STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN KENNETH MASSEY, JR.,

APPELLANT

APPELLATE CASE NO 2015-002563

INITIAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Rules

Statutes

STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in permitting Appellant to proceed *pro se* where the judge failed to ensure Appellant understood the dangers and disadvantages of self-representation and the record does not disclose that Appellant had sufficient background to intelligently waive his right to counsel or was apprised of his rights by some other source?

II. Did the trial judge err in permitting expert testimony concerning dog-tracking where the state failed to prove the dog's reliability in accordance with State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009)?

III. Did the trial judge err in failing to credit Appellant with time served in pre-trial detention awaiting disposition of the charges in direct contravention of the mandatory statutory provision and controlling case law?

STATEMENT OF THE CASE

On October 17, 2013, a York County grand jury indicted Appellant for grand larceny of items valued at or more than two thousand dollars (2013-GS-46-3508) and malicious injury to property with the damage being less than two thousand dollars (2013-GS-46-3509). R. * (indictments). Both indictments were subject to the property crime enhancement. R. * (indictments). The state, represented by Matthew Hogge and Austin Newman, called the case to trial before the Honorable Paul Burch and a jury on November 30, 2015. Tr. 1. Initially, Phil Smith represented Appellant. Tr. 1. However, during the pre-trial proceedings, Appellant moved to relieve Smith and proceed *pro se*. Tr. 71, ll. 1-8. Judge Burch granted the request. Tr. 72, l. 17 – Tr. 73, l. 1. Thereafter, Appellant represented himself. The jury found Appellant guilty as charged. Tr. 372, ll. 11-19. Judge Burch sentenced Appellant to ten years' imprisonment for grand larceny and two years' imprisonment for malicious injury to property. Tr. 387, ll. 11-18; R. *(sentence sheets). He ordered the sentences to be served consecutively. Tr. 387, l. 18; R. *(sentence sheets).

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

On July 17, 2013, Bobby Ferrell, a civil process server for the York County Sheriff's Office, was driving from his home in Chester County to the Moss Justice Center in York County. Tr. 7, ll. 10-24.[1] At 5:19 a.m., when Ferrell was just inside the York County line, he saw Appellant walking down the middle of the road. Tr. 8, ll. 4-11. Approximately twenty yards away, Ferrell saw a four-wheeler in a ditch. Tr. 8, ll. 14-19. Ferrell stopped his car and detained Appellant for questioning. Tr. 9, ll. 7-12. Appellant told Ferrell that he and his girlfriend argued, prompting him to leave and walk home to Rock Hill. Tr. 9, ll. 12-16. While walking, Appellant had been calling a friend for a ride. Tr. 9, ll.15-16; Tr. 261, l. 1 – Tr. 263, l. 3. When Ferrell asked Appellant about the four-wheeler in the ditch, Appellant indicated he was unaware of the four-wheeler. Tr. 9, ll. 17-23. It was a dark country road with no street lighting, forcing Ferrell to shine his flashlight on it so the two could see it. Tr. 9, ll. 22-23; see also, Tr. 132, ll. 2-6 (another officer describing the area as not heavily populated and noting there were more cows than people there).[2]

Ferrell called dispatch to explain what was happening, and Deputy Travis Shealey told Ferrell to keep Appellant at the roadside until Shealey arrived. Tr. 10, ll. 15-17; Tr. 10, l. 21 - Tr. 11, l. 6. It was no surprise then that Ferrell refused to return Appellant's identification when Appellant's friend showed up to give him a ride. Tr. 10, ll. 2-14; see also Tr. 130, ll. 4-12; Tr.

---

[1] Bobby Ferrell did not testify before the jury; however, he testified during an *in camera* hearing regarding his involvement. The chief investigating officer, Nick Schifferle, told the jurors that the police received a call from "an anonymous citizen" about a four-wheeler on the side of the road. Tr. 255, ll. 1-14.

[2] The officers investigating the alleged theft noticed there was no key in the four-wheeler and it was in gear. Tr. 138, ll. 17-23. There was also a piece of a garden hose tied to the front of the four-wheeler. Tr. 138, ll. 8-11.

152, ll. 16-20. When Appellant asked to leave, Ferrell told him he would have to wait and talk to the deputies who were on their way. Tr. 10, ll. 2-14.

Although Shealey should have been ending his shift, he went to meet Ferrell and Appellant on the roadside at 5:30 a.m. Tr. 125, l. 20 - Tr. 126, l. 10; Tr. 130, ll. 18-20. To Shealey's questioning, Appellant explained the argument with his girlfriend and his walking home as a result. Tr. 140, ll. 1-4; see also, Tr. 258, ll. 7-18. Shealey handcuffed Appellant and waited for other officers to arrive. Tr. 140, ll. 7-8. Shealey explained that Appellant had been stopped near the home of Benjamin "Benji" Fairfax, Shealey's good friend. Tr. 134, l. 21 - Tr. 135, l. 1. Although Ferrell indicated that he stopped Appellant when he was approximately *twenty* yards from the four-wheeler, Shealey claimed Appellant was within *three or four* yards, or between nine and twelve feet, of the four-wheeler when Shealey arrived. Tr. 153, ll. 18-24.

According to Fairfax, when he went to bed on the night of July 16, 2013, at 11:30 p.m., his four-wheeler was under a shed off the side of his utility building, approximately 200 feet from the roadway. Tr. 190, l. 8 - Tr. 191, l. 9. When Fairfax awoke the next morning, he noticed the four-wheeler was gone. Tr. 190, ll. 12-24. Fairfax walked out his front door to investigate, but was met by an officer who explained the police were investigating the theft of his four-wheeler and had a suspect in custody. Tr. 190, ll. 18-21; Tr. 192, ll. 2-17. The officer said there was a canine responding to run a trail from the four-wheeler to Fairfax's shed. Tr. 192, ll. 13-17.

On the roadside and later at the detention center, Appellant repeatedly informed officers that he could not have stolen the four-wheeler and pushed it across the yard because he had recently undergone surgery to remove a cancerous tumor from his buttocks. Tr. 161, ll. 3-7; Tr. 258, ll. 7-11. In fact, the tumor was about the size of a fist and its removal left Appellant

temporarily disabled – unable to exert himself physically and unable to left anything over ten pounds. Tr. 297, ll. 4-23; Defendant's #3.

Prior to the canine team's arrival, approximately eight other officers arrived on the scene. Tr. 165, ll. 12-24. The police records showed eleven police cars responded. Tr. 165, ll. 19-24. Nevertheless, Shealey claimed none of the officers entered the area; instead, they were "[s]tanding around." Tr. 169, ll. 13-24.

