

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-001038

Robert Henry Osbey,.....Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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TABLE OF CONTENTS

QUESTION PRESENTED2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW5

ARGUMENTS

 I. The PCR court did not err in finding Petitioner waived his right to counsel by his conduct where he was advised three separate times over the course of a year that he had a constitutional right to counsel and if he wanted one appointed to him, he needed to file an application with the Public Defender’s Office, but he failed to do so prior to pleading guilty.....6

CONCLUSION11

QUESTION PRESENTED

- I. **Should this Court deny review where the Post-Conviction Relief (“PCR”) court correctly found Petitioner waived his right to counsel by his conduct where he was advised three separate times over the course of a year that he had a constitutional right to counsel and if he wanted one appointed to him, he needed to file an application with the Public Defender’s Office, but he failed to do so prior to pleading guilty?**

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Petitioner was indicted at the December 2014 term of the Spartanburg County Grand Jury for two counts of trafficking in cocaine base, 10-28g (2014-GS-42-6239, and -6240) and one count of possession with intent to distribute cocaine base (2014-GS-42-6241). On April 1, 2015, Petitioner appeared *pro se* and pleaded guilty before the Honorable J. Derham Cole to all charges as indicted. Pursuant to the State's recommendation, Judge Cole sentenced Petitioner to imprisonment for concurrent terms of eight years for each count of trafficking in cocaine base, and to a consecutive term of five years suspended to three years of probation for possession with intent to distribute cocaine base. Petitioner did not appeal his convictions or sentences.¹

Petitioner filed an application for post-conviction relief ("PCR") on February 23, 2016 alleging his guilty plea was involuntary and that he did not knowingly waive his right to counsel. Respondent made its Return on October 13, 2016, requesting that an evidentiary hearing be held. A hearing was convened on February 1, 2017, at the Spartanburg County Courthouse before the Honorable Edward W. Miller. Petitioner was present and represented by Susannah C. Ross, Esquire. Assistant Attorney General Caitlin B. Hastings represented Respondent.

Judge Miller issued an order of dismissal on March 21, 2017 and filed March 27, 2017. Petitioner filed a notice of appeal on April 26, 2017. On August 29, 2017, a petition for a writ

¹ On February 22, 2016, Petitioner also pled guilty to two State Grand Jury charges – trafficking in cocaine (conspiracy) (400 grams or more) and trafficking in cocaine (200 to 400 grams) (2014-GS-47-0007). Private attorney, Tivis C. Sutherland, IV, Esquire, represented Petitioner on these charges. Petitioner received, and is currently serving, a negotiated fifteen (15) year sentence for these convictions. Petitioner filed a PCR application for these convictions. That PCR action is still pending (2017-CP-23-1523).

of certiorari was filed on Petitioner's behalf by LaNelle Cantey DuRant, Esquire. This return follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief decision is whether “any evidence of probative value” exists to sustain the lower court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The post-conviction relief court’s findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

ARGUMENTS

- I. The PCR court did not err in finding Petitioner waived his right to counsel by his conduct where he was advised three separate times over the course of a year that he had a constitutional right to counsel and if he wanted one appointed to him, he needed to file an application with the Public Defender's Office, but he failed to do so prior to pleading guilty.**

The post-conviction relief court did not err in denying relief because Petitioner waived his right to counsel by conduct before pleading guilty. The accused in a criminal prosecution has a Sixth Amendment right to the assistance of counsel. U.S. Const. amend. VI. South Carolina Courts recognize “three different ways in which a defendant may relinquish his right to counsel: (1) waiver by an affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture.” State v. Roberson, 382 S.C. 185, 187, 675 S.E.2d 732, 733 (2009) (citing State v. Boykin, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct. App. 1996). Waiver by conduct “can be inferred from a defendant’s actions.” State v. Cain, 277 S.C. 210, 210, 284 S.E.2d 779, 779 (1981) (citing State v. Jacobs, 271 S.C. 126, 245 S.E.2d 606 (1978).

