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SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2015-002140

Kenneth Hilton,.....Petitioner,

v.

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

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

- I. Did the PCR judge err in permitting Petitioner to proceed pro se without specifically advising him of the dangers and disadvantages of self-representation because the record reflects Petitioner made a knowing and intelligent waiver of counsel and there is no constitutional right to counsel in PCR actions?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. Petitioner was indicted at the March 2012 term of the Cherokee County Grand Jury for kidnapping (2012-GS-11-0226) and waived presentment on the charge of assault with intent to commit second-degree criminal sexual conduct ("CSC") (2013-GS-11-0017). Don Thompson, Esquire, represented Petitioner. On January 23, 2013, Petitioner pleaded guilty as indicted before the Honorable J. Derham Cole. Judge Cole sentenced him to consecutive terms of twenty-five years for kidnapping and twenty years for assault with intent to commit second-degree CSC. Petitioner did not appeal.

Petitioner filed an application for post-conviction relief ("PCR") on May 1, 2013. Respondent made a return and motion for more definite statement on March 17, 2014, and an evidentiary hearing was scheduled to take place on April 10, 2014, at the Spartanburg County Courthouse. Petitioner filed a document on February 7, 2014, in which he asked to have his appointed counsel, Leah B. Moody, Esquire, relieved. (Supp. App. p. 1). Applicant filed another document on April 1, 2014, in which he again asked to have counsel relieved. (Supp. App. pp. 7-15). A hearing was convened on April 10, 2014. Petitioner was present and represented by Moody, and Suzanne H. White, Esquire, represented Respondent. At that time, Petitioner moved to relieve counsel. (Supp. App. p. 26). The Honorable J. Derham Cole issued a written order filed July 22, 2014, granting the motion. (Supp. App. p. 33). 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 and Petitioner would be required to proceed pro se.

A subsequent evidentiary hearing into the matter was convened on March 27, 2015, 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 filed September 28, 2015, the Honorable Roger L. Couch denied and dismissed the matter with prejudice. (App. pp. 136-143).

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).

ARGUMENT

- I. The PCR judge did not err in permitting Petitioner to proceed pro se without specifically advising him of the dangers and disadvantages of self-representation because the record reflects Petitioner made a knowing and intelligent waiver of counsel and there is no constitutional right to counsel in PCR actions.**

Respondent submits the PCR judge did not err in allowing Petitioner to represent himself at the PCR hearing because the record shows Petitioner made a knowing and voluntary waiver of counsel. Regardless, there is no constitutional right to counsel in a PCR 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, 377 S.C. at 106, 659 S.E.2d at 495 (citing S.C. Code Ann. § 17-27-60 (2003); Rule 71.1(d), SCRCPC; 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.

Petitioner argues that the PCR judge was required to give him warnings about proceeding pro se in his PCR action pursuant to Faretta v. California, 422 U.S. 806 (1975). Faretta provides that a criminal defendant awaiting trial who wishes to relieve counsel must "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. 806, 835. However, Faretta involved the waiver of the Sixth Amendment right to counsel in a criminal trial, id. at 807, and there is no such right to counsel in PCR actions. Finey, 481 U.S. at 556-57; Richardson, 377 S.C. at 105-06, 659 S.E.2d at 494-95.

Nevertheless, although Respondent submits it is not controlling on the issue of waiver of PCR counsel, in Faretta, "the ultimate test is not the trial judge's advice . . . but, rather, the defendant's understanding. . . .[And] [i]f 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 v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (citing Fitzpatrick v. Waiwright, 800 F.2d 1057, 1065 (11th Cir. 1986); see also United States v. Gallop, 838 F.2d 105 (4th Cir.1988)).

Here, Leah Moody, Esquire, was appointed as counsel for Petitioner on June 10, 2013, at the outset of his PCR action. (Supp. App. p. 4). On February 7, 2014, Petitioner filed a pro se document purporting to be a motion to dismiss his appointed counsel. (Supp. App. p. 1). As part of his filing, Petitioner included a document captioned "consolidated affidavit & waiver to dismiss court appointed attorney to be heard in chambers, SCRCF Rule 77(b)," in which Petitioner stated: "I make this waiver, to dismiss my Court appointed Attorney, with the full understanding of the dangers of self-representation and the consequences of proceeding pro se. (Supp. App. p. 3). On April 1, 2014, Petitioner filed another document with the Cherokee County Clerk of Court titled "Consolidated notice & motion for court order to transfer pending complaint & motion for dismissal of court appointed attorney." (Supp. App. p. 9). Petitioner stated he wished to "renew his request to . . . dismiss his court appointed attorney and allow

Applicant [thirty] days to file his own pro se amendment to his application." (Supp. App. p. 10). Petitioner further stated in the motion: "Please be advised Applicant makes the above request, voluntarily, knowingly, with full knowledge of the dangers of proceeding pro se." (Supp. App. p. 10).