Officer Tim Carroll arrived on the scene with his canine, Hattie, at 6:19 a.m. Tr. 213, ll. 10-20. The police wanted to know if a track would go from Appellant to the four-wheeler and back to where the four-wheeler was taken. Tr. 210, ll. 23-25. To accomplish this goal, Carroll had Hattie sniff Appellant's pant leg. Tr. 210, l. 25 – Tr. 211, l. 1. At that time, Appellant was less than fifty yards away from the four-wheeler, a distance greater than testified to by Ferrell and Shealey concerning Appellant's location in relation to the four-wheeler when the two officers arrived. Tr. 214, ll. 13-19. Carroll then allowed Hattie to start searching along the roadway. Tr. 211, ll. 2-3. Carroll claimed she picked up a track going down the side of the road, not the middle, toward the four-wheeler. Tr. 211, ll. 2-4. When she got to the four-wheeler, she nosed it, then turned up to the yard and went up the embankment. Tr. 211, ll. 4-6. She crossed the yard and went to a storage shed. Tr. 211, ll. 6-7. At this point, Hattie began to circle around, indicating to Carroll that the track had ended. Tr. 211, ll. 7-10. Prior to starting the search, it was Carroll's understanding that the four-wheeler had been taken from that particular storage shed. Tr. 211, ll. 7-8. Carroll and Hattie started "cutting" the area, trying to pick up an exit, but could not find a track going anywhere else. Tr. 211, ll. 10-13.

Carroll explained that when Hattie is "on a track," she barks. Tr. 215, ll. 16-18. Further, Carroll explained that because Hattie was doing a "reverse track," she did not identify Appellant.

Tr. 216, ll. 14-15. Carroll admitted that although dogs follow human odor, dogs prefer tracking from cold to hot, meaning dogs prefer to track from where someone *was* to where the person *is* currently or was most recently. Tr. 221, ll. 17-24. Carroll opined, however, that dogs can reverse track for up to one mile. Tr. 221, l. 24 - Tr. 222, l. 13. Hattie had never performed such a feat, however. Tr. 222, ll. 16-19. In fact, Hattie had never performed a reverse track in a training exercise until *after* July 17, 2013. Tr. 223, l. 9 – Tr. 224, l. 9.

ARGUMENT

I. The trial judge erred in permitting Appellant to proceed *pro se* where the judge failed to ensure Appellant understood the dangers and disadvantages of self-representation and the record does not disclose that Appellant had sufficient background to intelligently waive his right to counsel or was apprised of his rights by some other source.

Relevant facts

During a pretrial hearing to determine the admissibility of dog-tracking evidence, Appellant moved to relieve trial counsel and proceed *pro se*. After the state completed re-direct examination of its witness on the subject, trial counsel indicated he had no more questions but stated that Appellant wished to cross-examine the officer. Tr. 70, ll. 1-5. The judge responded that Appellant could not do that "unless he wants to take over his defense and you're out of here." Tr. 70, ll. 6-7. After a brief break, the judge explained that he did not mean "to be curt about that." Tr. 70, ll. 12-13. However, he viewed the situation as "clear-cut." Tr. 70, l. 13. The judge stated that Appellant could not ask questions as long as trial counsel was representing him. Tr. 70, ll. 15-16. By the use of the phrase "you're out of here," the judge meant, Appellant would have to release trial counsel from representation and "take over the actual defense." Tr. 70, ll. 16-18. The judge then permitted a recess for trial counsel and Appellant to consult. Tr. 70, ll. 22-24.

After the short recess, trial counsel stated he had met with Appellant who "indicated after contemplation a decision that he would feel more comfortable with representing himself in this trial." Tr. 71, ll. 1-4. Additionally, trial counsel noted that Appellant had asked that trial counsel "assist him, hand him items and serve as sort of an assistant to him," but that Appellant understood "he would be representing himself at this point." Tr. 71, ll. 4-6. The judge stated that he and Appellant needed "to talk about this a little bit." Tr. 71, ll. 9-10. According to the judge, he could

provide Appellant with "standby counsel," which would permit Appellant to ask questions. However, the judge warned that "once you pull the trigger on that, if I agree with it, then he won't be able to go forward with any other question and you'd be on your own, and sometimes representing yourself can be a dangerous proposition." Tr. 71, ll. 10-15.

He asked how familiar Appellant was with the court system, and Appellant responded, "Fairly, fairly." App. 71, ll. 15-17. Appellant indicated he had finished fourteen or fifteen years of school, including two years at Winthrop University and a semester at a technical school. Tr. 71, ll. 20-22. The judge then remarked, "And you know the old saying without me quoting it." App. 71, ll. 23-24. Appellant responded, "Representing himself's a fool." Tr. 71, l. 25.

After this exchange, the judge asked if Appellant were "sure that [he] want[ed] to make this move." Tr. 72, ll. 1-3. Appellant responded he was sure, but explained he would need trial counsel's assistance because the two had *not* gone over "some of the stuff" due to time constraints. Tr. 72, ll. 4-6. He explained he would need trial counsel to help him go through some of the information and would need trial counsel to assist him with some information. Tr. 72, ll. 6-8; Tr. 72, ll. 12-16. The judge said he had "no problem with that" and remarked that trial counsel would be "strictly" limited in that role. Tr. 72, ll. 17-20.

Thereafter, the judge noted that Appellant seemed to be very intelligent with years of education, and as a result, he was releasing trial counsel. Tr. 72, l. 22 – Tr. 73, l. 1. Appellant then represented himself in the remainder of the pre-trial hearing and the trial.

Discussion

A criminal defendant "has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) (citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)). "The Sixth Amendment does not provide merely

that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975). "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." Id. at 835. Thus, the decision to proceed *pro se* must be made knowingly, intelligently, and voluntarily. Id. In fact, "[t]he courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights." State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003).

"Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel." Barnes, 407 S.C. at 36, 753 S.E.2d at 550; see also State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) (explaining "it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver"). "Faretta requires that 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.'" Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (quoting Faretta, 422 U.S. at 835). "To establish a valid waiver of counsel, Faretta requires the accused 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, 423-424, 392 S.E.2d 462, 463 (1990).

According to the South Carolina Supreme Court, "a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred." Id.[3] However, "[t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to

[3] The trial judge must "make a meaningful inquiring into [a defendant's] background to determine whether [the defendant] had sufficient experience or knowledge to waive counsel." Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001).

counsel is the defendant's understanding." State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). Therefore, "[i]n the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the reviewing court] will look to the record to determine whether [the defendant] 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. In other words, "[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, 301 S.C. at 294, 391 S.E.2d at 576.

According to this Court, a variety of factors may be considered by a reviewing court when determining if an accused has sufficient background to comprehend the dangers of self-representation, including:

> (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused 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 the accused knew the legal challenges he could raise in defense to the charge(s) 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.

In re Christopher H., 359 S.C. 161, 167-168, 596 S.E.2d 500, 504 (Ct. App. 2004).

The Supreme Court held the record did not demonstrate Wroten was sufficiently aware of the dangers of self-representation to make an informed decision to proceed without counsel. Wroten, 301 S.C. at 294-295, 391 S.E.2d at 576-577. Notably, the trial judge made no specific inquiry to determine whether Wroten made his choice to represent himself voluntarily and knowing. Id. at 294, 391 S.E.2d at 576. Wroten was forty-five years old at the time of his guilty plea and had

only a fifth-grade education. Id. at 295, 391 S.E.2d at 576. Wroten had spoken to a public defender only once. Id. at 295, 391 S.E.2d at 576-577. When the plea judge asked if he wanted an attorney, Wroten responded that he did not know what to do. Id. at 295, 391 S.E.2d at 577. Wroten had one prior conviction on his record – a guilty plea in 1979. Id. Not only did the trial judge fail to provide proper Faretta warnings, the record failed to disclose that Wroten had sufficient background to make a voluntary waiver or that Wroten was advised of the dangers of self-representation from some other source.