“The determination of whether one’s actions constitute waiver is a question of fact.” Id. at 497, 685 S.E.2d at 607. As such, the PCR court’s findings of fact must be given great deference where there is probative evidence in the record to support them. Caprood, 338 S.C. at 109, 525 S.E.2d at 517.

At Petitioner’s guilty plea, the plea judge noticed Petitioner was not represented by counsel so he advised Petitioner of his right to counsel, that counsel could be appointed if he could not afford one, and asked if Petitioner knew that. Petitioner responded he did. (App. p. 3, ll. 5-15). The plea judge asked Petitioner if when he was arraigned, the magistrate judge

informed him of his right to a lawyer, that one could be appointed if he wanted, and that he needed to fill an application for same in the Public Defender's Office, to which Petitioner indicated the magistrate judge did inform him. (App. p. 3, ll. 16-22). Petitioner admitted he did not apply for a public defender. (App. p. 3, ll. 23-25). The plea judge then asked if during Petitioner's first appearance the judge inform him of his right to a lawyer, that one could be appointed if he wanted, and that he needed to fill an application for same in the Public Defender's Office, to which Petitioner indicated he was again informed. (App. p. 4, ll. 1-8). Again, Petitioner did not apply for a public defender. (App. p. 4, ll. 9-11). The plea judge asked if during Petitioner's second appearance the judge informed him of his right to a lawyer, that one could be appointed if he wanted, and that he needed to fill an application for same in the Public Defender's Office, to which Petitioner indicated he was informed a **third** time. (App. p. 4, ll. 12-17). Petition still did not apply for a public defender. (App. p. 4, ll. 18-19).

Petitioner was arrested approximately one year prior to his guilty plea. (App. p. 4, l. 25 – p. 5, l. 4). Within that year, despite three separate instructions that if he could not afford an attorney, he need to fill out an application for a public defender, Petitioner made no attempts to apply for a public defender. Petitioner told the plea judge he “tried to talk over there yesterday.” (App. p. 5, ll. 9-10). Then, Petitioner told the plea judge he also called the Public Defender's Office the week before his trial date, but they told him it would take two weeks to appoint an attorney to him. (App. p. 5, ll. 14-16). Judge Cole found Petitioner waived his right to counsel by failing to hire a lawyer or applying for a public defender over the course of a year until the week before, when his case was put on the trial docket despite having been instructed three

separate times he needed to apply for a public defender if he could not retain a lawyer. (App. p. 5, ll. 11-13; p. 5, l. 20 – p. 6, l. 2).

Petitioner proceeded to freely and voluntarily plead guilty as indicted after being apprised of and waiving his constitutional rights, advised of the charges against him, the possible penalties, and the State's recommendation. (App. pp. 6-13).

At Petitioner's PCR hearing, Petitioner conceded he waited a long time get a lawyer, but explained he did not have the money to get one. (App. p. 36, ll. 20-22). Petitioner testified he was given approximately thirty days' notice of his trial date. (App. p. 37, ll. 18-20). The PCR judge agreed with the plea judge in that Petitioner had waived his right to counsel by conduct. At the end of the hearing, the PCR judge also noted Petitioner had a prior criminal history which demonstrated his experience with the criminal justice system.² (App. p. 40, ll. 13-20).

Neither the plea judge nor the PCR judge erred in finding Petitioner waived by conduct. The waiver was inferred by Petitioner's acts, or rather omissions, and therefore, Faretta³ warnings did not need to be given for a valid waiver by conduct. In Roberson, this Court found the Court of Appeals erred in finding that in order for a defendant to waive by conduct the requirements of Faretta must be met. Roberson, 382 S.C. at 188, 675 S.E.2d at 732. This Court specifically found Faretta inapplicable in cases of waiver by conduct. Id. Waiver by conduct only requires a finding by the court that a defendant has waived his right through some act or omission. Id.; See also Cain, supra (“[W]aiver of the right to counsel may be inferred from a defendant's actions.”).

