

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Supreme Court County
Honorable R. Keith Kelly, Circuit Court Judge

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JEROD KEYKENDALL HARRIS,

S.C. SUPREME COURT
PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2014-002693

BRIEF OF PETITIONER

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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ISSUE PRESENTED

Did the PCR court err in finding that Petitioner knowingly, voluntarily, and intelligently waived his right to PCR counsel where the PCR court failed to conduct a *Faretta*¹ hearing to ensure that Petitioner was aware of the dangers and disadvantages of self-representation?

¹ 422 U.S. 806, 95 S.Ct. 2525 (1975).

STATEMENT

Indictment and Guilty Plea

On May 5, 2011, Petitioner was indicted for one count of attempted murder. App. 60 - 61. On May 31, 2012, Petitioner pled guilty as indicted before the Honorable Mark J. Hayes. App. 4 - 21.

Robert Hall represented Petitioner and Assistant Solicitor Abel Gray represented the State. Pursuant to a negotiated plea agreement, Judge Hayes sentenced Petitioner to fifteen years imprisonment. App. 19, ll. 1-24.

PCR Application

On November 5, 2012, Petitioner filed an application for PCR alleging that, among other grounds, plea counsel was ineffective for failing to investigate his case and for providing Petitioner with erroneous advice resulting in an involuntary guilty plea. App. 22 - 28. The State filed a Return on February 25, 2014. App. 29 - 33.

PCR Waiver of Counsel Hearing

On April 7, 2014, a hearing was held before the Honorable J. Derham Cole. App. 34 - 39. Petitioner's court-appointed counsel, J. Brandt Rucker, was present and Assistant Attorney General Suzanne H. White represented the State.

PCR counsel informed the court that Petitioner wished to "have a private, retained attorney at this time." App. 36, ll. 8-11. Petitioner confirmed this and noted, "I didn't feel comfortable . . . that [PCR counsel] was in my best interest. . ." *Id.* at ll. 14-16.

The Court asked Petitioner:

Q: [D]o you understand that what you're asking me to do today is to terminate [PCR counsel's] representation of you?

A: Yes, sir.

Q: In other words, you've got a court-appointed lawyer, and if you terminate his services today, then you're telling me you don't want a court-appointed lawyer, you're going to hire somebody.

A: Yes, sir.

Q: [i]f I terminate his services today and I continue [the hearing] so you can hire a lawyer, do you understand in the future you're not going to get another court-appointed lawyer?

You'll either have to hire one or you'll be representing yourself.

A: Okay.

App. 36, l. 19 - 38, l. 3. The court relieved counsel and ruled that "[Petitioner] is going to hire counsel. And he will not be permitted to have another court-appointed lawyer." App. 38, ll. 1-2. The court never inquired about Petitioner's education level and never warned Petitioner about the hazards of self-representation.

PCR Hearing

On November 4, 2014, Petitioner's evidentiary hearing was held before the Honorable R. Keith Kelly. App. 40 - 53. Petitioner represented himself and Assistant Attorney General Suzanne White again represented the State. App. 40 - 53. Petitioner and plea counsel both testified at the hearing.

At the beginning of the hearing, the PCR court asked Petitioner if he was representing himself. App. 42, ll. 5-13. Petitioner replied that "I'm going to have to, sir. . . I was told I had to." *Id.* at ll. 10-12. The State then explained to the court:

And, Your Honor, just to clarify. He had an attorney that had been appointed in our last term. He asked for that attorney to be relieved. And Judge [Cole] informed him that, if he wanted to relieve his appointed attorney, he would

not be allowed to have another appointed attorney, but he could retain an attorney or proceed *pro se*.

Id. at ll. 15-19.

Testimony of Petitioner

After being sworn, Petitioner then attempted to explain why he was entitled to post-conviction relief, "I had a lot of errors and was denied - I was denied due process under the law and under equal protection - the equal protection clause, you know, due to ah -- my -- my indictment wasn't convened when they said it was convened." App. 44, ll. 1-4. Petitioner argued that his indictment was "annulled". *Id.* at ll. 5-13.

When prompted by the court, Petitioner summarized that his indictment was "null and void." App. 45, ll. 23 - 46, ll. 3. On cross-examination, Petitioner testified that plea counsel never explained the Grand Jury process to him or how a Grand Jury issues an indictment. App. 46, ll. 14 - 47, ll. 6.

