STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable Alison R. Lee, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2016-001553

Trey A. Williams, #341036, ...Respondent,

v.

State of South Carolina, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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INDEX

QUESTIONS PRESENTED

I. Whether the post-conviction relief judge erred in finding Respondent satisfied his burden of proving that he did not waive his right to counsel where Respondent's prior and standby counsel testified that he explained to Respondent the dangers of self-representation.

II. Whether the post-conviction relief judge erred in finding Respondent satisfied his burden of proving that his appellate counsel was ineffective for failing to raise the issue that his waiver of counsel was invalid where Respondent made no objection to proceeding *pro se*, leaving the issue unpreserved for appellate review.

STATEMENT

Respondent is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. Respondent was indicted at the May 2010 term of the York County Grand Jury for criminal sexual conduct with a minor, first degree (2009-GS-46-2646). Erik Delaney, Esquire represented Respondent.

On April 15-16, 2010, Respondent appeared before the Honorable John C. Hayes, III, for a pretrial hearing. During that hearing, Respondent informed Judge Hayes that he wanted to proceed to trial *pro se*. After a colloquy, Judge Hayes granted Respondent's request but appointed Mr. Delaney to serve as standby counsel. Respondent requested a bench trial, after Judge Hayes explained his right to a jury trial. On May 26, 2010, the day of trial, Respondent told Judge Hayes that he changed his mind and wanted a trial by jury. App. 23-24. However, Judge Hayes denied Respondent's motion to withdraw his waiver of a jury trial. App. 24. Respondent, appearing *pro se*, proceeded to a bench trial before Judge Hayes. Judge Hayes found Respondent guilty and sentenced him to imprisonment for thirty years.

Respondent filed a notice of appeal at the South Carolina Court of Appeals. Lanelle C. Durant, Esquire, of the South Carolina Commission on Indigent Defense perfected the appeal. The Court of Appeals affirmed Respondent's conviction and sentence. State v. Williams, Op. No. 2013-UP-102 (S.C. Ct. App. filed March 13, 2013). The Remittitur was issued on April 3, 2013.

Respondent filed an Application for post-conviction relief on June 12, 2013. Respondent filed a return on or about September 13, 2013. The Honorable Alison R. Lee convened an evidentiary hearing on the application at the Moss Justice Center in York, South Carolina on November 18, 2014. Respondent was present and represented by Charles T. Brooks, III,

Esquire. Petitioner was represented by Assistant Attorney General J. Rutledge Johnson, Esquire. By an Order signed July 14, 2016, and filed July 18, 2016, the PCR Court granted relief on the grounds that Respondent did not waive his right to counsel and that Respondent's appellate counsel was ineffective for failing to raise the issue of whether Respondent validly waived his right to counsel.

STANDARD OF REVIEW

When reviewing questions of fact, this Court may affirm the post-conviction relief judge's grant relief only if there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624) (1989)). However, the Court must overturn the post-conviction relief judge if there is no probative evidence to support her findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). When reviewing questions of law, the Court conducts a *de novo* review, and must reverse the post-conviction relief judge when his decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) (quoting Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013).

ARGUMENT

I. The post-conviction relief judge erred in finding Respondent satisfied his burden of proving that he did not properly waive his right to counsel.

Underlying Facts

Prior to Respondent's trial, a hearing was held before Judge Hayes on April 15-16, 2010. Respondent was represented at the time by Eric Delaney (hereinafter "Counsel"). At this hearing, Respondent informed the trial court that he wished to have Counsel relieved, asking the trial court "Could I represent myself today? Could I be able to represent myself throughout my case today?" App. 5, ll. 22-23. Judge Hayes then had the following discussion with Respondent:

> Trial Court: Well I would have to relieve Mr. Delaney and it you want to proceed by yourself and represent yourself you can't do half and half. You either have an attorney or you don't.
>
> Respondent: Yes, sir.
>
> Trial Court: And if I relieve your attorney then you don't have one. And that's dangerous because you're not an attorney and an attorney could be of a benefit to you. And of course you've got an attorney appointed to you at no expense to you. But you have a right to hire an attorney and you also have a right to waive your right to counsel and proceed on your own if you wish. What do you wish to do?

App. 5, l. 24 – 6 l. 11.

