).

Green testified that Bryant asked him to take Bryant to Derrick Sumter's ("Sumter") house. (Tr. p. 298, line 8-18). Bryant had told Green he had "messed up and shot the girl." (Tr. p. 298, lines 18-25). Bryant had also asked for help in disposing of the body, but Green refused. (Tr. p. 301, line 21 – p. 302, line 4). Green, however, took Bryant to Sumter's home where Bryant gave Sumter the trash bag with Randolph's belongings. (Tr. p. 300, lines 1-7). Bryant asked Sumter to dispose of these items. (Tr. p. 334, line 4 – p. 335, line 2). Bryant put his gun inside the bag before handing it to Sumter. (Tr. p. 335, lines 10-15). Sumter complied by dumping the revolver into the Congaree River then tossing the bag into a wooded area off of South Carolina Highway 48. (Tr. p. 336, line 17 – p. 339, line 4). After having completed this task for Bryant, Bryant then asked Sumter to pick up Appellant and drive him back to the scene

of the murder. Sumter did as Bryant asked. He and Appellant recovered Randolph's body, and drove to a swampy area called "Four Holes" where Appellant left Randolph's body. (Tr. p. 339, line 19 – p. 345, line 18).

The pathologist who conducted the autopsy testified that Randolph had been shot twelve times – six times in the head and six times in the chest. Randolph suffered damage to several major organs including her brain. (Tr. p. 457, lines 19-23). Death would not have been immediate but Randolph would only have lived at the most several minutes before dying from the wounds. (Tr. p. 462, line 5 – p. 465, line 3).

ARGUMENT

The trial judge did not abuse her discretion in declining to imply a waiver of the right to counsel based upon Appellant's request to dismiss counsel when Appellant made no request to represent himself.

Relevant Facts:

Prior to trial, Appellant sent a letter to the Supreme Court of South Carolina asking that his lawyer be removed from his case. Judge Murphy questioned Appellant about the letter. Appellant expressed to Judge Murphy that he had made the request because Appellant did not believe he was being "represented right." Appellant requested that his attorney, Mr. Leiendecker, be dismissed. (Tr. p. 8, lines 3-12). Appellant stated that he did not believe Mr. Leiendecker was prepared for trial. He complained Mr. Leiendecker had only recently been appointed and had not communicated with him sufficiently. (Tr. p. 8, lines 16-22).

Mr. Leiendecker informed the Court that while he agreed that appointed had been initially delayed, he had met with Appellant approximately six (6) times, discussed the evidence with Appellant, had worked with investigators and analyzed the evidence, and was fully prepared for trial. (Tr. p. 9, line 14 – p. 11, line 3).

Appellant continued to assert that he was not sufficiently informed of the process and also asserted that he was upset that he was not allowed bond while others who had been involved had been allowed bond. (Tr. p. 11, line 10 – p. 12, line 1).

Judge Murphy asked Appellant about any legal training or knowledge. (Tr. p. 12, lines 2-9). Appellant admitted he had no formal training, "just what [he would] hear from guys that been through stuff like this from doing time on drug charges up the road." (Tr. p. 12, lines 10-12).

Judge Murphy resolved:

... I'm certain that it would not be a good thing for you to proceed without an attorney. It's too late in the game for me to change and ask another attorney to represent you because your case is being called for trial today. Having been appointed in May, that's nine months since his appointment to [the] case; and frankly, I think that's sufficient time for him to have to be adequately prepared. I'm certain that if he was not adequately prepared, he would tell the Court and ask for a continuance, and that's certainly not the case here, so I'm gong to deny your request to remove him from your case.

(Tr. p. 13, lines 5-15).

Appellant and Mr. Leiendecker thereafter conferred. (Tr. p. 13, line 16). The trial judge also advised that Appellant could have additional time to confer until the jury panel arrived. Further, the trial judge advised that "during the trial if things come up where you have a question and need to talk to him, just ... let me know and I will grant that request," to which Appellant responded, "All right." (Tr. p. 13, line 17 – p. 14, line 5). Again, Appellant made no request to represent himself at trial.

Discussion:

It is beyond question that a criminal defendant may waive his Sixth Amendment right to counsel and represent himself at trial. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975). It is likewise beyond question that a defendant's waiver of the right to counsel shall not be denied simply because the waiver is likely to be contrary to the defendant's best interest. *State v. Brewer*, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997) ("A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed pro se does not justify a denial of the right to self-representation"). *See also State v. Barnes*, 407 S.C., 27, 753 S.E.2d 545 (2014) (rejecting provision in *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379 (2008) that would allow a trial judge to decline to accept a waiver from an individual with severe mental illness that may affect the ability to represent himself). However, a request to waive the right to

counsel and “proceed *pro se* must be clearly asserted by the defendant prior to trial.” *Brewer*, 328 S.C. at 119, 492 S.E.2d at 98. *See also State v. Reed*, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). Courts are loath to find waiver where the request to waive is not clearly reflected on the record:

The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused-whose life or liberty is at stake-is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

Johnson v. Zerbst, 304 U.S. 458, 465, 58 S. Ct. 1019 (1938). *See also Estelle v. Williams*, 425 U.S. 501, 515, 96 S. Ct. 1691, 1698, 48 L. Ed. 2d 126 (1976) (Powell, J., concurring) (“We generally disfavor inferred waivers of constitutional rights.”).

