STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Colleton County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALBERT EDWARD SIDERS,

APPELLANT

APPELLATE CASE NO 2015-000995

AMENDED INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying Sider's motion to relieve counsel and failing to advise Siders of his right to represent himself *pro se*?

STATEMENT OF THE CASE

Appellant Albert E. Siders was indicted by the Colleton County Grand Jury for armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. R. * (Indictments).

On April 20, 2015, Siders filed a Notice of Motion and Motion to Relieve Counsel. R. * (*Pro Se* Motion Apr. 20, 2015). A pre-trial hearing was held before the Honorable Thomas W. Cooper, Jr., but the motion to relieve counsel was denied. Pre-Trial Tr. 1 – 13; Trial Tr. 1 – 24.

On April 20-22, 2015, Siders proceeded to trial before the Judge Cooper and a jury. Siders was represented by David Mathews, and the state was represented by assistant solicitors Steve Knight and Reed Evans. Trial Tr. 1. The jury found Siders guilty of the indicted offenses. Trial Tr. 270 – 271. Judge Cooper sentenced Siders to concurrent terms of life imprisonment without parole for armed robbery and kidnapping. Trial Tr. 282. Pursuant to S.C. CODE ANN. § 16-23-490, Judge Cooper did not impose a sentence on the weapons offense. R.* (Solicitor's Memo Apr. 22, 2015).

On May 13, 2016, Appellant filed his original initial brief of appellant. The state filed its original initial brief of respondent on July 25, 2016, to which Appellant replied on September 6, 2016. Subsequent to the filing of the initial briefs, but prior to the filing of the record on appeal, counsel for Appellant became aware of an additional transcript relevant to the issue raised in the original briefs. On September 12, 2016, Appellant requested an abeyance to obtain the transcript. On December 15, 2016, following receipt and review of the transcript, Appellant filed a motion to withdraw the original briefs and file an amended brief of appellant and designation of matter. By Order filed January 26, 2017, this Court granted the motion to withdraw the original briefs and ordered that the amended initial brief and designation be filed within thirty days of the Order.

This amended brief of appellant follows.

ARGUMENT

The trial court erred in denying Sider's motion to relieve counsel and failing to advise Siders of his right to represent himself *pro se*.

Introduction

The trial judge erred in denying Sider's pre-trial motion to relieve trial counsel. Siders had filed a civil lawsuit against Mathews in the federal court creating a potential conflict of interest. Rather than exploring the nature of the suit, the trial judge erroneously ruled that the pendency of a grievance or civil suit against one's counsel could not create a conflict of interest. The trial judge also failed advised Siders of his right to proceed *pro se*. Siders explained that Mathews had spent a very limited amount of time with him and that he had no confidence in Mathews. Siders never asked for appointment of another attorney and signed his motion "Albert E. Siders PRO SE, Defendant." See R. * (*Pro Se* Motion Apr. 20, 2015). The trial judge's failure to properly consider the conflict of interest and advise Siders regarding his right to proceed *pro se* was error. Siders is accordingly entitled to a new trial.

Relevant Facts

Siders admitted that he entered a BP gas station store, pulled out a BB gun, and demanded money from the clerk. However, he testified that he engaged in that conduct while under duress from two black males, who found out that Siders had worked as a confidential informant for the drug enforcement task force the prior year. Siders testified that the men were setting him up in retribution for the controlled buys he made as a confidential informant from Sharonda Mitchell and Celestra "Cornbread" Rivers. Trial Tr. 166 – 189. Though Siders had a ski mask when he entered the BP, he did not pull it down to cover his face and looked directly at the surveillance camera. Siders also did not take the store clerk's cell phone before leaving the store, but rather told her that

he knew that she was going to "call the cops" and that was her job. Trial Tr. 179, ll. 12-16; see also State's Ex. 4 (Surveillance Video), on file with this Court.

Siders made a pre-trial motion to relieve his public defender, David Mathews, citing both a failure to communicate and a pending civil lawsuit Siders filed against Mathews in federal court. Pre-trial Tr. 1 – 13; Trial Tr. 3 – 24; see also R. * (*Pro Se* Motion Apr. 20, 2015). Siders explained that during the fourteen months he had been incarcerated, Mathews had only seen him three times – July 20, 2014, the day before his original trial date; July 21, 2014, his original trial date; and April 7, 2015, approximately two weeks prior to his new trial date of April 20, 2015. Siders said that because of their lack of communication, he had lost confidence in Mathews. He also filed a civil suit against Mathews in the federal district court in Greenville, South Carolina. Pre-trial Tr. 4, l. 1 – 5, l. 12.