Judge Hayes continued the matter until the following day to give Respondent ample time to discuss matters with Counsel. The following day Counsel informed the trial court that Respondent still wished to proceed *pro se*. After discussing Respondent's right to an attorney, Judge Hayes asks Respondent if he would like to proceed *pro se*. App. 13, l. 4. After Respondent answered that he would like to proceed *pro se*, Judge Hayes appointed Counsel to serve as standby counsel during the trial. App. 13, ll. 6-8. Judge Hayes informed Respondent that Counsel will sit behind him during the trial and Respondent can turn to him for questions on procedure as a resource. App. 13, ll. 9-16.

On May 26, 2010, Respondent proceeded to trial before Judge Hayes, who again asked Respondent if he wished to proceed *pro se*. App. 20, ll. 11-13. Judge Hayes then had the following discussion with Respondent:

> Trial Court: You know you have a right to an attorney. I think I explained to you that before. An attorney could be of benefit to you and even though I have relieved and there is a danger in your representing yourself since you are not an attorney. You have waived your right to an attorney on the record before. But you are still between now and Wednesday if you wish to hire an attorney you of course could do that. You understand that?
>
> Respondent: Yes, sir.
>
> Trial Court: And do you understand you have a right to a trial by jury? That is you have a right to have twelve jurors picked impartially and have them seated and have them hear the case, have the case submitted to them; make an argument to them yourself. The State would have the right to make an argument. And then I will charge them on the law and they will then deliberate and determine whether or not the evidence was sufficient for them to find you guilty of this offense beyond a reasonable doubt. Do you understand you have all those rights?
>
> Respondent: Yes, sir.
>
> Trial Court: Do you have any questions about them?
>
> Respondent: Yes, sir. So if I wanted, if I wanted an attorney I could get an attorney now?
>
> Trial Court: You waived your right to have an appointed attorney. You can hire an attorney if you wish but I will tell you that you're going to trial, noticed for trial on Wednesday, so we have a jury downstairs, so you could be tried by a jury or without a jury. I'm told by Ms. Colton you talked about going forward on a bench trial without a jury but you are going to trial on Wednesday. But if you were to hire an attorney that attorney if they were willing to take the case that's fine, but you are going to trial either with or without an attorney.

App. 20, l. 14 – 21 l. 21.

Respondent informed the trial court that he wished to proceed with a bench trial. Respondent agreed that he understood that he had the right to argue his case, the right to confront

the witnesses, the right to testify or remain silent, and to call his own witnesses. App. 22, ll. 6-10. During the trial, Respondent cross examined four of the State's five witnesses, called one witness of his own, and testified on his own behalf. After the bench trial, Respondent was found guilty as indicted.

At the PCR hearing, Respondent alleged that Counsel's performance was so ineffective that it caused him to proceed *pro se*. App. 192, ll. 21-24. Respondent testified that Counsel prevented him from making objections and advised him that he could not object to any testimony. App. 194, ll. 3-7. He further testified that he was never advised of any rules or procedures. App. 194, l. 22. Respondent then explained that disagreements with the allegations on his indictments caused him to relieve Counsel. Respondent agreed that Judge Hayes told him of the dangers of self-representation and he still chose to represent himself. App. 221, ll. 3-15. Respondent also agreed that he did not object to Judge Hayes allowing him to represent himself. App. 222, ll. 22-24.

During the PCR hearing, Counsel testified that when he was relieved, he sat with Respondent as standby counsel throughout the trial. App. 227, ll. 14-18. He testified that he did not raise any issue about Respondent's competency to go forward and represent himself. App. 227, ll. 19-21. He testified that before he was relieved, he "advised him to have a lawyer on these charges," "went over with him the danger of representing himself," and had these discussions in the holding cell. App. 228, ll. 3-5.

In response to an inquiry about whether Respondent understood the rules and the trial procedures, Counsel testified that Respondent did not seem to have many questions and "was very meticulous about writing a lot of notes, questions he was going to ask in anticipation of

these witnesses." App. 229, ll. 9-11. Counsel testified that at some point during the middle of the trial, Respondent voluntarily "just gave up and said he was not interested." App. 229, ll. 14-15.