“Waiver is most commonly understood as an affirmative, verbal request.” *State v. Thompson*, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003). Here, Appellant simply did not make a request to waive his right to counsel; rather, he requested only that present counsel be dismissed. At no point did Appellant seek to represent himself, even after his initial request to relieve counsel based on lack of preparation was denied. In fact, Appellant relied upon counsel immediately after the discussion which further evidences his desire for counsel. *See Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, (1977) (“waiver requires not merely comprehension but relinquishment, and Williams’ consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right”). At any rate, as set out above, the record demonstrates that Appellant made no request to waive and to represent himself. Thus, contrary to his position on appeal, there was no request for waiver that could be honored. *See*

United States v. Weisz, 718 F.2d 413, 426 (D.C.Cir. 1983) (“the right of self-representation is waived unless defendants articulately and unmistakably demand to proceed *pro se*”).

Moreover, while the trial judge here did briefly touch upon the advantages of counsel, that was done so in consideration of the motion to dismiss counsel. “Appellate courts have required more than an equivocal request for self-representation before they engage in a full-blown *Faretta* inquiry.” *Reese v. Nix*, 942 F.2d 1276, 1280 (8th Cir. 1991) (collecting cases). Simply requesting counsel be relieved of appointment is not an unequivocal request to waive the right to counsel. *State v. Sims*, 304 S.C. 409, 414-15, 405 S.E.2d 377, 380-81 (1991) (finding no request to “proceed *pro se*” in defendant’s complaint that counsel should be dismissed). *See also United States v. Loya-Rodriguez*, 672 F.3d 849, 858 (10th Cir. 2012) (finding defendant’s letter “expressing total frustration with his attorney and a desire to speak about something with the court” without counsel was not sufficient evidence defendant “clearly and unequivocally invoked the right to represent himself at trial.”). Nor can Appellant rely on the short discussion on the general dangers of self-representation as evidence of an understanding that he was attempting to waive his right and represent himself.

In *United States v. Light*, 406 F.3d 995, 999 (8th Cir. 2005), the Court of Appeals acknowledged the district court’s reference to “the potential negatives of such a decision” to pursue self-representation while determining, nonetheless, that counsel would participate in the proceedings. The Court of Appeals found the defendant’s inquiry on the “rule on representing yourself,” was not sufficient to be an “unequivocally express a wish to represent himself.” *Id.* The Court of Appeals then concluded that the district court’s dialogue with the defendant “was simply explaining the role of counsel” but resolved that dialogue “did not interfere with Light’s right to self-representation” or work to chill any potential request. *Id.* Likewise in the instant

case, the trial judge simply explained the benefits of counsel and did not impose counsel upon a defendant actively attempting to waive. Rather, in full support that Judge Murphy did not construe the instant motion as one insisting upon self-representation, the record shows the judge did not engage in a “full-blown *Faretta* inquiry.” When read in context, the record does not support that Appellant was choosing to conduct his defense *pro se* and was doing so with eyes “wide open” to the dangers and disadvantages. *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525.

That the request consistently remained one concerning counsel is also supported by the judge’s reference to the fact she would not appoint another attorney where the trial was imminent. (Tr. p. 13, lines 6-8). *See Sims*, 304 S.C. at 415, 405 S.E.2d at 380 (courts are “entitled to take into account the countervailing state interest in proceeding on schedule” and whether “substitute counsel [would have] adequate time to prepare”). In fact, compelling an individual to continue *pro se* after granting a motion to dismiss without discussion as to a specific waiver has been found to be an involuntary waiver of the right to counsel. *See Smith v. Grams*, 565 F.3d 1037, 1045-46 (7th Cir. 2009) (declining to find valid waiver of right to counsel when defendant allowed to dismiss attorney but court did not advise that he would have to proceed *pro se*); *United States v. Meeks*, 987 F.2d 575, 579 (9th Cir. 1993) (declining to find a valid waiver where counsel’s motion to withdraw was granted at the same time defendant’s motion to substitute counsel was denied, given that the court, not defendant, forced waiver of the right).

Given that courts will “indulge every reasonable presumption against waiver of the right to counsel,” *State v. Thompson*, 355 S.C. at 262, 584 S.E.2d at 134, the trial judge did not abuse her discretion in declining to find an implied waiver of the right to counsel based merely upon Appellant’s motion to dismiss counsel in the absence of a specific request to proceed *pro se*.

Appellant’s argument to the contrary should be rejected.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

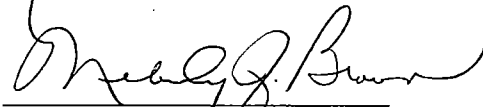
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