Testimony of Plea Counsel

Petitioner asked plea counsel, "was you aware of the indictment being - being - that it wasn't - that it wasn't valid?" App. 47, ll. 21-23. Plea counsel countered that he did not know how the indictment was invalid or defective. App. 48, ll. 8-21.

After a series of back-and-forth questions with plea counsel, Petitioner eventually clarified that he was alleging that plea counsel failed to determine whether Petitioner was indicted within ninety days of the alleged attempted murder. App. 48, ll. 23 - 49, ll. 7.

Plea counsel stated that there was no such ninety day deadline for issuing an indictment. App. 50, ll. 4-7. Petitioner responded that he disagreed with plea counsel, but ended his examination. *Id.* During cross-examination, plea counsel stated that he did not believe that Petitioner's indictment was invalid. App. 51, ll. 1-18.

The hearing began at 9:58 a.m. and ended at 10:14 a.m.

Order of Dismissal

On December 2, 2014, the PCR Court denied Petitioner's application by written order. App. 54 - 58. The order specifically noted that Petitioner, "was advised that if he chose to relieve appointed counsel, he would be required to either retain an attorney or proceed *pro se*." App. 54, n. 1. The order summarily concluded that Petitioner had failed to prove plea counsel was ineffective for not challenging the validity of Petitioner's indictment. App. 56 -58.

ARGUMENT

The PCR court erred in finding that Petitioner knowingly, voluntarily, and intelligently waived his right to PCR counsel where the PCR court failed to conduct a *Faretta*² hearing to ensure that Petitioner was aware of the dangers and disadvantages of self-representation.

Introduction

At the April 7, 2014 hearing, the court failed to inform Petitioner of the risks and disadvantages of representing himself. App. 36, ll. 8 - 38, ll. 2; *see also State v. Boykin*, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996) (a trial judge must determine if the waiver is the product of a knowing, voluntary, and intelligent decision). The court only explained that if Petitioner was unable to secure private counsel, he would have to represent himself. App. 37, ll.6-23.

The Court did not expound on the numerous risks that a *pro se* inmate faces by electing to represent himself. *see also Whitehead v. State*, 310 S.C. 532, 426 S.E.2d 315 (1992) (holding that since trial court reached the merits of Petitioner's PCR application, the court should have either appointed counsel or obtained a knowing and intelligent waiver of the right to counsel). *See Wroten v. State*, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) ("the ultimate test [for determining a valid waiver] is not the trial judge's advice but rather the defendant's understanding.").

Therefore, the PCR court erred in allowing Petitioner to represent himself because there was no evidence that Petitioner knowingly, voluntarily, and intelligently, waived his right to counsel.

Discussion:

The right to counsel for a criminal defendant and the right to counsel for a post-conviction relief ("PCR") applicant arise from different legal authorities. Nevertheless, our case law has treated the two rights are closely analogous. As such, our courts consistently apply doctrines addressing a

² 422 U.S. 806, 95 S. Ct. 2525 (1975).

criminal defendant's right to counsel to questions regarding a PCR applicant's right to counsel.

In a criminal prosecution, the Sixth and Fourteenth Amendments of federal constitution and Article I, Section Fourteen of the South Carolina 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. *See also* S.C. Code Ann. § 17-3-10.

The right to counsel for an indigent applicant in a PCR proceeding is guaranteed by S.C. Code Ann. § 17-27-60. An indigent PCR applicant is also entitled to the appointment of counsel under Rule 71.1(d), SCRPC, "[i]f, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent."

Concomitant with the right to representation by counsel, criminal defendants and PCR applicants have the right to represent themselves. However, the right to self-representation is not absolute. A defendant or applicant may be denied the right to represent himself by "deliberately engage in serious and obstructionist misconduct" during the case. *See Faretta*, 422 U.S. at 834-35, 96 S.Ct. at 2541 n. 46; *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, 104 S.Ct. 994, 950-951 n. 8 (1984).

Moreover, neither indigent defendants nor indigent PCR applicants have the right to counsel of their choice. *State v. Jones*, 270 S.C. 587, 243 S.E.2d 461 (1978) (holding that indigent defendant is entitled to representation by counsel, not by counsel of his choosing). As this Court noted in *Richardson v. State*:

While there is no constitutional obligation to appoint counsel in a PCR matter, in South Carolina, if a PCR application presents questions of law or fact requiring a hearing, and the applicant is indigent, **state law provides that counsel must be appointed or a knowing, intelligent waiver of the right to counsel must be obtained.** However, a PCR applicant is not entitled to appointed

counsel of choice. While an applicant may have the right to reject or discharge court-appointed counsel and proceed *pro se* or retain his own counsel, he does not have the right, without a showing of satisfactory cause to refuse or dismiss the counsel appointed and have other counsel appointed.