A hearing on Petitioner's motion to relieve counsel was held on April 10, 2014, before the Honorable J. Derham Cole. (Supp. App. pp. 22-32). At the hearing, Petitioner again moved to relieve his appointed counsel. (Supp. App. p. 26). The Court asked Petitioner if he understood that he had a right to court-appointed counsel to assist him in his post-conviction relief action, and Petitioner stated he understood. (Supp. App. p. 26, lines 18-21). Petitioner informed the judge he did not want Moody to represent him and stated he wished to represent himself (Supp. App. p. 27, lines 2-3). Petitioner stated he understood that if Moody was relieved, he would not be able to ask for another attorney. (Supp. App. p. 27, lines 6-9). Judge Cole orally granted Petitioner's motion to relieve, (Supp. App. p. 27, lines 12-13), and subsequently issued a written "Order Relieving Counsel" filed July 22, 2014. (Supp. App. p. 33). The order instructed Petitioner "that if he chose to relieve his appointed counsel in this matter, the Court would not appoint further counsel and [he] will be required to proceed pro se in this matter." (Supp. App. p. 33). Petitioner did not object to the order.

At the PCR hearing, the PCR judge asked Petitioner if he wished to proceed pro se that day. (App. p. 49, lines 16-21). Petitioner stated he wanted to proceed pro se. (App. p. 49, lines 20-21). The PCR judge asked Petitioner if he was aware that if he wished to have an attorney, an attorney could be appointed for him. (App. p. 49, lines 22-24). Petitioner told the PCR judge that he did not need an attorney. (App. p. 49, lines 22-25). The PCR judge asked Petitioner if he was "aware of the kinds of things that an attorney might do to be of service to [him] in [the] matter."

(App. p. 50, lines 14-16). Petitioner said he was aware. (App. p. 50, line 19). The PCR judge then asked him if he needed to go over those things and Petitioner said no. (App. p. 50, lines 20-22). The PCR judge then inquired about Petitioner's educational background, his employment background, and whether he was under the influence of any substances and understood what he was doing. (App. p. 50, line 23-p. 52, line 9). Petitioner stated he completed school up until about the eleventh grade, that he was employed with a company for fourteen years, that he was not under the influence of any substances, and that he understood what he was doing that day. (App. p. 50, line 25-p. 52, line 12). The court also asked Petitioner if he was able to proceed that day and whether he understood what the hearing was about. (App. p. 52, lines 4-12). Petitioner affirmed that he was ready and that he understood. (App. p. 52, lines 4-12). At the PCR hearing, Respondent also informed the court that at the April 2014 hearing, Petitioner requested to have appointed counsel relieved. (App. p. 53, line 24-p. 54, line 17). Petitioner agreed that information was correct. (App. p. 53, line 24-p. 54, line 17).

Respondent submits that by asking the Court to relieve his court-appointed counsel and specifically requesting to proceed pro se, Petitioner waived his statutory right to PCR counsel. Petitioner knew of the right and knew that it was being abandoned. He affirmatively stated in the pro se documents submitted with his motion to relieve counsel that he was making the request with full knowledge and understanding of the dangers of proceeding pro se. Petitioner had a statutory right to appointed counsel, and Leah Moody was appointed to represent him. However, he demonstrated both in his filings and before Judge Cole that he did not want his appointed counsel to represent him, but preferred to represent himself. Petitioner was made aware he had a right to counsel at the hearing in which he relieved counsel and again prior to his evidentiary hearing. Further, Petitioner had an attorney for the plea that resulted in his underlying conviction,

and he also had four prior convictions for a second degree sexual offense and three prior convictions for indecent liberties with a child. (App. p. 20, lines 10-15). Respondent submits that although the record does not indicate whether he was represented when facing his prior charges, his prior convictions alone show that he is familiar with the criminal justice system, which is another factor indicating that Petitioner was aware of the risks of self-representation.

Accordingly, the record shows Petitioner's decision to represent himself was made eyes open with a full understanding of the risks of self-representation. See Wroten, 301 S.C. at 294, 391 S.E.2d at 576. Regardless, because there is no constitutional right to PCR counsel, the PCR judge was not required to specifically advise Petitioner of the dangers of proceeding pro se in his PCR action. Therefore, the PCR judge did not err in allowing Petitioner to go forward pro se at the PCR hearing, and this Court should deny the Petition for Writ of Certiorari.

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,

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By: 
ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA
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SC SUPREME COURT

Appeal from Cherokee
The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2015-002140

KENNETH HILTON,

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:

**Robert M. Pachak, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211**

This 11th day of July, 2016



ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUL 11 2016
SC SUPREME COURT

July 11, 2016

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

RE: Kenneth Hilton v. State of South Carolina
Appellate Case No.: 2015-002140

Dear Mr. Shearouse:

Enclosed for filing are the original and one bound copy 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: Robert M. Pachak, Esquire