THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

APPEAL FROM CALHOUN COUNTY
Court of General Sessions

Maité Murphy, *Circuit Judge*

Supreme Court Case No. _____

Court of Appeals Case No. 2015-000559

Court of Appeals Opinion No. 2017-UP-406 Filed Oct. 25, 2017

Court of Appeals Rehearing Denial Filed December 14, 2017

THE STATE,

Respondent,

vs.

JERRY MCKNIGHT, SR.,

Petitioner.

Petition for Writ of Certiorari

Howard W. Anderson III
LAW OFFICE OF
HOWARD W. ANDERSON III, LLC
PO Box 661
Pendleton, SC 29670
(864) 643-5790
Appointed Pursuant to the Appellate Practice Project

-and-

Robert M. Dudek
DIVISION OF APPELLATE DEFENSE
PO Box 11433
Columbia, SC 29211-1433
(803) 734-1343

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

CERTIFICATE OF COUNSEL

Undersigned counsel hereby certifies that Petitioner filed a Petition for Rehearing, which the Court of Appeals denied. [App. 129-34].

QUESTION PRESENTED

1. Did the Court of Appeals err in holding that Mr. McKnight did not invoke his right to discharge his trial counsel and proceed pro se, where the trial judge manifested awareness of his request by engaging in the *Faretta* colloquy but nonetheless denied that request because, contrary to precedent, the judge thought that it "would not be a good thing for [him] to proceed without an attorney," [App. 18]?

STATEMENT OF THE CASE

A. The Trial Court Proceedings

1. The Indictments

In January 2015, a grand jury in Calhoun County returned three indictments against Jerry McKnight, Sr., arising out of the death of Kymmarah Randolph: one for murder, one for possession of firearm by a person convicted of a violent crime, and one for kidnapping. [App. 6-10].

2. The Faretta *Hearing*

Approximately two hours before the venire arrived for qualification at his criminal trial, the court held an *ex parte* hearing with Mr. McKnight and his trial counsel to address Mr. McKnight's February 2015 letter requesting the discharge of his counsel. [App. 12-19; 86]. At the hearing, Mr. McKnight told the trial court: "I feel like I'm not being represented right by him and that I would like to have him dismissed." [App. 13]. Among his complaints was that his counsel was not communicating with him and that he did not believe his counsel was adequately prepared to represent him. [App. 13-14].

After the court indicated that it would not consider continuing the trial because it was confident in trial counsel's preparation, the court asked Mr. McKnight whether he "had any legal training or ... [knew] the rules of evidence." [App. 17]. When he replied that he had no such training, the trial court ruled that "it would not be a good thing for [him] to proceed without an attorney" at his trial and then denied his motion:

> THE COURT: Sure, and understandably [the other inmates in the jail with whom he has spoken about the legal process] may be somewhat familiar with the system, but they didn't go to law school. They didn't take the bar exam. They didn't have a successful law practice and become the head public defender like your attorney here has. Your attorney's very well versed in the law and is extremely competent, and frankly you're lucky that you got him to be appointed to your case because he's an excellent trial attorney. I can tell you that I don't see him telling the Court that he would be prepared for trial if he wasn't. I think he certainly would have your best interest at heart. I don't want you to go forward with this trial here today without being represented. You're telling me that you're not trained in the law. You know, you haven't gone to law school and those types of things, so you need somebody to stand in for you and represent you and someone that's capable and well trained and diligent in their efforts in doing that, and without an attorney, I'm certain that it would not be a good thing for you to proceed without an attorney. It's too late in the game for me to change and ask another attorney to represent you because your case is being called for trial today. Having been appointed in May, that's nine months since his appointment to your case; and, frankly, I think that's sufficient time for him to have to be adequately prepared. I'm certain that if he was not adequately prepared, he would tell the Court and ask for a continuance, and that's certainly not the case here, so I'm going to deny your request to remove him from your case.

[App. 17-18].

3. The Trial

The trial court then proceeded to a jury trial on those three indictments in a trial that began on March 2, 2015, and ended on March 6, 2015. The jury convicted him of all three charges.

On March 6, 2015, the trial court sentenced Mr. McKnight in accordance with the verdicts to life for the murder charge, with concurrent sentences of 30 years for kidnapping and 5 years for firearm possession. [App. 3-5].

4. The Notice of Appeal

Mr. McKnight served his notice of appeal on March 10, 2015, four days after judgment. [App. 90].

B. Proceedings Before the Court of Appeals

On appeal to the Court of Appeals, Mr. McKnight challenged the trial court's refusal to allow him to discharge his trial counsel and proceed *pro se* at trial. [App. 94]

Via an unpublished opinion, the Court of Appeals affirmed on October 25, 2017. [App. 127].

Mr. McKnight filed a timely petition for rehearing, which the Court of Appeals denied on December 14, 2017. [App. 129-33]. This timely petition for writ of certiorari ensues.