Likewise, the Supreme Court held the record failed to reveal that Watts made an intelligent waiver of counsel. Watts, 347 S.C. at 403-404, 556 S.E.2d at 371. First, the plea judge failed to make a meaningful inquiry into Watts's background to determine whether he had sufficient experience or knowledge to waive counsel. Id. at 403, 556 S.E.2d at 371. The judge elicited from Watts that he was forty-one years old and had graduated from high school. Id. at 404, 556 S.E.2d at 371. When the judge asked about his prior criminal history, the solicitor, not Watts, answered that he had been convicted of simple possession of marijuana and strong arm robbery "some time ago." Id. The judge made no further inquiry into the prior conviction. Id. According to the Court, the record failed to demonstrate Watts was warned adequately of the dangers of self-representation when he relieved his appointed counsel, and affirmatively demonstrated that he was not warned by the plea judge as required by Faretta. Id. Additionally, the record failed to demonstrate that Watts had sufficient background to make an intelligent waiver of counsel absent the proper Faretta warnings. Id.

The Court held Prince was not sufficiently aware of the dangers of self-representation to make an informed decision to proceed *pro se* based on the record before it. Prince, 301 S.C. at 424, 392 S.E.2d at 463. Prince was twenty-two years old at the time of his guilty plea, had completed

high school, and had some college education. Id. Additionally, Prince had previously pleaded guilty to armed robbery. Id. However, the record indicated Prince "was mentally disturbed at the time of his plea." Id. When he was incarcerated, Prince began receiving psychiatric treatment and was still undergoing treatment three years later at the time of his PCR hearing. Id. During the PCR hearing, Prince "exhibited little understanding of criminal proceedings" and "testified he relied upon the solicitor's advice at the plea hearing." Id.

The colloquy between Judge Burch and Appellant differed sharply from the colloquies held sufficient by courts to warn a defendant of the dangers and disadvantages of self-representation. In Reed, 332 S.C. at 41, 503 S.E.2d at 749-750, the "trial judge questioned [Reed] in camera about his knowledge of the proceedings and what it would mean to represent himself rather than have representation by two capital trial qualified attorneys." Further, "[t]he trial judge warned [Reed] of the dangers and disadvantages of self-representation. [Reed] stated that he understood what he was waiving but still chose to waive counsel." Id. at 41, 503 S.E.2d at 750. In fact, the "trial judge held several hearings to determine whether [Reed] understood what it meant to represent himself and to waive the appointment of experienced counsel." Id. When the judge informed Reed of the dangers and disadvantages of self-representation, Reed "continued to assert that he understood what he was waiving and demonstrated to the judge that he was making a knowing, intelligent perhaps unwise, voluntary decision to represent himself." Id. at 41-42, 503 S.E.2d at 750.

In Graves v. State, 309 S.C. 307, 310, 422 S.E.2d 125, 127 (1992), the South Carolina Supreme Court examined the entire record, both the trial and PCR transcripts, to determine whether facts beyond the trial judge's colloquy with Graves showed he had sufficient background or was apprised of his rights by some other source. The record revealed Graves had completed three years at the John J.R. Law School of Criminal Justice, had an extensive criminal background, and had

worked at a law library. Id. Additionally, Graves' trial counsel testified at the PCR hearing that he had discussed with Graves some of the risks of proceeding *pro se*. Id.

In Starnes, 388 S.C. 590, 601, 698 S.E.2d 604, 610 (2010), the Court held a capital defendant's waiver of counsel was valid where the waiver was addressed several times prior to trial, and during the hearing on the motion to proceed *pro se*, the trial court "methodically and carefully explained the dangers of self-representation and ensured [Starnes] understood the various issues at trial." The trial judge inquired into Starnes's mental state, his knowledge of the numerous aspects of a trial, his knowledge of the elements of the charges against him, and his knowledge of available defenses. Id.

Failure to warn pursuant to Faretta

The United States Supreme Court held that when a defendant requests to proceed *pro se*, "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948). "To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Id. at 724. Thus, a judge must make "a penetrating and comprehensive examination of all the circumstances." Id.

"The judicial inquiry and educative effort concerning the importance of legal representation that must necessarily precede any knowing and intelligent waiver of counsel cannot be cursory or by-the-way in nature." United States v. Belanger, 936 F.2d 916, 918 (7th Cir. 1991). At a minimum, a court must inform a defendant "of the crimes with which he was charged, the nature of those charges, and the possible sentences they carry." Id. Also, "a defendant should be made aware

of the 'difficulties he would encounter in acting as his own counsel.'" Id. at 919 (quoting United States v. Moya-Gomez, 860 F.2d 706, 733 (7th Cir. 1988)).

The record discloses Judge Burch's failure to explain the dangers and disadvantages of self-representation to Appellant. The judge told Appellant that "sometimes" self-representation "can be a dangerous proposition." Tr. 71, ll. 14-15. The only other tangential reference to the dangers of self-representation was when the judge asked Appellant if he knew the "old saying," and Appellant responded, "Representing himself's a fool." Tr. 71, ll. 23-25. In discussing Appellant's right to proceed *pro se*, the judge's admonishment was devoid of any explanation of the dangers and disadvantages of self-representation. The judge stated, almost in passing, that it would be dangerous for Appellant to represent himself. There was no actual advisement of the dangers and disadvantages associated with self-representation as required by Faretta. The judge never ensured Appellant understood the charges against him or the nature of those charges. The judge never advised Appellant of the sentencing range of those offenses or of the collateral consequences. No one advised Appellant of any defenses he may have or the ability to present mitigation during sentencing. The judge never even told Appellant that he would be held to the rules of court. The judge failed to explain the difficulties Appellant would encounter during self-representation, as was evident from the record starting with Appellant's opening statement, continuing to his cross-examination of witnesses, his attempts to introduce exhibits, and concluding with his closing argument.

Insufficient background to waive

This Court and the South Carolina Supreme Court have set forth a non-exhaustive list of factors to determine whether the record as a whole indicates Appellant had a sufficient background to understand the dangers and disadvantages of self-representation in order to make a knowing and

voluntary waiver. An analysis of those factors demonstrates Appellant's background was insufficient to waive his right to counsel.

The judge asked two questions regarding Appellant's ability to represent himself. The first was to inquire as to Appellant's familiarity with the court system. Tr. 71, ll. 15-16. Appellant posited he was "fairly" familiar with the courts. Tr. 71, l. 17. The judge sought no additional explanation of what this meant or how Appellant had obtained any knowledge of the court system. The second question was to ask about Appellant's education. Tr. 71, ll. 18-19. Appellant told the judge, "I finished 14 years of school, actually 15, land surveyor by profession, went to Winthrop two years, York Tech about a semester." Tr. 71, ll. 20-22. When Appellant explained that there was "stuff" that he had not reviewed with trial counsel and would require trial counsel's assistance to understand that "stuff," the trial judge failed to ensure exactly to what Appellant was referring and the dangers of self-representation when Appellant was not familiar with the entirety of the evidence.

