

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No. 2015-002140

Kenneth Hilton,.....Petitioner,

v.

State of South Carolina,Respondent.

BRIEF OF RESPONDENT

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QUESTION PRESENTED

- I. Did the PCR court err in permitting Petitioner to proceed *pro se* where the record reflects Petitioner made a knowing and intelligent waiver of counsel?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. Petitioner was indicted at the March 2012 term of the Cherokee County Grand Jury for kidnapping (2012-GS-11-0226) and first-degree criminal sexual conduct ("CSC") (2012-GS-11-00227). Don Thompson, Esquire, represented Petitioner. On January 23, 2013, Petitioner pleaded guilty as indicted on the kidnapping charge and waived presentment to the Grand Jury on an indictment for assault with intent to commit second-degree CSC (2013-GS-11-0017) before the Honorable J. Derham Cole. In exchange for his guilty plea, the State dismissed the first-degree CSC indictment. Judge Cole sentenced him to consecutive terms of twenty-five years for kidnapping and twenty years for assault with intent to commit second degree CSC. Petitioner did not appeal.

Petitioner filed an application for post-conviction relief ("PCR") on May 1, 2013. Respondent made a return and motion for more definite statement on March 17, 2014, and an evidentiary hearing was scheduled to take place on April 10, 2014, at the Spartanburg County Courthouse. Petitioner filed a document on February 7, 2014, in which he asked to have his appointed counsel, Leah B. Moody, Esquire, relieved. (Supp. App. p. 1). Applicant filed another document on April 1, 2014, in which he again asked to have counsel relieved. (Supp. App. pp. 7-15). A hearing was convened on April 10, 2014. Petitioner was present and represented by Moody, and Suzanne H. White, Esquire, represented Respondent. At that time, Petitioner moved to relieve counsel. (Supp. App. p. 26). The Honorable J. Derham Cole issued a written order filed July 22, 2014, granting the motion. (Supp. App. p. 33). The order also stated that the court instructed Petitioner that if he chose to relieve his appointed counsel, the court would not appoint further counsel and Petitioner would be required to proceed *pro se*.

A subsequent evidentiary hearing into the matter was convened on March 27, 2015, at the Spartanburg County Courthouse. Petitioner was present and proceeded *pro se*. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office represented Respondent. In a written order filed September 28, 2015, the Honorable Roger L. Couch denied and dismissed the matter with prejudice. (App. pp. 136-143).

STATEMENT OF FACT

Guilty plea

During Petitioner's guilty plea, the State gave a recitation of the facts underlying the criminal charges. The facts were as follows. Petitioner picked the victim up to give her a ride. (App. p. 16). However, when Petitioner took a turn in the opposite direction of where the victim requested to go, the victim discreetly called 911 on her cell phone. (App. pp. 16-17). An open line with 911 continued throughout the duration of the incident. The recording captured the victim begging to be let go and telling Petitioner she did not want to be touched. (App. p. 17). It also captured Petitioner threatening to beat the victim and telling her he was going to have his way with her. (App. pp. 16-17). The victim claimed he was hitting her in her face and throat as he was driving. (App. p. 17). There were also tire tracks showing where Petitioner pulled his vehicle near a cemetery. (App. p. 18). The victim alleged Petitioner made her take off her shorts and perform oral sex on him. (App. p. 18). The 911 recording captured him asking her what her name was, to which she responded her name was Katherine.¹ (App. p. 18). Petitioner then said to the victim, "Katherine, put your head down there and rock it out." (App. p. 18). The recording captured the victim dry heaving. (App. p. 18). Petitioner then told the victim, "I have got something else for you." (App. p. 18). Petitioner then attempted to penetrate her with his

¹ This is noteworthy because Petitioner claimed he knew her and had been having sex with her every day for ten or eleven days. (App. p. 28).

penis, but was unable to do so. (App. p. 18). Petitioner attempted to retrieve something from his console and the victim was able to get away. (App. p. 18). She ran through the woods toward I-85 with only a shirt on as she attempted to call 911 again, not realizing she was already on an open line with 911. (App. p. 18). Once she made contact with law enforcement, she gave them a very detailed description and a sketch was drawn up. (App. p. 18-19). The victim also insisted Petitioner had licked her left breast, so a DNA swab was taken from the area. (App. p. 19). The DNA was run through CODUS and a hit came back on Petitioner.² (App. p. 19). After he was arrested, Petitioner gave a statement that he picked the victim up to give her a ride and that she wanted to have sex with him, but he did not want to so he dropped her off. (App. p. 19).

After the State's recitation of the facts, the 911 recording was played for the plea court. (App. p. 20). Petitioner told the plea court, under oath, he agreed with the facts as recited by the State. (App. p. 23). However, he informed the plea court his defense was that the victim was a prostitute. (App. p. 7; pp. 27-29).