ARGUMENT

"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 (2014) (citation and footnote omitted).[1] The right to self-representation was a right of critical importance to our constitutional framers. *See, e.g.*, *Faretta v. California*, 422 U.S. 806, 821 (1975) ("In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing

[1] No right to self-representation exists on appeal. *State v. Roberts*, 364 S.C. 583, 588 (2005) ("Appellant clearly does not have a federal constitutional right to proceed pro se in this appeal from his criminal conviction. We also find there is no state constitutional provision which confers such a right.").

counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber.").

Prior to letting a defendant discharge counsel, the trial judge must conduct a *Faretta* colloquy with the defendant, to advise the defendant of the dangers of proceeding *pro se* and the right to have trial counsel. *Prince v. State*, 301 S.C. 422, 423-24 (1990). But, ultimately, the decision to discharge counsel rests with the defendant alone, regardless as to the trial judge's views of the wisdom of the defendant's choice. *Faretta*, 422 U.S. at 834 ("[A]lthough he may conduct his own defense ultimately to his own detriment, his choice [to discharge counsel] must be honored out of that respect for the individual which is the lifeblood of the law." (quotation omitted)).

The failure to honor a request to discharge counsel is a structural error, for which no showing of prejudice is required. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) ("Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless."). Whether the trial court has failed to comply with *Faretta* is a question of law, subject to *de novo* review. *E.g.*, *Brewer v. Williams*, 430 U.S. 387, 403 (1977).

Here, before trial, Mr. McKnight was clear that he wanted to discharge his counsel because he was dissatisfied with his counsel. [App. 13 ("I feel like I'm not being represented right by him and that I would like to have him dismissed.")]. In response to that request, the trial court began a *Faretta* colloquy, appropriately warning Mr. McKnight of the dangers of proceeding without a lawyer. *E.g.* [App 17-18 ("You know, you haven't gone to law school and those types of things....")].

But however well intentioned, the trial court erred, when it decided "to deny [his] request to remove [counsel] from [his] case" out of a belief that "it would not be a good thing for [him] to proceed without an attorney" [App. 18]. *See also* [App. 17 ("I don't want you to go forward with this trial here today without being represented.")]. As indicated above, the decision to proceed with or without counsel is a decision personal to the defendant. *Faretta*, 422 U.S. at 834.

The Court of Appeals was wrong to have held that Mr. McKnight did not in fact invoke his right to self-representation. As shown by the decision to conduct a *Faretta* colloquy, the trial judge was aware of his request. Nothing more was required to grant him an absolute right to discharge his counsel and try the case *pro se*. *United States v. Singleton*, 107 F.3d 1091, 1094 (4th Cir. 1997) (holding defendant's mid-trial statement "I would like to fire my attorney, your Honor" was sufficient to constitute waiver of the right to counsel); *Dorman v. Wainwright*, 798 F.2d 1358, 1366 (11th Cir. 1986) ("To invoke his Sixth Amendment right under *Faretta* a defendant does not need to recite some talismanic formula hoping to open the eyes and ears of the court to his request."); *United States v. Lorick*, 753 F.2d 1295, 1298 (4th Cir. 1985) (finding sufficient invocation in part because of the "recognition by the [trial] court at that point that the right [to dispense with counsel] had been asserted").

CONCLUSION

"[I]t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them." *Faretta*, 422 U.S. at 833-34. Mr. McKnight was clear he wanted to fire his lawyer. He was, however, prevented from doing so—unconstitutionally. U.S. Const. Amend. VI; SC Const. Art. I, § 14. This Court should, therefore,

grant the petition, reverse the judgment of the Court of Appeals, and remand with instructions for a retrial.

Respectfully submitted this 5th day of January, 2018.

JERRY MCKNIGHT, SR.

By: _____
One of His Attorneys

Howard W. Anderson III (#100329)
LAW OFFICE
OF HOWARD W. ANDERSON III, LLC
PO Box 661
Pendleton, SC 29670
(864) 643-5790
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-and-

Robert M. Dudek
DIVISION OF APPELLATE DEFENSE
PO Box 11433
Columbia, SC 29211-1433
(803)734-1343

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing paper by first-class mail, proper postage prepaid, this 5th day of January, 2018, on the following parties:

Hon. Alan M. Wilson
c/o Melody J. Brown, Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

Jerry McKnight, Sr. (SCDC#00189200)
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

By: [signature]

Howard W. Anderson III (#100329)
LAW OFFICE
OF HOWARD W. ANDERSON III, LLC
PO Box 661
Pendleton, SC 29670
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-and-

Robert M. Dudek
DIVISION OF APPELLATE DEFENSE
PO Box 11433
Columbia, SC 29211-1433
(803)734-1343

SUBSCRIBED AND SWORN TO BEFORE
ME this 5th day of January, 2018.

[signature] (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.