Additionally, there were no questions asked regarding physical or mental health. In fact, the judge made no inquiry regarding Appellant's mental status, whether he suffered from any mental illness or was taking medication for a mental condition. The judge's exchange with Appellant concerning his waiver of counsel was a short inquiry by the judge concerning matters mostly unrelated to the dangers of self-representation. The judge asked leading questions concerning a limited scope of Appellant's background to which Appellant responded with bare bones information. There was no "penetrating and comprehensive examination of all the circumstances."

As mentioned previously, the record is devoid of any indication that Appellant knew the nature of the charges and possible penalties. Certainly, Appellant was present when the charges were read to the jury and probably had been served with arrest warrants and/or indictments, but the

record shows no understanding by Appellant of the *nature* of those charges – meaning the elements of the offenses and the state's purported evidence to support those offenses. Further, there was no indication that trial counsel had explained the dangers of self-representation, as will be discussed later in greater detail.

Appellant's waiver of his right to counsel in no way demonstrates an attempt to delay or manipulate the proceedings. The court appointed stand-by counsel. Typically, that factor would weigh in favor of finding Appellant's waiver voluntary and knowing, but in the instant matter in weighs against such a finding. As discussed earlier, Appellant told the judge there was "stuff," presumably information contained within his case file with which he was not familiar and would require additional assistance – beyond what could be provided by stand-by counsel.

Certainly, Appellant had an extensive criminal history as was demonstrated by the state's recital of his criminal record at sentencing and through the introduction of documents to support the sentencing enhancement. Tr. 375, l. 23 – Tr. 377, l. 7; R. *(Court's Exhibit #5). Primarily, Appellant's prior record included probation violations and guilty pleas. R. *(Court's Exhibit #5). The only indication that Appellant had ever gone to trial was the sentence sheet for a shoplifting offense, which resulted in a conviction and a three-year sentence on March 31, 2015. R. *(Court's Exhibit #5). Although the sentence sheet identified Hogge as the prosecutor, there was no indication that Appellant was represented by counsel during the proceeding. R. *(Court's Exhibit #5). Accordingly, Appellant's trial experience was very limited.

The judge never warned Appellant that he would be required to comply with the rules of court if he chose to represent himself and the record is replete with examples of how Appellant was not equipped for such an undertaking. For example, during re-cross examination of the officer during the pretrial hearing, Appellant twice attempted to go beyond the scope of re-direct

examination, which drew a quick objection from the state, which was sustained. Tr. 77, ll. 11-21; Tr. 78, ll. 14-24. Although trial counsel challenged the admissibility of Appellant's statement during pre-trial proceedings, Appellant failed to object to the introduction of the statement; thus, he failed to preserve the issue for appeal. Tr. 139, l. 19 – Tr. 142, l. 12; Tr. 258, ll. 5-18. Additionally, Appellant admitted an exhibit that included an indication that he was being investigated for a probation violation. Tr. 252, ll. 5-12; R. *(Defendant's #1). Thus, he was informing the jury that he had a prior conviction for which he was on probation at the time of the alleged theft of the four-wheeler. This was information to which the jury would not have been privy but for Appellant's error. Fortunately, the fair-minded solicitor realized the potential harm, alerted the court, and agreed to the substitution of an exhibit with the dangerous information redacted. Tr. 252, ll. 5-19; R. *(Defendant's #1(A)). The charge conference revealed another deficit – Appellant requested the judge charge the jury on trespassing, which he claimed was a lesser-included offense of grand larceny. Tr. 315, ll. 9-14. The judge quickly and correctly dismissed this request by noting that trespassing was not a lesser-included of grand larceny. Tr. 315, ll. 15-16. The judge, unprompted, then went on to discuss petty larceny, an *actual* lesser-included offense. Tr. 315, ll. 16-21.

During his opening statement and closing argument, Appellant demonstrated his ignorance of the law and his lack of competency to represent himself in numerous ways. In his opening statement, Appellant informed the jurors that the state's burden was "by a preponderance of the evidence." Tr. 121, ll. 5-6. This was obviously erroneous. However, incongruously, Appellant later asked the jurors if the state could prove the case "without a shadow of a doubt." Tr. 122, l. 22. Again, Appellant clearly advocated an erroneous standard to the jury. Then, in his closing argument, Appellant shifted the burden of proof from the state by informing the jury that he had demonstrated his innocence. Tr. 334, l. 19. No doubt the jurors were confused about not on the

burden of proof, but who had it. Certainly, the solicitor's closing argument and the judge's instructions in this regard were accurate, but those matters did little to clear up the errors that Appellant injected into the trial.

Appellant remarked in opening and closing on "young black men" across America suffering "injustice even during the time of need or help" and asked the jurors to "recall Freddie Gray of Baltimore" and "Sandra Bland." Tr. 123, ll. 7-15; Tr. 330, ll. 15-17. These drew immediate objections from the solicitor, which were sustained. Tr. 123, ll. 16-18; Tr. 330, ll. 19-20. However, the solicitor told the jurors that Appellant "should be ashamed of himself for grasping at race and trying to use the stories that we hear too often in the news these days, trying to take that and use that to his own benefit and his own advantage." Tr. 345, ll. 2-5. According to the solicitor, race had "nothing to do with this case" and he was "sick about hearing about it in the news." Tr. 345, ll. 5-7. Although it was "terrible what's going on out there," the solicitor told the jurors that it had nothing to do with the case. Tr. 345, ll. 7-8. Undaunted, the solicitor argued that Appellant was "not Freddie Gray." Tr. 349, ll. 4-5. Appellant did not object to the state's improper argument, and did not request an opportunity to rebut the argument – again, demonstrating his inability to represent himself competently.

Perhaps most damaging to Appellant's case was when he opened the door to testimony from the alleged victim that Appellant had been implicated in a prior theft of the very same four-wheeler alleged to have been stolen to support the charge of grand larceny. Tr. 191, ll. 15-18; Tr. 203, ll. 12-22. Although Appellant objected, he provided no basis for the objection. Tr. 203, l. 20. The judge overruled the objection noting that Appellant could not object to his own question. Tr. 203, ll. 21-22. Appellant was ill-equipped to argue that he was not objecting to his own question, but was objecting that the answer was non-responsive and should have been stricken from the record. The

record also revealed Appellant was making inquiries of stand-by counsel and the judge inquired if stand-by counsel were "handing over documents" or providing "legal advice." Tr. 203, ll. 24-25. The impression created from the record is that Appellant desperately needed legal counsel, but was unable to obtain the legal advice he sought because he had relieved trial counsel. In response to the court's inquiry, Appellant stopped his cross-examination of the alleged victim. Tr. 204, ll. 1-2.

Demonstrating his failure to understand the rules of court, Appellant moved for a mistrial based on the alleged victim's testimony identifying him as suspect in a prior theft of the very same four-wheeler *after* another witness testified. Tr. 249, ll. 15-20. Such a motion was untimely. Judge Burch told Appellant that his cross-examination of the alleged victim was "the danger" of self-representation because he lacked "that careful analysis that an experienced attorney can analyze." Tr. 249, ll. 21-23. According to the judge, Appellant opened the door for the response. Tr. 249, l. 23 – Tr. 250, l. 2. Appellant requested an explanation as to "opening the door," signifying his ignorance on this significant legal concept. Tr. 250, ll. 3-4. Quite simply, the record is replete with examples of Appellant's inability to represent himself at a minimal level of competence.