In Roberson, the appellant waived his Sixth Amendment right to counsel when he disregarded the instructions of the court and inexcusably failed to appear for trial. Id. Likewise, Petitioner waived his right to counsel when he disregarded **three** separate instructions of the court and inexcusably failed to hire a lawyer or apply for a public defender. To further demonstrate Petitioner's utter neglect to exercise his right to counsel, Petitioner was aware of his trial thirty days prior and still waited until the week before his trial to **call** the Public Defender's Office and at no point in time during the one year pendency of his trial did he actually apply for a public defender.

Additionally, this Court, in finding Roberson waived by conduct, considered in its analysis the fact that Roberson's criminal history showed a familiarity with the criminal justice system. Id. Here, the record demonstrates the PCR court also considered Petitioner's familiarity with the criminal justice system and understanding of his rights based on his prior criminal record. (App. p. 40, ll. 13-20) The record also demonstrates that Petitioner took responsibility and fully acknowledged and accepted his guilt at his plea hearing. (App. p. 10, l. 23 – p. 11, l. 1). Petitioner stated he was pleading guilty "freely and voluntarily[.]" (App. p. 10, ll. 20-22). Petitioner pled pursuant to a recommended concurrent sentence. (App. p. 10, ll. 6-15). Petitioner clearly knew and understood the charges against him and the possible penalties he faced. (App. pp. 8-10).

In State v. Jacobs, 271 S.C. 126, 245 S.E.2d 606 (1978), this Court found there was an inferable waiver of the Sixth Amendment right to counsel by omissions. Jacobs participated in his trial but did not have counsel. Id. Because Jacobs was not indigent, the court urged him to

² It is unclear if the PCR court also considered Petitioner's active sentences for his State Grand Jury convictions.

retain a lawyer and continued the case at least once to enable Jacobs to hire counsel. Id. Although Jacobs never expressly waived his right to counsel, this Court held he waived his right to counsel by his conduct because he was given reasonable time to secure counsel, he was financially able to retain counsel, and the court advised him to seek counsel. Id.

Similar to Jacobs, Petitioner was given a reasonable amount of time (one year) to secure counsel and the court advised him of his right to counsel and how to obtain an appointed lawyer. There was nothing more the court could do to protect Petitioner's right to counsel short of holding his hand and walking him to the Public Defender's Office to file an application. At some point, a defendant has to accept responsibility in securing and asserting his own rights. His repeated neglect in securing an attorney and his disregard for the court's instructions are sufficient to find a waiver of his right to counsel by his conduct.

Lastly, Petitioner's reliance on Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990), and Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002), is misplaced. Wroten and Gardner are wholly inapplicable to the case at bar. Both of those cases involved a defendant's waiver of the right to counsel by an affirmative, verbal request. Wroten and Gardner were not apprised of the dangers of proceeding *pro se* and therefore, the Court found there was no valid waiver. Petitioner did not need to be advised of the dangers of proceeding *pro se* in order to waive his right to counsel by his conduct. Accordingly, there is probative evidence in the record to support the PCR court's denial of relief and the PCR court did not err in finding Petitioner waived by conduct.

³ Faretta v. California, 422 U.S. 806 (1975).

CONCLUSION

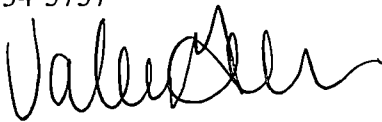
For the foregoing reasons, this Court should deny the Petitioner's Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent respectfully requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON
Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
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By: 
ATTORNEYS FOR RESPONDENT

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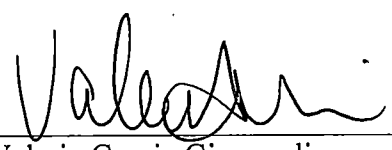
State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Valerie Garcia Giovanoli, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**LaNelle C. Durant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia South Carolina 29211-1589**

I further certify that all parties required by Rule to be served have been served.
This 17th day of October, 2017.



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ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

October 17, 2017

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S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Robert Osbey v. State of South Carolina
Appellate Case No. 2017-001038
Lower Court Case No. 2016-CP-42-0729

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,

Valerie Garcia Giovanoli
Assistant Attorney General
SC Bar #102524

VGG/lm
Enclosures

cc: LaNelle C. DuRant, Esquire
Trisha Allen, Director - Victim Advocacy Division (without enclosure)