Counsel reiterated on cross-examination that he did not see any competency issues with Respondent. App. 230, ll. 9-10. Again, he testified that he advised Respondent of the dangers of self-representation, including the potential penalties he was facing and certain trial issues such as the difficulty of cross examining doctors. App. 230, ll. 12-21. Counsel also testified that he advised Respondent against moving to relieve and told him on several occasions that it was not in his best interest to represent himself. App. 230, l. 24 – 231, l. 1; App. 233, ll. 4-5.

During the State's closing argument at the PCR hearing, the State argued that there was no objection made during trial concerning Respondent's competency and nothing presented at the PCR hearing regarding his competency other than speculation. App. 235, l. 22 – 236, l. 5. The State also argued that any issue regarding ineffective assistance of appellate counsel should fail because nothing was preserved at trial for appellate review. App. 237, ll. 4-8.

The PCR Court found that the Trial Court did not specifically address the disadvantages of Respondent proceeding *pro se* and that Respondent did not have a sufficient background to understand these dangers. The PCR Court also found appellate counsel ineffective for failing to raise the issue of Respondent's waiver of counsel on direct appeal.

Discussion

The PCR Court erred in finding that Respondent satisfied his burden of proving that he did not properly waive his right to counsel when he relieved Counsel and proceeded *pro se*. For the foregoing reasons, Petitioner would assert that there was no evidence to support the PCR Court's conclusion that Respondent did not properly waived his right to counsel as he was informed of the dangers of self-representation by the judge and by Counsel and because there

was no evidence presented that Respondent did not have sufficient background to understand the disadvantages of self-representation.

To establish a valid wavier of counsel, [an accused must] be (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation. Bridwell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992) (citing Faretta v. California, 422 U.S. 806 (1975)).

"The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding." State v. McLauren, 349 S.C. 488, 493, 563 S.E.2d 346, 348 (Ct. App. 2002) (citing State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997)). If the trial judge fails to make a "specific inquiry . . . addressing the disadvantages of proceeding *pro se,* this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." Bridwell, 306 S.C. 518, 413 S.E.2d 30 (citing Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990); Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990)).

In McLauren, the South Carolina Court of Appeals noted that courts have considered a list of factors "in determining if an accused had sufficient background to understand the disadvantages of self-representation[.]" 349 S.C. 488, 563 S.E.2d 346. These factors include:

1. The accused's age, educational background, and physical and mental health;
2. Whether the accused was previously involved in criminal trials;
3. Whether he knew of the nature of the charge and of the possible penalties;
4. Whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case;
5. Whether he was attempting to delay or manipulate the proceedings;
6. Whether the court appointed stand-by counsel;
7. Whether the accused knew he would be required to comply with the rules of procedure at trial;
8. Whether he knew of legal challenges he could raise in defense to the charges against him;
9. Whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and
10. Whether the accused's waiver resulted from either coercion or mistreatment.

McLauren, 349 S.C. 488, 494-95, 563 S.E.2d 346, 349 (citing State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992).

In this case, the entire record supports the fact that Respondent made a knowing and intelligent waiver of counsel. Respondent moved to have Counsel relieved and Judge Hayes explained that he had the right to counsel and that it would be dangerous to proceed *pro se* because Respondent was not an attorney. He explained that it would benefit him to have an attorney but he could proceed *pro se* if he so desired. Judge Hayes then continued the case to the following day to allow Respondent sufficient time to discuss his decision to proceed *pro se* with Counsel. The following day, Judge Hayes again went over Respondent's right to counsel and that having an attorney would benefit him and proceeding without an attorney would be dangerous since Respondent is not an attorney. Finally, at Respondent's insistence, Judge Hayes granted Respondent's request to relieve Counsel and appointed Counsel to sit as standby counsel.

Immediately prior to trial, Judge Hayes again inquired about Respondent's decision to proceed *pro se*. Judge Hayes again went over his right to counsel and explained that having an attorney would benefit him and proceeding without an attorney would be dangerous since Respondent is not an attorney.

Respondent was also made aware of his right to counsel and the dangers of self-representation through his discussions with Counsel. Counsel explained at the pre-trial hearing that he explained to Respondent his concerns about Respondent representing himself at trial. Counsel also testified at the PCR hearing that he did not have any concerns about Respondent's competency, advised Respondent about his right to counsel, and discussed the dangers of self-representation.