Not advised of dangers from another source

Finally, the record provides no evidence Appellant was advised of the dangers and disadvantages of self-representation from another source. The record indicates a break was taken for trial counsel to consult with Appellant regarding Appellant's desire for self-representation, but there is no indication that trial counsel advised Appellant of the dangers and disadvantages of self-representation during that break or at any time.

Remedy

In State v. Dixon, 269 S.C. 107, 109, 236 S.E.2d 419, 420-421 (1977), the South Carolina Supreme Court remanded the case "to the lower court for a determination of whether the waiver [of

counsel] was intelligently made." According to the Court, "[t]he justice of the case [did] not require a new trial." Id. at 109, 269 S.E.2d at 420. However, the proper remedy for determining the validity of such waivers was called into question in State v. Coto, 296 S.C. 480, 374 S.E.2d 181 (1988) and State v. Bateman, 296 S.C. 367, 373 S.E.2d 470 (1988) when the Court ordered new trials. In State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991), the South Carolina Supreme Court attempted to clarify the proper remedy in such cases in light of the differing opinions. The Court held that "except in extraordinary cases where it is clear 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." Id.; see also In re Christopher H., 359 S.C. 161, 169, 596 S.E.2d 500, 505 (Ct. App. 2004) (finding a remand for a factual determination regarding whether the waiver was knowingly and intelligently made would serve no useful purpose where the record clearly reflected the judge failed to adequately advise Christopher of the right to counsel, failed to make a specific inquiry as to Christopher's knowledge of the dangers of self-representation, and demonstrated that Christopher had insufficient background to comprehend the dangers of self-representation).

Here, the judge failed to engage in a formal inquiry with Appellant to apprise him of the dangers and disadvantages of self-representation. Further, the record failed to demonstrate that Appellant had a sufficient background to understand the dangers and disadvantages of self-representation. Therefore, a remand on the issue of self-representation would serve no useful purpose and a reversal is necessary.

II. The trial judge erred in permitting expert testimony concerning dog-tracking where the state failed to prove the dog's reliability in accordance with *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009).

Relevant facts

Prior to trial, Appellant moved to exclude testimony by the state's purported canine tracking expert. Tr. 33, ll. 20-22. The court heard the testimony of Timothy Carroll, a deputy with the York County Sheriff's Office (YCSO), *in camera*. During the hearing, Carroll explained he had worked full-time with the canine unit for just over seven years. Tr. 34, ll. 6-14. For this case, he worked with his bloodhound named Hattie. Tr. 34, ll. 20-25. Hattie began her service to law enforcement when she was one-year old. Tr. 35, ll. 3-6. She was a "tracking, trailing dog." Tr. 35, ll. 7-9.

Carroll, Sergeant Clinton, and Chris Kinsey trained Hattie beginning when she was about eight-weeks old. Tr. 37, ll. 19-24. This early training involves the puppies going out as a liter to follow the three trainers around. Tr. 38, ll. 1-2. Over time, the trainers increased the distance for the puppies to follow, hid from the puppies, and incorporated different surfaces. Tr. 38, ll. 2-12. Eventually, the trainers started "throwing in contamination." Tr. 38, ll. 12-19.

Hattie had been trained during a week-long YCSO winter seminar and for five years pursuant to "in-service training" performed by the YCSO. Tr. 36, ll. 1-4. Prior to July 17, 2013, the day that Hattie was deployed for the purpose of attempting to track in this case, she had performed human odor detection. Tr. 35, ll. 12-17. Carroll "believe[d]" Hattie had "demonstrated reliable detection of human odor" during those prior deploy tracks. Tr. 35, ll. 18-22.

According to Carroll, Hattie would bark "on just about every breath" when she had "locked on a person. Tr. 49, ll. 7-12. He described Hattie as "very unique with that" – barking. Tr. 68, ll. 16-22. After repeating his claim that Hattie would bark "just about every breath" when she picked up a track, he then described this has happening "especially something that's hotter." Tr. 68, ll. 22-24. Carroll noted that he could tell from Hattie's conduct if she were distracted or paying attention to something else during a track. Tr. 49, ll. 15-23. He described Hattie as "quiet" and "circling around" when she "comes off of that track." Tr. 68, l. 24 – Tr. 69, l. 1. Then, when she "picks it back up ... she'll start barking again." Tr. 69, ll. 1-2.

YCSO had no handbook concerning canine tracking, and its policies and procedures manual had nothing specific to canine handling and tracking. Tr. 52, ll. 12-22. Carroll was unaware of any manuals or handbooks from SLED on the subject. Tr. 52, ll. 23-24. Hattie was not certified by any national organization. Tr. 52, l. 25 – Tr. 53, l. 1. No agency other than YCSO ever trained or tested Hattie, and her training records were never reviewed by any outside agency or group. Tr. 53, ll. 2-13.

Carroll was unaware of Hattie's error rate. Tr. 53, ll. 24-25. However, Hattie's training records showed numerous indications of her errors and her general unreliability. After trial counsel confronted Carroll with the training records, Carroll agreed with the solicitor that Hattie was not "a hundred percent correct," but he still provided no information concerning her error rate or whether such a rate was generally acceptable in the field of canine tracking. Tr. 68, ll. 13-15.

On January 7, 2007, the record indicated Hattie failed to pick up the track until the end. Tr. 54, ll. 1-12. Also on that day, Hattie was distracted by deer droppings while tracking a human. Tr. 54, ll. 19-25. The handler had to "verbally correct[] her and cast her back past the

deer crossing." Tr. 54, ll. 19-25. On February 25, 2009, Hattie showed trouble with distractions again. Tr. 56, ll. 19-25. On March 18, 2009, when Hattie switched from the suspect's track onto contamination, the handler corrected her and put her back on the suspect's track. Tr. 57, ll. 3-15. Likewise, Hattie was distracted near gas pumps during a training exercise on March 20, 2009, and required correction. Tr. 57, ll. 16-24. She showed her capitulation for distraction on April 22, 2009, when she switched from an older track to a hotter one, requiring correction from her handler. Tr. 58, l. 23 – Tr. 59, l. 10.

On February 2, 2009, Hattie had difficulty working in a 14 mile per hour wind and across a hard top surface. Tr. 55, l. 25 – Tr. 56, l. 8. On February 20, 2009, Hattie showed difficulty tracking a suspect across a parking lot – again, showing difficulty with hard surfaces. Tr. 56, ll. 12-18. In fact, on March 31, 2009, she was unable to complete a track on a roadway at all. Tr. 58, ll. 15-22. Hattie was unable to track a suspect during a training exercise when grass was mowed. Tr. 58, ll. 7-14. On February 3, 2010, Hattie missed a subject's turn, requiring correction from her handler. Tr. 59, l. 24 – Tr. 60, l. 7. The next month, on March 10, 2010, Hattie "had trouble working the track, crossing on the road, but was able to pick it back up the opposite side." Tr. 60, ll. 11-20.