377 S.C. 103, 659 S.E.2d 493 (2008) (affirming PCR court's refusal to relieve appointed counsel) (*citations omitted*) (*emphasis added*).

Our courts have long recognized that a litigant may knowingly waive constitutional or statutory rights. *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 495, 685 S.E.2d 600, 607, *opinion clarified*, 386 S.C. 274, 688 S.E.2d 120 (2009) (holding that governor knowingly waived statutory right to keep Commission's investigatory papers and other documents related to ethics complaint against governor); *see also State v. Torrence*, 317 S.C. 45, 46, 451 S.E.2d 883, 883 (1994) (a capital defendant, who is competent, may waive his right to appeal if the decision to do so is knowing, intelligent, and voluntary.).

Regardless of the source of the right being waived, a waiver must be an intentional and voluntary relinquishment of a known right. *Maxwell v. Genez*, 350 S.C. 563, 571, 567, S.E.2d 496, 500 (Ct. App. 2002); *Huckaby v. State*, 305 S.C. 331, 408 S.E.2d 242 (1991) (*abrogated on other grounds by, Turner v. State*, 384 S.C. 451, 682 S.E.2d 792 (2009)) (waiving right to counsel in probation revocation hearings); *see also In re Christopher H.*, 359 S.C. 161, 166, 596 S.E.2d 500, 503 (Ct. App. 2004) (holding that record did not show that juvenile knowingly waived constitutional right to counsel).

"[I]t is the responsibility of the trial judge to determine whether there has been an intelligent and competent waiver." *State v. Bateman*, 296 S.C. 367, 369, 373 S.E.2d 470, 471 (1998) (*citations omitted*); *see also Boykin*, 324 S.C. 552, 478 S.E.2d 689 (a trial judge must determine if the waiver is the product of a knowing, voluntary, and intelligent decision). Courts indulge every reasonable

presumption against waiver of fundamental rights, and do not presume acquiescence in the loss of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938).

South Carolina law does not distinguish between the level of knowledge required for the waiver of a statutory right and that required for the waiver of a constitutional right. *Sanders v. State*, 412 S.C. 611, 773 S.E.2d 580, n. 2 (2015) (holding that a defendant who waives statutory right to collateral review is entitled to challenge whether advice received in agreeing to waiver was constitutionally defective and cautioning against guilty pleas that require defendant to waive ineffective assistance of counsel claims); compare *State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014) (declining to adopt a higher competency standard for waiver of right to counsel than that of competency to stand trial).³

The only proper inquiry following a timely invocation of the right to self-representation is that mandated by *Faretta*. *State v. Winkler*, 388 S.C. 574, 698 S.E.2d 596 (2010). To establish a valid waiver of the right to counsel by a PCR applicant, the applicant must be (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. *Faretta*, 422 U.S. at 807, 95 S.Ct. at 2527; see also *Whitehead*, 310 S.C. at 535, 426 S.E.2d at 317 (holding that, in a PCR proceeding, the trial court should have either appointed counsel or obtained a knowing and intelligent waiver of the right to counsel).

In the absence of a specific inquiry by the trial judge addressing the disadvantages of proceeding *pro se*, appellate courts will look to the record to determine whether a petitioner had sufficient background or was apprised of his rights by some other source. *State v. Bridwell*, 306

³ A notable exception to this general rule requiring a contemporaneous objection is found when the record does not reveal a knowing and intelligent waiver of the right to counsel. A *pro se* defendant cannot be expected to raise this issue without the aid of counsel. *State v. Rocheville*, 310 S.C. 20, 24, 425 S.E.2d 32, 35 (1993).

S.C. 518, 413 S.E.2d 30 (1992). "While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, **the ultimate test [for determining a valid waiver] is not the trial judge's advice but rather the defendant's understanding.**" *Wroten*, 301 S.C. at 294, 391 S.E.2d at 576. (*emphasis added*).

Relevant factors for assessing Petitioner's understanding of the consequences of self-representation 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.

State v. Cash, 309 S.C. 40, 419 S.E.2d 811 (Ct. App. 1992). If, on appeal, this Court does not find the waiver of counsel was knowing and voluntary, the court will remand for a new trial. *State v.*

Cash, 304 S.C. 223, 403 S.E.2d 632 (1991).