Mathews claimed that he had also seen Siders once the week prior to April 20, 2015 and that he was "ready to try the case." Pre-trial Tr. 5, ll. 13-16. Mathews said that he had reviewed the twenty-page letter that Siders sent to federal judge David Norton, which Mathews said explained "really everything about the case that anyone could ever want to know and then some." Pre-trial Tr. 5, ll. 16-21; see Court's Ex. 1 (Siders' letter). Mathews said that there was not anything else to talk to Siders about and that based upon the letter, he issued two subpoenas,[1] both of which were served. Pre-trial Tr. 5, l. 21 – 6, l. 2. Mathews went on to lament that none of his clients think that he spends enough time with them, but that three times was more than he sees a lot of his clients. Pre-trial Tr. 6, ll. 2-19.

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[1] Mathews later referenced subpoenas that he issued for Celestra "Cornbread" Rivers and Officer Mike Orella. Trial Tr. 4, l. 16 – 5, l. 9. "Mike Orella" appears to have been a reference to "Edward Marcurella." Trial Tr. 147 – 162.

Regarding discovery, Mathews said that Siders had "seen everything in the file" and been given copies. Pre-trial Tr. 6, ll. 20-25. Regarding the lawsuit, Mathews said that he had not been served with anything but provided Judge Cooper with some papers handed to him by Siders. Pre-trial Tr. 7, l. 1 – 9, l. 2. After reviewing the documents, Judge Cooper asked Siders what actions he had requested that Mathews had not done on his behalf. Siders said that there were three warrants related to his case that Mathews had not obtained but requested that any further discussions be conducted *in camera*. Pre-trial Tr. 9, l. 3 – 12, l. 9. Judge Cooper agreed to set the case aside and recall it later in the afternoon. Pre-trial Tr. 12, l. 10 – 13, l. 14.

The case was re-called with only essential court personnel present in the courtroom. Mathews asked if he could provide a brief summary but said: "And then I know he wants to be heard, I have no doubt of that." Trial Tr. 3, ll. 2-18. Mathews said that the case involved an armed robbery of a convenience store. Trial Tr. 3, ll. 20-23. He said that "the armed robber walks into the thing, shows a gun and looks face-on into the camera." Trial Tr. 3, ll. 23-25. Siders was quickly identified as a suspect by police and explained the reason for his actions in a letter to Judge Norton and statements to various other individuals. Trial Tr. 4, ll. 1-6. Siders letter explained that he had spent the earlier portion of the day with two men, one of whom was called "Dread." They asked Siders if he was an informant and one of them made a phone call to Celestra "Cornbread" Rivers, a drug dealer who was arrested after selling drugs to Siders when Siders was acting as a confidential informant. The charges against Rivers were ultimately dismissed. After getting off of the phone with Rivers, the men told Siders that he was going to go rob the store or they would kill him. Trial Tr. 4, l. 6 – 5, l. 20.

Mathews explained that Siders feared that the men would have Siders killed if he testified, leaving him in a dilemma of either accepting the state's twenty year plea offer or proceeding to

trial, at which he would have to testify to prove coercion, to face a mandatory sentence of life without parole. Trial Tr. 5, l. 21 – 6, l. 21. Mathews said: "It's been difficult, because Mr. Siders really really really really really wants to be heard and he wants to be heard in a great deal of detail. And I tried to explain the mechanics of, it's difficult to get through." Trial Tr. 6, l. 23 – 7, l. 2.

Siders said that Mathews "basically . . . covered it" but explained more about his retention as a confidential informant, how Rivers and his co-defendant Sharonda Mitchell a/k/a Wanda Moochry knew that Siders made the undercover buy, and his lack of protection from law enforcement when rumors circulated in the community that Siders was working with the police. Trial Tr. 7, l. 6 – 15, l. 12. Siders said that he was forced to rob the store and that the men only gave him a BB gun so that he would not be able to defend himself against them. They also had a small video camera, which he believed they used to record him committing the robbery. Siders explained that he purposefully did not pull down the mask and that he looked directly into the camera because he knew that he could explain that he was forced to commit the robbery. Trial Tr. 15, l. 13 – 20, l. 15. Judge Cooper responded that if Siders decided to go forward with a jury trial, he could explain that to the jury and then it would be up to the jury whether they believed him or not. Trial Tr. 20, l. 16 – 21, l. 2.