On June 9, 2010, contamination stumped Hattie again. Tr. 60, l. 21 – Tr. 61, l. 6. Although she started following the correct track, she turned off when the contamination was introduced and followed the "contaminated" track until she was corrected and placed back on the original track. Tr. 60, l. 21 – Tr. 61, l. 6. This happened again on January 19, 2011, and August 31, 2011, when Hattie followed a "contaminated" track despite starting on the right track, forcing her handler to correct her and place her on the original track. Tr. 61, l. 20 – Tr. 62, l. 3. Less than two months after the police deployed Hattie to track the four-wheeler in this case, on

September 4, 2013, started working a "contaminated" track. Tr. 64, l. 16 – Tr. 65, l. 3. The handler corrected her, and she was able to pick up the right track. Tr. 64, l. 16 – Tr. 65, l. 3.

During a training exercise on November 7, 2012, Carroll believed Hattie had switched from the right track to a "contaminated" track. Tr. 63, l. 14 – Tr. 64, l. 2. In light of this belief, he prevented her from making a certain turn, pulling her off the track. Tr. 63, l. 14 – Tr. 64, l. 2. Later, Carroll learned Hattie was on the correct track after all. Tr. 63, l. 14 – Tr. 64, l. 2. On February 6, 2013, just months before the tracking in the present case, Hattie lost a track during a training exercise and her handler had to place her back on the track. Tr. 64, ll. 3-15.

Concerning Hattie's track on July 17, 2013, Carroll explained that prior to his arrival, "people had walked in the roadway," but the path from the four-wheeler through the yard "was uncontaminated." Tr. 41, ll. 3-9. Carroll was uncertain how many officers had contaminated the area between Appellant and the four-wheeler. Tr. 73, ll. 17-24. It was Carroll's understanding that Shealey "tried to keep people away from the four-wheeler, away from the house." Tr. 74, ll. 14-16. When Carroll arrived, the officers "were interested in seeing where [the detained] individual had come from, if he, in fact, went to where the four-wheeler was taken from or if he continued on down the road." Tr. 41, ll. 10-17. Hattie "scented off his pant leg and cut the - - cut the area, searched the area in between him and the four-wheeler and picked up this track going up the roadway to the four-wheeler." Tr. 41, ll. 18-22. When Hattie reached the four-wheeler, she "kind of nosed the four-wheeler a little bit, turned up into the yard," continued up the embankment and through the yard. Tr. 41, l. 22 – Tr. 42, l. 5. She "tracked around to a storage shed and to the far side where she began circling around," indicating the track stopped. Tr. 42, ll. 6-8. Carroll and Hattie "started cutting it out wider and wider" trying to pick up the track again, but could not. Tr. 42, ll. 10-15. Carroll opined that Hattie followed Appellant's

track "to the four-wheeler and up to where the four-wheeler was taken from." Tr. 42, l. 22 – Tr. 43, l. 3.

Hattie had never performed such a back track or reverse track in a training exercise prior to July 17, 2013, when she tracked the four-wheeler in this case. Tr. 66, l. 19 – Tr. 67, l. 3. Perhaps coincidentally, after Hattie tracked the four-wheeler, Carroll had Hattie conduct a reverse track during a training exercise on July 17, 2013. Tr. 66, l. 19 – Tr. 67, l. 3. Although Appellant's trial was in December 2015, over two years after his arrest and Hattie's tracking, Carroll never had Hattie conduct another reverse track during a training exercise. Tr. 66, l. 19 – Tr. 67, l. 3.

Despite Hattie's demonstrated unreliability in training exercises, particularly with contaminated tracks, and the fact that she had never performed a reverse track in training, Carroll told the judge that he was "confident with her track" on July 17, 2013 based on his "experiences with Hattie," what he "saw" during the tracking, and "how she tracked in this situation." Tr. 69, ll. 19-23.

At the conclusion of the hearing, the state argued to qualify Carroll as an expert and for admissibility of the dog-tracking evidence and cited to State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). Tr. 79, l. 21 – Tr. 80, l. 10. In making his argument, the solicitor stated

> He's demonstrated that he has sufficient training and ability that he can instruct the jury on this which is an area that's not commonly known to everybody; (2), this is a bloodhout, which is obviously a breed characterized by an acute power of scent; (3), the dog's been trained to follow the trail by scent; (4), by experience the dog is found to be reliable; the dog has been through all sorts of training; the dog is not one hundred percent accurate in all those training, but it's training by its nature they are - - they're to teach the dog. The dog was placed on the trail where the suspect was known to have been within a reasonable time; an hour is an average time. There's some case law in South Carolina that says 14 hours is still an allowable time. And the trail is not otherwise contaminated. There were other people there on the scene, but the scene was not so contaminated that the dog could not make this track, as Deputy Carroll testified, he did not have to correct

> the dog in any way, and in his opinion, his dog followed the scent trail of [Appellant].

Tr. 80, l. 12 – Tr. 81, l. 6.

Appellant objected to the introduction of the evidence and to the qualification of the witness. Appellant explained "there's no training manual" and "no certification of the dog." Tr. 81, ll. 9-11. Additionally, the training exercises were not peer reviewed to determine reliability, and Hattie had no error rate. Tr. 81, ll. 12-13. Appellant noted that Hattie "was never trained to reverse track." Tr. 81, ll. 15-16. Unsurprisingly, Carroll had "not provided substantial enough expertise in using a dog in reverse track" as indicated by the training records. Tr. 81, ll. 19-25.

Nevertheless, Judge Burch agreed with the state and qualified Carroll as an expert witness and permitted the introduction of the canine-tracking evidence:

> First of all, the Court will note that the witness has been qualified before; this is not a brand new dog fresh out of training and extensive training and tracking. Anybody that's familiar with dogs, especially hunting dogs and breeds and the way they perform after training, basically is following a trail, that they initially are familiarized with; the training that this dog that we've heard extensive testimony about over several years has been way beyond what I would even imagine that the training goes through. The Court's certainly impressed with the record-keeping that the York County Sheriff's Department has done in regards to that. So overall, I find that the witness is qualified to testify to this.

Tr. 82, ll. 5-17.[4]

Discussion

The leading case in South Carolina concerning the admissibility of dog-tracking evidence is State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). On April 19, 2004, Gary White, Anthony Morris, and Roy Wiggins drove to a convenience store. Id. at 267, 676 S.E.2d at 685. White and Morris went into the store, while Wiggins waited in the car. Id. White grabbed the

[4] When the state called Tim Carroll to testify before the jury, Appellant renewed his objection to his qualification and the presentation of the evidence. The judge overruled the objection. Tr. 209, ll. 16-23.

store manager and placed a gun to her neck. Id. Morris began stealing items from the store. Id. "White, while standing up, apparently lost consciousness." Id. Morris screamed at White, waking him. Id. at 268, 676 S.E.2d at 685. As White and Morris left the store, a police officer arrived in the parking lot. Id.

The officer saw one person running away from the store. Id. He described the person as a black male, wearing a white t-shirt and dark pants, and carrying something in one of his hands. Id. The officer went in the direction in which the man had run. Id. The officer saw a car parked on the street, and then saw a black man get out of the car and run. Id. The officer did not chase the man, but he remained with the driver – Wiggins. Id.

Thirty minutes after the robbery, Officer Gunter arrived on the scene with his tracking dog, Aurie. Id. The first officer gave Gunter the information regarding where he saw the suspect and Gunter and Aurie began tracking. Id. They found White nearby, sleeping next to some bushes with a gun in his hand. Id. At trial and on appeal, White challenged the qualification of Gunter as an expert and the admission of the dog tracking evidence. Id. at 269, 676 S.E.2d at 686.