Here Petitioner sought to relieve his appointed PCR counsel and to retain a private attorney. App. 36, ll. 19 - 37, ll. 12; *Cf. Richardson*, 377 S.C. at 106, 659 S.E.2d at 495 (holding that “mere disagreement” between an applicant and his attorney is not sufficient cause, without more, to relieve appointed counsel). As an initial matter, the PCR court did not have to immediately relieve appointed counsel, but could have simply ordered that appointed counsel be relieved upon the filing of a notice of appearance by a privately retained attorney.

Instead, the court terminated appointed counsel’s representation. The court’s advisement provided Petitioner with only part of the information that he needed in order to effectuate a knowing and voluntary waiver of the right to counsel. The court’s singular focus was on admonishing Petitioner that, if he failed to secure private counsel, he would have to represent himself as the court would not appoint another attorney. App. 36, ll. 19 - 37, ll. 12.

The court did not inform Petitioner of the hazards of self-representation. *See Faretta*, 422 U.S. at 820-821, 95 S.Ct. at 2534; *see Whitehead*, 310 S.C. at 316, 426 S.E.2d at 535 (holding that PCR judge must appoint counsel or obtain a knowing and intelligent waiver of right to counsel); *see also Watts v. State*, 347 S.C. 399, 556 S.E.2d 368 (2001) (reversing conviction where trial judge failed to warn petitioner of dangers of entering into *pro se* guilty plea). This was in error; the court had a duty to fully explain the risks of proceeding *pro se* in the likely event Petitioner was unable to privately retain an attorney. *Prince v. State*, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) (holding that defendant was not sufficiently aware of the dangers of self-representation).

Furthermore, it is clear from the record that Petitioner did not have the experience or the background to understand the dangers of self-representation absent a *Faretta* warning from the court. *Cf. Cash*, 309 S.C. at 43, 419 S.E.2d at 813 (holding that despite lack of *Faretta* warnings,

defendant has sufficient educational background and litigation experience to understand the disadvantages of self-representation). Petitioner did not graduate from high-school and does not have a GED. App. 11, ll. 3-8. In addition, during the guilty plea, defense counsel averred that Petitioner suffers from unspecified mental health problems. App. 17, ll. 2-17.

Petitioner's original PCR application contained multiple grammatical errors. App. 22 - 27. His attempted questioning of plea counsel on the validity of his indictment - the sole issue he presented at the hearing - was full of legal errors and completely ineffectual. App. 47, ll. 15 - 50, ll. 7; *see State v. Gentry*, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005) (holding that indictments are a notice document, not the basis for subject matter jurisdiction); *see also Richardson*, 377 S.C. at 106, 659 S.E.2d at 495 (observing that "many times . . . an applicant does not understand the PCR process.").

In sum, there was no evidence that Petitioner's background or experience would allow him to - in the absence of a specific warning from the court - knowingly appreciate the dangers and disadvantages of self-representation. *Whitehead*, 310 S.C. at 535, 426 S.E.2d at 316-317 (*citing Prince* 301 S.C. at 424, 392 S.E.2d at 463 ("[t]o establish a valid waiver of the right to counsel, the PCR applicant must be made aware of the right to counsel and the dangers of self-representation")). The transcript of Petitioner's **sixteen minute** PCR hearing illustrates exactly the kind of dangers that an unwitting *pro se* litigant faces and underscores the crucial importance of providing an adequate warning. App. 43, l. 22 - 52, l. 19.

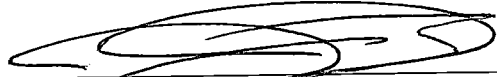
Accordingly, this Court should reverse the denial of Petitioner's PCR application and remand the case for a new hearing as the PCR court erred in finding that Petitioner's waiver of counsel was knowingly, voluntarily, and intelligently made. App. 54, n. 1; *High v. State*, 300

S.C. 88, 386 S.E.2d 463 (1989) (this Court will not uphold PCR judge's finding if there is no evidence to support it or controlled by an error of law).

CONCLUSION

By reason for the foregoing arguments, Petitioner Jerod Harris respectfully requests this Court to reverse the trial court's order of dismissal and remand his case for a new evidentiary hearing.

Respectfully Submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 7th day of March, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

JEROD KEYKENDALL HARRIS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

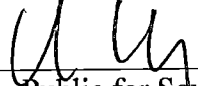
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Jerod Keykendall Harris, #255423, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 7th day of March, 2017.


John H. Strom
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 7th day of March, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025