PCR

On February 7, 2014, Applicant filed his first motion to dismiss his court appointed attorney. (Supp. App. p. 1). In his cover letter, he informed the Cherokee Clerk of Court of his First Amendment right to access the court and requested his PCR attorney be relieved. Petitioner also mentioned a hearing he had before the Honorable J. Mark Hayes, II, in which he had requested relief of his trial counsel, Don Thompson. (Supp. App. p. 1). To further support his promise he had a "full understanding of the dangers of self-representation and the consequences of proceeding *pro se*[,]” Petitioner stated his experience from his hearing to relieve his trial counsel, before Judge Hayes, made him aware of what his waiver consisted of. (Supp. App. p.

² Petitioner was in the CODUS system because of prior sexual offense convictions in which he sexually assaulted his six year old niece. (App. p. 19; p. 20).

3). Petitioner further stated in the motion: “Please be advised Applicant makes the above request, voluntarily, knowingly, with full knowledge of the dangers of proceeding *pro se*.” (Supp. App. p. 10).

A hearing on Petitioner's motion to relieve counsel was held on April 10, 2014, before the Honorable J. Derham Cole. (Supp. App. pp. 22-32). PCR counsel informed the court of her correspondence and communication with Petitioner. (Supp. App. pp. 24-26). PCR counsel arranged for a phone conference, however, when Petitioner got on the phone with her, he told her he did not want to talk to her and hung up. (Supp. App. pp. 25-26). The PCR court then asked, “you have asked for your lawyer to be relieved from any further obligation to represent you[?]” (Supp. App. p. 26). Petitioner responded, “Yes sir, I certainly have.” (Supp. App. p. 26). Petitioner then informed the PCR court he was aware of his right to an attorney in his PCR action, but that he'd like to represent himself. (Supp. App. pp. 26-27). Petitioner also told the PCR court he was aware he would not receive another court appointed attorney. (Supp. App. p. 27). The PCR court orally granted Petitioner's motion to relieve Moody (Supp. App. p. 27), and subsequently issued a written “Order Relieving Counsel” filed July 22, 2014. (Supp. App. p. 33). The order instructed Petitioner “that if he chose to relieve his appointed counsel in this matter, the Court would not appoint further counsel and [he] will be required to proceed *pro se* in this matter.” (Supp. App. p. 33). Petitioner did not object to the order.

Thereafter, Petitioner filed various amendments, addendums, and affidavits, in support of his claims. (App. pp. 105-132). On March 27, 2015, an evidentiary hearing was convened before the Honorable Roger L. Couch. At the PCR hearing, the PCR judge asked Petitioner if he wished to proceed *pro se* that day. (App. p. 49). Petitioner stated he wanted to proceed *pro se*. (App. p. 49). The PCR judge asked Petitioner if he was aware that if he wished to have an

attorney, an attorney could be appointed for him. (App. p. 49). Petitioner responded to the PCR judge, "I do not need an attorney, sir." (App. p. 49). The following colloquy then took place between the PCR judge and Petitioner:

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)

Respondent also informed the court that at the April 2014 hearing, Petitioner requested to have appointed counsel relieved. (App. p. 53-54). Petitioner agreed that information was correct. (App. pp. 53-54).

Applicant then proceeded to present his 28 claims to the PCR court. (App. pp. 56-84). He attempted to read his allegations from a document that the court admitted as an exhibit. (App. p. 70; p. 105). Petitioner also filed and submitted a proposed order granting relief to the PCR court. (App. pp. 133-135).

STANDARD OF REVIEW

On review of a PCR court's resolution of procedural questions arising under the Post-Conviction Procedure Act or South Carolina Rules of Civil Procedure, an abuse of discretion standard of review is applied. Mangal v. State, 421 S.C. 85, 805 S.E.2d 568 (2017) (citing Winkler v. State, 418 S.C. 643, 663, 795 S.E.2d 686, 697 (2016) (applying an abuse of discretion standard to the trial court's decision on a motion for a continuance); Sweet v. State, 255 S.C. 293, 296, 178 S.E.2d 657, 658 (1971) (same)); State v. Sims, 304 S.C. 409, 405 S.E.2d 377) (applying an abuse of discretion standard to trial judge's decision to discharge court appointed counsel).

ARGUMENT

I. The PCR court did not err in permitting Petitioner to proceed *pro se* where the record reflects Petitioner made a knowing and intelligent waiver of counsel.