Judge Cooper then issued his ruling denying Sider's motion to relieve Mathews. Judge Cooper said: "[Mathews] is . . . familiar with your case, and he can . . . get the witnesses that you need and he's subpoenaed those witnesses. He can't tell what they're going to say. He has no control over that. They're going to say whatever they're going to say." Trial Tr. 21, ll. 4-10. Judge Cooper explained to Siders that he would be able to testify if he chose to but would be subject to cross-examination by the state. The jury would then decide if the state met its burden

of proof beyond a reasonable doubt after hearing everything. Trial Tr. 21, l. 11 – 22, l. 5. Judge Cooper further ruled:

> Mr. Mathews is prepared to try your case. He knows about your case. He's read the 20-page letter, whatever it happens to be, that says these things, I imagine, and he's familiar with the background. He's an experienced trial lawyer. He can -- he can present this case. So your motion to have him relieved is respectfully denied.
>
> . . .
>
> I do not find that you have shown that Mr. Mathews is ill-prepared or not prepared to present your case for you today. As a matter of fact, it appears that most of the presentation of the case is going to be your side, what you've names you have given him, to -- to, hopefully, support what you're saying. Whether they do or not is beyond his control and beyond yours as well. But the motion to have Mr. Mathews relieved as your lawyer is respectfully denied.

Trial Tr. 22, l. 6 – 23, l. 6.

Siders inquired as to whether the civil lawsuit that he filed against Mathews created a conflict of interest. Trial Tr. 23, ll. 12-17. Judge Cooper responded "no" and explained that "some folks take advantage of that and they file grievances against their lawyers on the eve of trial in the hopes that that -- that that would be a reason for their lawyer to step aside." Trial Tr. 23, ll. 18-23. He ruled that neither a grievance or a lawsuit constitutes a conflict of interest, "especially if it has been raised for the purpose of trying to create a conflict of interest." Trial Tr. 23, l. 23 – 24, l. 9.

Siders then proceeded to trial with Mathews as counsel. Based on Siders' statement during the pre-trial hearing, the solicitor made two motions for the defense to be precluded from making any reference to life without parole, even as it related to Siders' claim of duress and coercion, which were granted without opposition from trial counsel. Trial Tr. 129, l. 8 – 130, l. 14; Trial Tr. 141, l. 12 – 142, l. 21. In addition to Siders' testimony, the defense presented testimony from Edward Marcurella, the narcotics officer who Siders worked with in February 2013, and from Mary Blakely, Siders' sister who was aware of rumors that Siders was a "snitch."

Trial Tr. 147 – 191. Siders was convicted and sentenced to life imprisonment without the possibility of parole under the recidivist statute. Trial Tr. 270, l. 11 – 271, l. 10; Trial Tr. 277, l. 8 – 282, l. 20.

Discussion

The trial judge erred in denying the motion to relieve counsel where he failed to properly evaluate the potential conflict of interest and failed to advise Siders regarding his right to proceed *pro se*. With respect to the civil suit that Siders had filed against Mathews and others, Judge Cooper ruled that the "filing a grievance or even filing a civil lawsuit which is based on grievance **will not constitute a conflict of interest**." Trial Tr. 24, ll. 3-9 (emphasis added). He told Siders that "some folks" try to "take advantage of that and they file grievances against their lawyers on the eve of trial in the hopes that [it] would be a reason for their lawyer to step aside." Trial Tr. 23, ll. 18-23. He continued: "That is not a reason and it . . . has [been] held not to constitute a conflict of interest, especially if it has been raised for the purpose of trying to create a conflict of interest." Trial Tr. 23, l. 23 – 24, l. 2.

In Richardson v. State, 377 S.C. 103, 107, 659 S.E.2d 493, 495 (2008), our Supreme Court warned of a tactic used in PCR matters whereby an applicant files a complaint against appointed counsel with the Office of Disciplinary Counsel and then files a motion to relieve counsel based on the complaint. The Richardson Court wrote: "We caution the bench that the filing of a disciplinary complaint should not result in *automatic* removal of appointed counsel." 377 S.C. at 107, 659 S.E.2d at 495 (emphasis added). Rather, the Court instructed: "[T]he basis for the complaint should be **explored** and the PCR judge should exercise discretion in determining whether the basis for the complaint constitutes sufficient cause to relieve counsel." Id. Notably, the right to counsel in a PCR case is statutory rather than constitutional, calling into

question the applicability of Richardson. See Aice v. State, 305 S.C. 448, 452 n. 2, 409 S.E.2d 392, 395 n. 2 (1991). Even if applicable, Richardson does not stand for the proposition that the filing of a grievance or lawsuit based on a grievance "will not constitute a conflict of interest." See Trial Tr. 23, l. 18 – 24, l. 9. Rather, it requires that the basis of the complaint be explored by the judge. Though Judge Cooper noted that some defendants use the filing of a grievance or suit to "take advantage" of the system or to "create a conflict of interest," there was no evidence that Siders' suit was tactical rather than based on a genuine breakdown in communication.