The South Carolina Supreme Court that "all expert testimony under Rule 702, SCRE, imposes on the trial courts an affirmative and meaningful gatekeeping duty." Id. at 270, 676 S.E.2d at 686. The Rule 702 criteria include the "trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." Id. "Reliability is a central feature of Rule 702 admissibility." Id. The Court then adopted the following evidentiary framework concerning dog tracking evidence, providing that the admission of such evidence is established if

> (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an

> acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated.

Id. at 272, 676 S.E.2d at 687.

The Court concluded the dog tracking evidence against White met the reliability threshold under Rule 702, SCRE. Id. at 271, 676 S.E.2d at 687. The Court found there was "ample evidence concerning the training and reliability of the dog, Aurie." Id. Aurie was a "German shepherd that descended from a bloodline of known police and military working dogs." Id. Aurie had been certified in several areas of tracking based on her performance on tests. Id. Through those certifications and tests, it had been shown that Aurie's "strongest skill [was] tracking people." Id. Aurie and the handler had been partners for more than seven years and had completed 750 tracks. Id. The Court concluded the expertise and dog-tracking evidence was "well supported by the record." Id.

Judge Burch erred in qualifying Carroll as an expert and permitting the dog tracking evidence in the case against Appellant where the state failed to show the reliability of the evidence. The state offered very little evidence that Carroll satisfied the expert qualifications under Rule 702. Essentially, the testimony was that Carrol had been full-time with the canine unit for seven years at the time of trial. Tr. 34, ll. 12-16. During those seven years, he had been working with Hattie for tracking. Tr. 35, ll. 3-6. Additionally, he had attended three week-long National Police Bloodhound Association seminars and one York County Sheriff's Office week-long bloodhound seminar. Tr. 37, ll. 3-8. He had received three weeks of training for handling *drug* dogs. Tr. 37, ll. 10-12. He also received training in the area of "man-tracking without the use of a canine" through SLED. Tr. 37, ll. 12-14. In short, Carroll had received very little training or education on handling dogs for purposes of tracking humans. Certainly, he had a

great deal of experience, but that experience was marred by the fact that it was within the YCSO without any consultation with outside sources.

Appellant concedes that a bloodhound is a breed of dog characterized by an acute power of scent; however, Appellant notes there was no evidence on this point offered and no request for judicial notice.

Carroll's testimony and the training records indicated that Carroll and his colleagues made efforts to train Hattie to follow a trail by scent. However, there was no evidence offered that their training methodology was of the type used by others engaged in training dogs to track. The state also offered no evidence the training methodology used had been peer reviewed; in fact, the evidence was to the contrary. No one outside YCSO had reviewed the training methodology employed by Carroll and his cohorts. Thus, while the record showed efforts to train Hattie to follow a trail by scent, the record provided no effort those efforts were proven through testing to produce positive results.

Similarly, the training log showed Hattie to be unreliable. Numerous instances of Hattie losing a trail or failing victim to contamination were contained within the training records. The training records also showed Carroll's repeated maneuvers and admonishments to pull Hattie from a scent trail she preferred and being placed on a scent trail that he desired – what Carroll described as "correcting." Hattie received no training from anyone outside YCSO, and her training had been handled exclusively by three officers within YCSO. No outside source reviewed Hattie's records or reviewed the training methodology employed with Hattie to determine the reliability and accuracy of her tracking. Carroll could provide no error rate for Hattie despite the extensive written training log. Most importantly, Hattie had never performed a reverse track in training prior to the reverse track she appeared to conduct on July 17, 2013. In

other words, Carroll asked Hattie to perform a feat on July 17, 2013, that he had never requested of her in a training session. Thus, he was unable to determine whether Hattie could perform such a task with any measure of reliability or accuracy. In short, the state failed to present evidence of Hattie's reliability, particularly as to reverse tracks.

The fifth factor discussed by the Supreme Court – the dog was placed on the trail where the suspect was known to have been within a reasonable time – reinforces the unreliability of dogs performing reverse tracks. Clearly, the expectation is that the dog is placed on a trail in order to track *to* the person, not *away from* the person. Carroll did not place Hattie on the trail where Appellant was known to have been within a reasonable time. Rather, he had Hattie smell Appellant's pant leg and then begin to track. Hattie tracked along the roadway, which was not surprising in light of the testimony that Appellant had been in the roadway. This area between Appellant and the four-wheeler was also an area where Appellant had been as a result of the involvement by the police, as will be discussed in greater detail below. Hattie's tracking from the four-wheeler to the shed indicated Hattie was tracking a scent associated with the four-wheeler, not necessary Appellant's scent.

The evidence clearly established, and the state conceded, the trail between Appellant and the four-wheeler was contaminated. Although the solicitor argued it was not "so contaminated," there was still an admission that the area was contaminated. This admission was necessary in light of the evidence that eleven cars responded to the scene, and at least, eight officers were present. Although Shealey insisted those officers were merely "standing around," such an excuse defies reason. Additionally, Shealey could not ensure that the area had not been contaminated prior to his arrival or while he was busy with other matters unrelated to safeguarding the area.

Further, the officers testified differently as to where Appellant was in relation to the four-wheeler. One officer claimed Appellant was as close as three to four yards to the four-wheeler, a second officer placed Appellant twenty yards from the four-wheeler, and Carroll placed Appellant "less than" fifty yards from the four-wheeler. This indicated the officers had moved Appellant to various locations within the space between Appellant and the four-wheeler. To the extent that Hattie was tracking Appellant in that space, Appellant's scent was there based on the officers' placement of his scent there through movement. Thus, the area was contaminated by numerous sources. Further, this was the most important area for tracking purposes because there would be no doubt of a scent trail between the four-wheeler and the shed where the four-wheeler was stored. The question was where did that scent trail go after the four-wheeler. This most crucial area was contaminated, including, oddly enough, contamination from Appellant.

The trial judge erred in qualifying Carroll as an expert and permitting the introduction of dog-tracking evidence in light of the state's failure to show Carroll's qualifications and Hattie's reliability. The record evidence demonstrated the state failed the White test. As a result, this Court should reverse Appellant's conviction and remand for a new trial.

III. The trial judge erred in failing to credit Appellant with time served in pre-trial detention awaiting disposition of the charges in direct contravention of the mandatory statutory provision and controlling case law.

Relevant facts

During the sentencing proceeding, the solicitor informed the judge that on March 31, 2015, he tried Appellant for shoplifting. Tr. 377, ll. 5-6. Appellant was found guilty and sentenced to three years' imprisonment. Tr. 377, l. 7; R. *(Court's Exhibit #5). Concerning the sentences imposed for grand larceny and malicious injury to property, the solicitor argued that Appellant was entitled to credit for time served of only 99 days. Tr. 377, ll. 11-13. He admitted Appellant had "been detained for two some-odd years," but argued Appellant was not entitled to that time because "[h]e got credit for that two some-odd years for his shoplifting sentence." Tr. 377, ll. 14-15. The solicitor then cited the statute governing computation for time served and argued Appellant "wouldn't be able to draw upon the credit that he has that he was able to use for his three-year on the shoplifting." Tr. 377, ll. 15-25. According to the solicitor, Appellant "finished his three-year sentence in about seven months" and thereafter, he had been in the jail for 99 days awaiting trial on the two charges for which he was convicted during this trial. Tr. 378, ll. 19-23. Begrudgingly, the solicitor admitted that Appellant was arrested on these charges on July 17, 2013, and bonded out on August 27, 2013, entitling him to another 41 days. Tr. 379, ll. 3-15. In total, the solicitor argued Appellant was entitled to only 140 days' of credit for the time he served in pre-trial detention.