The PCR court did not err in allowing Petitioner to proceed *pro se* at his PCR hearing. There is no constitutional right to counsel in a post-conviction relief action. Pennsylvania v. Finney, 481 U.S. 551, 556-57 (1987); Richardson v. State, 377 S.C. 103, 105-06, 659 S.E.2d 493, 494-95 (2008) ("[T]here is no constitutional obligation to appoint counsel in a PCR matter in South Carolina."). However, "[a]n indigent applicant who is granted a [post-conviction relief] hearing has a statutory right to be represented by a court-appointed attorney." Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000) (citations omitted). "When a PCR application is not dismissed before a hearing is held, the PCR judge must appoint counsel or obtain a knowing and intelligent waiver of that right by the applicant." Whitehead v. State, 310 S.C. 532, 535, 426 S.E.2d 315, 317 (1992). (Emphasis in original).

Nevertheless, "a PCR applicant is not entitled to appointed counsel of choice." Richardson, 377 S.C. at 106. Though he "*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." Id. (citing State v. Jones, 270 S.C. 587, 243 S.E.2d 461 (1978)) (emphasis in original).

Petitioner argues that the PCR judge was required to give him warnings about proceeding *pro se* in his PCR action pursuant to Faretta v. California, 422 U.S. 806 (1975). Faretta provides that a criminal defendant awaiting trial who wishes to relieve counsel must "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. 806, 835. However, Faretta involves the waiver of the Sixth Amendment right to counsel in a criminal trial, id. at 807, and there is no such right to counsel in PCR actions. Finey, 481 U.S. at 556-57; Richardson, 377 S.C. at 105-06, 659 S.E.2d at 494-95.

Petitioner also relies on Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992), to support his argument that Faretta is applicable to PCR actions. This case is distinguishable from Whitehead. In Whitehead, the petitioner filed a second, successive PCR application, a petition for *habeas corpus* and a motion for appointed counsel. At a hearing on his *habeas corpus* petition, the judge consolidated the PCR application with the *habeas corpus* petition. Regarding the motion for appointment of counsel, the PCR judge noted the appointment of counsel for indigent defendants in successive PCR actions is discretionary, and therefore, declined to appoint counsel. The petitioner then proceeded *pro se* on his claims. On appeal, this Court reversed the PCR court and remanded the matter for a new hearing, holding,

[a] PCR judge must appoint counsel **or** obtain a knowing and intelligent waiver of that right by the applicant. To 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. See e.g., Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (199).

Id. at 535 (emphasis added).

Here, unlike the petitioner in Whitehead, Petitioner **was** appointed an attorney – he simply decided the attorney did not suit his preferences. Leah B. Moody, Esquire, was appointed as counsel for Petitioner at the outset of his PCR action. Therefore, the PCR court fulfilled its duty under Whitehead, that it “appoint counsel **or** obtain a knowing and intelligent waiver of” the right to counsel. Id. (emphasis added). Petitioner was not denied the right to counsel. It was

Petitioner, and only Petitioner, who insisted to have his counsel removed from the case, knowing he would not be afforded another appointed attorney.

Nevertheless, although Respondent submits it is not controlling on the issue of waiver of PCR counsel, in Faretta, “the ultimate test is not the trial judge's advice . . . but, rather, the defendant's understanding. . . .[And] [i]f the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied.” Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (citing Fitzpatrick v. Waiwright, 800 F.2d 1057, 1065 (11th Cir. 1986); see also United States v. Gallop, 838 F.2d 105 (4th Cir.1988)).

By asking the PCR court to relieve his court-appointed counsel and specifically requesting to proceed *pro se*, Petitioner waived his statutory right to PCR counsel.³ Petitioner knew of the right and knew that it was being abandoned. He also knew benefits of being represented by an attorney and declined to have it explained to him further. He affirmatively stated in the *pro se* documents submitted with his motion to relieve counsel that he was making the request with full knowledge and understanding of the dangers of proceeding *pro se* based on his experience in attempting to relieve his trial counsel before Judge Hayes. Petitioner had a statutory right to appointed counsel, and counsel was appointed to represent him. However, he demonstrated both in his filings and before Judge Cole and Judge Couch, that he did not want his

³ It is worth noting this case is distinguishable from those in which a PCR applicant simply regrets requesting the relief of his attorney and requests new PCR counsel. Petitioner consistently asserted his right to self-representation throughout the lower court proceedings. Petitioner continues to request counsel be relieved, even in this present appeal. Petitioner filed a motion to relieve his current appellate defender after he filed the Petition for Writ of Certiorari on Petitioner's behalf. Respondent respectfully submits that had PCR counsel not been relieved, Petitioner would be arguing to this Court his right to self-representation was violated. However, “the right of self-representation does not exist to be used as a tactic for delay, for disruption, for **distortion of the system**, or for **manipulation of the trial process**.” State v. Samuel, 414 S.C. 206, 212, 777 S.E.2d 398, 401 (Ct. App. 2015), reh'g denied (Oct. 23, 2015), cert. granted (Oct. 20, 2016) (citing United States v. Frazier-El, 204 F.3d 553, 560 (4th Cir.2000)). (Emphasis added). Respondent would further submit where Petitioner has consistently and adamantly asserted his right of self-representation, without disavowal, it distorts the system and manipulates the PCR trial process to argue now on appeal that his statutory right to PCR counsel was violated.

appointed counsel to represent him, but preferred to represent himself. Petitioner was made aware he had a right to counsel at the hearing in which he relieved counsel and again prior to his evidentiary hearing.