Judge Cooper further erred in failing to advise Siders regarding his right to proceed *pro se*. "The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975); U.S. CONST. AMEND. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence"). "[T]he Sixth Amendment right to the assistance of counsel implicitly embodies a 'correlative right to dispense with a lawyer's help.'" Id. at 814 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)).

"A South Carolina 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); S.C. Const. art. I, § 14 ("The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, **and to**

be fully heard in his defense by himself or by his counsel or by both." (emphasis added)); see also S.C. CODE ANN. § 17-3-10; S.C. CODE ANN. § 40-5-80. The Faretta Court ruled that 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." 422 U.S. at 819. To that end, the Court explained:

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel represents the defendant only through a tenuous and unacceptable legal fiction. **Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.**

Id. at 820–21 (internal citations omitted) (emphasis added). The Faretta Court recognized that it is the defendant – not his attorney or the solicitor – who will "bear the personal consequences of a conviction." Id. at 834. Thus, it is the defendant "who must be free personally to decide whether in his particular case counsel is to his advantage." Id. **While a defendant's decision to conduct his own defense may be to his own detriment, "his choice must be honored out of that respect for the individual which is the lifeblood of the law."** Id. (internal quotations omitted) (emphasis added). Even so, such a waiver of the right to counsel must be knowing and intelligent, with awareness of the dangers and disadvantages of self-representation. Id. at 835.

The right to self-representation must be preserved even if the court believes that a defendant will benefit from the advice of counsel. State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999); see also United States v. Singleton, 107 F.3d 1091 (4th Cir. 1997). If the

request proceed *pro se* is made after trial has begun, grant or denial of the right to proceed *pro se* was within the sound discretion of the trial judge. Fuller, 337 S.C. at 241. No matter when the request is made, "[i]t is incumbent upon the trial court to determine whether the request is made for purposes of delay or to gain a tactical vantage, and whether the lateness of the request may hinder the administration of justice." Fuller, 337 S.C. at 241 (quoting People v. Mogul, 812 P.2d 705, 709 (Colo.App. 1991).

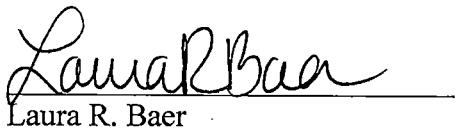
Here, the motion to relieve counsel was made before the selection of the jury. Though the case had been called for trial on July 21, 2014, the solicitor gave no indication that a brief continuance of the case would place any substantial burden on the state. See Motions Tr. 1 – 9. The state's case in chief and in rebuttal consisted primarily of police officers, with the exception of the convenience store clerk. Trial Tr. 94 – 135; Trial Tr. 192 – 207. Regarding the genuineness of the motion, Siders explained his dissatisfaction with trial counsel Mathews due to a breakdown in their communication. Even Mathews admitted that communication with Siders was "difficult." Trial Tr. 6, l. 23 – 7, l. 2.

Assuming *arguendo* that Siders' complaints were not sufficient to warrant substitution of counsel, it is notable that Siders never made such a request. Rather, Siders' motion itself indicated a desire to proceed *pro se* sufficient to trigger Faretta. R. * (*Pro Se* Motion Apr. 20, 2015); State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) ("So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta."); cf. State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991) ("The right to appear *pro se* must be clearly asserted by the defendant before trial."). "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 (citing State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998)). The trial court's ruling that Siders failed to show that Mathews was "ill-prepared" illustrates his failure to apply the proper standard. See Trial Tr. 22, l. 6 – 23, l. 6. Siders was not required to convince the trial court that he would do a better job at representing himself than Mathews. Faretta, 422 U.S. at 836. By failing to conduct the proper inquiry, the trial judge effectively forced Siders to accept a state-appointed public defender against his will, in violation of the federal and state constitutions. See id. This error mandates reversal of Siders' convictions. Barnes, 407 S.C. at 37.

CONCLUSION

Based on the foregoing, Appellant Albert Edward Siders respectfully requests that this Court reverse his convictions and remand his case for a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of February, 2017.

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V.

ALBERT EDWARD SIDERS,

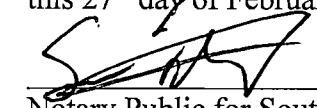
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Amended Initial Brief of Appellant and Amended Designation of Matter in the above referenced case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Albert E. Siders, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 27th day of February, 2017.

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of February, 2017.



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