

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Supreme Court County

Honorable Roger L. Couch, Circuit Court Judge

KENNETH HILTON,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2015-002140

BRIEF OF PETITIONER

ROBERT M. PACHAK
Appellate Defender

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

ATTORNEY FOR PETITIONER

 ORIGINAL

RECEIVED

OCT 26 2017

PETITIONER, SUPREME COURT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT.....3

CONCLUSION.....7

TABLE OF AUTHORITIES

Cases

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975) 4

Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986) 5

Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990) 5

Salley v. State, 306 S.C. 213, 410 S.E.2d 921 (1991) 4

United States v. Gallop, 838 F.2d 105 (4th Cir. 1988) 5

Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992) 5

Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990) 4

ISSUE PRESENTED

Whether the PCR court erred in allowing petitioner to represent himself when it did not warn petitioner of dangers and disadvantages of self-representation?

STATEMENT

On January 23, 2013, petitioner appeared before the Honorable J. Derham Cole in Cherokee County and pled guilty to kidnapping and assault with intent to commit criminal sexual conduct in the second degree. Petitioner was sentenced to twenty-five (25) years for kidnapping and to twenty (20) consecutive years on the assault charge. He was represented by Don Thompson, Esquire. Kim Leskanic, Esquire was the assistant solicitor. (App. p.1 – p. 32)

On May 1, 2013, petitioner filed an application for post-conviction relief. (App. p. 33 – p. 40) Respondent filed a return dated March 17, 2014. (App. p. 41 – p. 45) An evidentiary hearing was held on March 27, 2015, before the Honorable Roger L. Couch. Petitioner was present and represented himself. Plea counsel was present and was represented by Suzanne H. White, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing. (App. p. 46 – p. 104) On September 24, 2015, Judge Couch issued an order denying and dismissing petitioner's application for post-conviction relief. (App. p. 105 – p. 143)

A petition for writ of certiorari was filed on January 13, 2016. Respondent filed a return dated July 11, 2016. On September 8, 2017, this Court issued an order granting the petition for a writ of certiorari and directed the parties to submit briefs.

This brief of petitioner follows.

ARGUMENT

The PCR court erred in allowing petitioner to represent himself because it did not warn petitioner of the dangers and disadvantages of self-representation.

At the start of the PCR hearing the PCR court stated that the records before it indicated that petitioner was representing himself. Petitioner said that was correct. The court asked if that was how he wished to proceed and petitioner replied in the affirmative. The court advised petitioner that if he wanted an attorney, one would be appointed. Petitioner said he did not need an attorney. (App. p. 49, lines 16-25)

The PCR court then proceeded as follows:

The Court: Now, Mr. Hilton, there's a couple of things I'm required to go over with you about this. So - - -

Mr. Hilton: Yes, sir.

The Court: - - - be patient with me and let me get through these things.

Mr. Hilton: Yes, sir.

The Court: Mr. Hilton, the - - I want to be sure that you're aware of the kinds of things that an attorney might do to be of service to you in this matter.

Mr. Hilton: Right.

The Court: Are you aware of those things?

Mr. Hilton: Yes, I am.

The Court: Do I need to go over those with you at this time?

Mr. Hilton: No, sir.

The Court: Mr. Hilton, how far did you go with your education?

Mr. Hilton: About the eleventh grade.

The Court: Okay. And are you married?

Mr. Hilton: My wife is passed away.

The Court: I'm sorry to hear that.
Do you have children?

Mr. Hilton: No, I do not.

The Court: Now, before you were incarcerated, were you employed somewhere?

Mr. Hilton: I was working at Hucks Piggyback Trucking Service and I worked for them for 14 years.

The Court: Okay. So you were self-employed and able to support yourself?

Mr. Hilton: Not self-employed, I worked for the company.

The Court: You were employed yourself and - - -

Mr. Hilton: Right.

The Court: - - - you were able to take care of yourself?

Mr. Hilton: Yes, sir.

The Court: Did you handle your own business affairs at that time?

Mr. Hilton: Yes, I did.

The Court: Now, do you suffer from any mental, physical, or nervous conditions today that would affect your ability to reason or make good decisions?

Mr. Hilton: No, sir.

The Court: Have you taken or used any drugs, medications, or other substances that would have that effect?

Mr. Hilton: No, sir.

The Court: So, Mr. Hilton, do you know what you're doing?

Mr. Hilton: Yes, I do.

The Court: Are you able to proceed in this matter today?

Mr. Hilton: I am indeed, sir.

The Court: And do you understand what this hearing is about?

Mr. Hilton: Yes, I do, sir.

The Court: All right. I'll make a finding that Mr. Hilton is in a position to represent himself in this matter. Mr. Hilton, if you change your mind about that, at anytime during this proceeding, I'm going to ask that you inform me immediately so that we can discuss that.

Mr. Hilton: Right.

The Court: You understand that?

Mr. Hilton: Yes, sir.

(App. p. 50, line 8 – p. 52, line 20)

Notably absent from the above was any warning as required by Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975); Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990); Salley v. State, 306 S.C. 213, 410 S.E.2d 921 (1991).

In Wroten the Court said:

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.” 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 582. While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge’s advice but rather the defendant’s understanding. *Fitzpatrick v. Wainwright*, 800 F.2d 1057 (11th Cir. 1986). If the record demonstrates the defendant’s decision to represent himself was made with an understanding of the risks for self-representation, the requirements of a voluntary waiver would be satisfied. *Id.* At 1065, see also *United States v. Gallop*, 838 F.2d 105 (4th Cir. 1988).

The Court then concluded:

We find the record before us does not demonstrate petitioner was sufficiently aware of the dangers of self- representation to make an informed decision to proceed without counsel and hold the PCR judge erred in finding a knowing and intelligent waiver of counsel.

Respondent has written in her return that there is no constitutional right to counsel in a PCR action. (Return, p. 7). But the South Carolina Rules of Civil Procedure do mandate the right to counsel for indigent post-conviction relief applicants. And in any waiver of counsel, the applicant must be made aware of the dangers and disadvantages of self-representation. *Whitehead v. State*, 310 S.C. 532, 426 S.E. 2d 315 (1992); *Prince v. State*, 301 S.C. 422, 392 S.E. 2d 462 (1990).

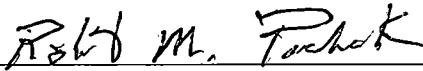
While respondent has argued in her return other factors to support a waiver of counsel and has cited documents in the supplemental appendix, there is nothing to suggest that the PCR judge was aware of those things. He was only told by respondent that petitioner had a hearing in April of 2014 where he was allowed to go *pro se*. This current PCR hearing was held almost a year later on March 27, 2015.

Respondent seems to suggest that the standard for waiver in a PCR case is different than it is in a criminal case because counsel is not mandated by the constitution. But that is not the

case. In an “Order Relieving Counsel” that was filed on July 22, 2014, petitioner was instructed that further counsel would not be appointed and that petitioner would have to proceed *pro se*. (Supp. App. p. 33) There was nothing presented at the evidentiary hearing to suggest that the PCR judge was aware of this order.

CONCLUSION

Petitioner should be given a new PCR hearing.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of October, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Cherokee County

Honorable Roger L. Couch, Circuit Court Judge

KENNETH HILTON,

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 Valerie Garcia Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Kenneth Hilton, #354034, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 26th day of October, 2017.



Robert M. Pachak
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of October, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 5, 2027.