Even if an express waiver of counsel was required in addition to the appointment of counsel in this case, Petitioner had sufficient background to understand the dangers of proceeding *pro se* and was apprised of his rights by another source. In the absence of a specific inquiry by the trial judge addressing the disadvantages of proceeding *pro se*, this Court looks to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source. Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) (citing Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990)).⁴ “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.” Wroten at 294, 391 S.E.2d 576 (citing Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir.1986)). Both Prince and Wroten involved the waiver of a criminal defendant’s constitutional right to counsel and thus distinguishable from Petitioner’s waiver of his statutory right to PCR counsel. However, this Court cited to Prince in the proposition put forth in Whitehead, that “to 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.” Whitehead, 310 S.C. at 535. Therefore, to the extent Whitehead can be interpreted as extending Faretta to PCR actions, Petitioner waived his right to counsel based on his background and knowledge and having been apprised of his right to counsel by another source.

The record demonstrates Petitioner was at approximately fifty-two at the time of his

⁴ Thus, Petitioner’s argument that the PCR judge at Petitioner’s evidentiary hearing was not aware of filings made by Petitioner, the previous hearing on his motion to relieve counsel, or the order relieving counsel is irrelevant.

hearing to relieve Moody and his PCR evidentiary hearing and completed the eleventh grade. (App. p. 15). The record is rife with demonstrations of Petitioner's ability to read, write, cite case law, and make legal arguments. Petitioner, acting *pro se*, also supplemented his application with additional allegations. In Petitioner's *pro se* filings, he cites to the United States Constitution, the South Carolina Post-Conviction Relief Act, the Rules of Civil Procedure, the Profession Code of Conduct, and various case law. (App. pp. 105-135; Supp. App. p. 1-21). Petitioner himself repetitively claimed he was making the decision to relieve his attorney fully aware of the dangers of proceeding *pro se*, and further maintained his knowledge was based on his previous hearing before Judge Hayes on his motion to relieve plea counsel. (Supp. App. p. 3).

The record also demonstrates Petitioner had familiarity with the criminal justice system and understanding of his rights based on his prior record that includes "four [prior] convictions for second degree sexual offense and three [prior] convictions for indecent liberties with a child." (App. p. 20). Petitioner had a familiarity with the criminal justice system at the time he asked the PCR court to relieve Moody. In light of his age, educational background, his criminal history and, the litany of motions in which he insists he is aware of his right to counsel and the dangers of proceeding *pro se*, letters, and pleadings filed by Petitioner, a waiver colloquy between Petitioner and the PCR court on the record was unnecessary to find Petitioner waived his statutory right to PCR counsel.

Accordingly, the record shows Petitioner's decision to represent himself was made with eyes open with a full understanding of the risks of self-representation. See Wroten, 301 S.C. at 294, 391 S.E.2d at 576. Regardless, because there is no constitutional right to PCR counsel, the PCR judge was not required to specifically advise Petitioner of the dangers of proceeding *pro se* in his PCR action. By having the opportunity to work with his court-appointed attorney, his

awareness of his right to PCR counsel, his adamant request to relieve his court-appointed attorney, the PCR court's ample warnings that he would not be appointed a second attorney but must proceed *pro se*, indicating that he understood he would not be allowed to receive a second court-appointed lawyer, his repeated admission he was aware of the dangers of proceeding *pro se*, his familiarity with the criminal justice system, and his failure to ever object, even to this day, to the removal of his court-appointed attorney, Petitioner waived his statutory right to PCR counsel. Accordingly, the PCR court did not err when it relieved PCR counsel and allowed Petitioner to proceed *pro se*, as requested, at his PCR hearing and therefore, this Court should affirm the PCR court's ruling.

CONCLUSION

For the foregoing reasons, this Court should affirm the PCR court's ruling.

Respectfully submitted,

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Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the September 20, 2016, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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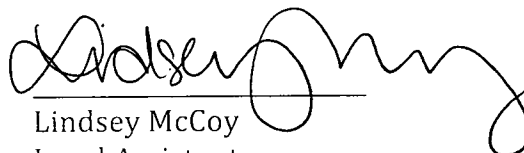
Respondent.

PROOF OF SERVICE

I, Lindsey McCoy, certify that I have served the within **Brief of Respondent** on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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This 27th day of December, 2017.



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