Accordingly, it is clear that Respondent was made aware of his right to counsel and the dangers of self-representation through the trial judge's many inquiries and, more importantly, through his discussions with Counsel. Although the judge's inquires may have been brief, he made these inquiries at least three times prior to trial. Petitioner contends that the PCR Court erred because there was probative evidence that Respondent was "apprised of his rights by some other source" through his discussions with Counsel. See Bridwell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992).

Additionally, there was no evidence in the record to suggest that Respondent was not competent to understand his rights and proceed *pro se*, as Counsel specifically testified that he never had an issue with Counsel's competency. The PCR Court erred in finding that "[d]uring the PCR hearing, [Respondent] exhibited little understanding of criminal proceedings," as Respondent's understanding at the PCR hearing had no bearing whatsoever on whether Respondent had sufficient background to understand the dangers of self-representation at the time of trial. The PCR Court also erred by giving any consideration to the fact that Respondent testified that he was mentally challenged or had an intellectual disability at the time of trial. The PCR Court considered this fact but also acknowledged that the only evidence to support this contention was Respondent's self-serving testimony. Thus, there was no evidence presented outside of the self-serving testimony that Respondent was not competent to understand his rights and proceed *pro se*, and any consideration of this fact would be speculation. Additionally, any finding that Respondent did not understand the criminal procedure because he did not cross examine witnesses is refuted by the fact that Counsel testified that Respondent was preparing cross-examination questions for witnesses but voluntarily "gave up" in the middle of trial.

The PCR Court also erred by misapplying Watts v. State, 347 S.C. 399, 556 S.E.2d 368 (2001). The PCR Court cited Watts, which held that a solicitor's testimony that the trial judge "would have warned" the PCR applicant about the dangers of self-representation was insufficient to satisfy the Faretta requirements. The PCR Court appeared to find that this was similar to Counsel's testimony that he would have informed Respondent of the dangers of self-representation. It is clear from the record that Counsel's explanation is not speculative as he testified that he discussed the dangers of self-representation, the possible penalties, trial issues, and issues concerning cross examining the doctors. See App. 230. This is in no way analogous to a solicitor speculating what a judge would have explained to a defendant.

The PCR Court also erred in finding that Respondent was not apprised of the dangers of self-representation by some other source. The PCR Court misapplies Bridwell, which held that if the trial judge fails to make a "specific inquiry . . . addressing the disadvantages of proceeding *pro se,* this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." The PCR Court erred in holding that the record "did not reflect that [Respondent] was made aware of the dangers of self-representation by a source outside [Counsel] or the Trial Judge." App. 257. Petitioner contends that "some other source" described in Bridwell means a source other than the trial judge and does not mean, as the PCR Court found, that is must be a source other than the trial judge and the attorney. In this case, there is evidence in the record, specifically from Counsel's testimony, that he explained the dangers of self-representation, and the PCR Court erred in finding there must be evidence from "some other source" aside from Counsel's testimony. For the above reasons, Petitioner contends there is no evidence to support the PCR Court's finding that Petitioner did not knowingly and intelligently waive his right to counsel.

II. The post-conviction relief judge erred in finding Respondent satisfied his burden of proving that appellate counsel was ineffective for failing to raise the issue that his waiver of counsel was invalid.

The PCR Court erred in finding that Respondent satisfied his burden of proving that appellate counsel was ineffective for failing to raise the issue that his waiver of counsel was invalid. This Court has held that "appellate counsel is not ineffective for failing to raise on appeal an issue that was not preserved for review." Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005). The issue of Respondent's waiver of counsel was not briefed in Respondent's direct appeal. The PCR Court erred in finding that this issue would likely have been meritorious on appeal as it overlooked the fact that it was not preserved for review. Respondent admitted during the PCR hearing, and it is clear from the record, that he never objected to the Trial Court allowing him to represent himself. App. 222, ll. 22-24. Accordingly, there was no evidence to support the PCR Court granting relief on this basis as this issue was not preserved for appellate review.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant certiorari to review the post-conviction relief judge's erroneous granting of post-conviction relief.

Respectfully submitted,

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February 10, 2017.

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TREY A. WILLIAMS, #341036,

RESPONDENT,

v.

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PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Writ of Certiorari and Appendix** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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This 10th day of February, 2017.

JOCELYN BAKER
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2016-001553