In contradiction to the argument he was presenting during the sentencing proceeding, the solicitor stated that at some point prior to trial, Appellant offered to plead guilty to everything in exchange for a seven-year sentence, and the solicitor accepted the offer. Tr. 384, ll. 5-8.

However, Appellant subsequently changed his mind. Tr. 384, l. 8. The solicitor also indicated he had offered Appellant "a time-served sentence," which would "allow him the credit for the three years, the three years to run concurrent and that - - and - - to run concurrent to the three year sentence he got on the shoplifting." Tr. 386, ll. 13-21. Pursuant to this line of reasoning, it appeared the solicitor was arguing that Appellant was entitled to receive credit for time served on his grand larceny and malicious injury to property sentences, including the time after his arrest for shoplifting, but only if Appellant entered guilty pleas to all of the charges.

Appellant informed the judge that he had been incarcerated since December 30, 2013, and was entitled to credit for all the time he served awaiting disposition of the grand larceny and malicious injury to property charges. Tr. 379, l. 25 – Tr. 380, l. 6. Appellant further explained that he had "been detained over two years" awaiting trial on the charges. Tr. 383, ll. 20-21. According to the sentence sheet for the shoplifting conviction, Appellant was sentenced on March 31, 2015, following a trial, and received credit for fifteen months of time served. R. *(Court's Exhibit #5). The indictment and sentence sheet indicated the shoplifting occurred on December 19, 2013. R. *(Court's Exhibit #5).

Judge Burch agreed with the solicitor's construction of the statute and ordered that Appellant receive only 140 days of credit for time served during pre-trial detention despite Appellant's objection and clear evidence in the record that he was detained for two years. Tr. 387, ll. 18-20; R. *(sentence sheets).

Discussion

Statutory interpretation is a question of law. See Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (citing Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)). This Court is "free to decide a question of law with no particular

deference to the circuit court." Id. at 524, 642 S.E.2d at 753. "A statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself." State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008). The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id. (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). In other words, "[t]he legislature's intent should be ascertained primarily from the plain language of the statute." State v. Sweat, 379 S.C. 367, 375, 665 S.E.2d 645, 649 (Ct. App. 2008). The language of the statute "must be read in a sense which harmonizes with the subject matter and accordance with its general purpose." Id.

It has long been settled that the section of the statute discussing credit for time served prior to trial is mandatory. State v. McCord, 349 S.C. 477, 487, 562 S.E.2d 689, 694 (Ct. App. 2002). Section 24-13-40 of the South Carolina Code provides:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time

> served must be calculated from the date of the commencement of the service of the sentence. In **every case** in computing the time served by a prisoner, full credit against the sentence **must be given for time served prior to trial and sentencing**, and may be given for any time spent under monitored house arrest. Provided, however, **that credit for time served prior to trial and sentencing shall not be given**: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) **when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.**

(emphasis added). As recognized by this Court, the statute "mandates prisoners receive credit for the time they served prior to trial unless one of two exceptions exist, either: (1) the prisoner was an escapee or (2) the prisoner was already serving a sentence on a different offense. Because the language of section 24-13-40 is mandatory, a judge cannot deny a defendant credit for time served prior to trial unless one of the two exceptions applies." State v. Boggs, 388 S.C. 314, 316, 696 S.E.2d 597, 598 (Ct. App. 2002). The exception requiring interpretation in this case, and the one invoked by the solicitor, is the second one – a prisoner already serving a sentence on a different offense.

The seminal case interpreting this exception is Allen v. State, 339 S.C. 393, 529 S.E.2d 541 (2000). Ricky Lee Allen was arrested on June 4, 2006 for two counts of grand larceny and one count of malicious injury to property. Id. at 394, 529 S.E.2d at 541. He bonded out on June 22, 1996, after remaining in jail for 18 days. Id. On June 26, 1996, just four days later, he was arrested on separate charges. Id. His bond on his original charges was revoked as a result of his subsequent arrest. Id. Still in pre-trial detention, on September 12, 1996, Allen pled guilty to all offenses. Id. However, Allen did not receive credit for the time he served in jail from June 26, 1996, until September 12, 1996 on his original charges. Id. Allen filed a post-conviction relief application challenging the computation of credit for time served.

Interpreting S.C. Code Ann. § 24-13-40, the Supreme Court held Allen was entitled to credit for the time he spent incarcerated between June 26, 1996, and September 12, 1996. Id. at 395, 529 S.E.2d at 542. The Court explained that Allen was not serving any sentence at the time of his June 26 arrest. Id. Furthermore, his "bond was revoked on the first set of charges" and "[h]e was, therefore, clearly in custody on **all** charges from June 26th through September 12th." Id. at 396, 529 S.E.2d at 542 (emphasis in original). "Under the plain, unambiguous terms of the statute," the Court found "Allen [was] entitled to credit for the time served on the first set of charges between June 26th and September 12th." Id.

In accordance with Allen, supra, which presents remarkable similarities to the instant case, Appellant was entitled to 566 days in credit for time served. No one disputed Appellant was entitled to receive credit for the 41 days he spent in jail following his arrest on these charges on July 17, 2013, and prior to bonding out on August 27, 2013. See R. *(Arrest Warrants); R. * (Discharge). Appellant was arrested on shoplifting charges on December 19, 2013. Thereafter, Appellant was awaiting trial on the charges – not only for shoplifting, but for grand larceny and malicious injury to property as well. Pursuant to Allen, supra, and the unambiguous language of the mandatory statute, he was entitled to credit for the time he spent in the jail from December 19, 2013, until his trial on the shoplifting charge on March 31, 2015, a total of 467 days. Appellant admitted he was not entitled to credit for the time he spent at the Department of Corrections, serving his active sentence on the shoplifting charge. Additionally, Appellant was entitled to credit for the 99 days he spent at the local jail after completing his sentence for shoplifting, awaiting trial on these charges, which was undisputed by the solicitor. In total, Appellant was entitled to 566 days in credit for time served. The judge erred as a matter of law in denying Appellant credit. Appellant requests a remand for re-sentencing.

CONCLUSION

Concerning Issues I and II, Appellant respectfully requests this Court reverse his convictions and remand for a new trial. Concerning Issue III, Appellant respectfully requests this Court remand the matter to the trial court for a new sentencing proceeding so that Appellant may receive credit for the time he served in pre-trial detention in accordance with the mandatory provisions of the statute and controlling case law.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 25th day of August, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
AUG 25 2016
SC Court of Appeals

Appeal from York County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN KENNETH MASSEY, JR.,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial 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 Initial Brief of Appellant and Designation of Matter have been served on John Kenneth Massey, Jr., #305341, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 25th day of August, 2016.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of August, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.