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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals

Honorable James R. Barber, Circuit Court Judge

Opinion No. 2017-UP-383 (S.C. Ct. App. Filed October 18, 2017)

2012-GS-39-2203, 2204;
2012-GS-39-2242

THE STATE,

RESPONDENT,

V.

VINCENT MISSOURI,

PETITIONER

APPELLATE CASE NO. 2018-000057

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 14, 2017.

QUESTION PRESENTED

Did the Court of Appeals err in finding petitioner was not denied his Sixth Amendment right to proceed *pro se*?

STATEMENT OF THE CASE

On November 12, 2013, a Pickens County grand jury indicted petitioner for entering a bank with intent to steal, armed robbery, and failure to stop for a blue light. R. 237-45. On December 19, 2013, a hearing was held before the Honorable Letitia H. Verdin on a motion filed by petitioner's attorney to be relieved. R. 1. Doug Richardson represented the State. R. 1. Aaron Angell represented petitioner. R. 1. Judge Verdin denied petitioner's request to proceed *pro se*. R. 7, ll. 22 – 23.

On May 19, 2014, petitioner was tried before the Honorable James R. Barber, III, and a jury. R. 14. Doug Richardson again appeared for the State and Aaron Angell again represented petitioner. R. 14. The jury convicted petitioner of entering a bank with intent to steal, strong arm robbery, and failure to stop for a blue light. R. 224, ll. 16 – 25. Judge Barber sentenced petitioner to concurrent terms of twenty years' imprisonment on the bank charge, five years' imprisonment for strong arm robbery, and three years' imprisonment for failure to stop for a blue light. R. 234, ll. 6 – 20.

On appeal, petitioner was initially represented by Tiffany Butler, who filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). On June 13, 2016, the Court of Appeals denied the petition to be relieved and ordered briefing of the issue, "Was Missouri denied his Sixth Amendment right to proceed pro se?" Petitioner's current counsel began representing him before the filing of the initial reply brief. The materials submitted by petitioner pursuant to the Anders procedure were made a part of the Record on Appeal by consent of the parties. Supp. R. 1 – 42. On October 18, 2017, the Court of Appeals affirmed petitioner's convictions. App. 1. The Court of Appeals denied the petition for rehearing and this petition for certiorari follows.

ARGUMENT

The Court of Appeals erred in finding petitioner was not denied his Sixth Amendment right to proceed *pro se*.

Introduction

Trial judges are rightly skeptical of last-minute motions to relieve counsel or to proceed *pro se*. Criminal defendants frequently make such motions as last ditch efforts to postpone a trial or to get a different lawyer. Appellate courts rightfully give trial judges wide latitude to control their courtroom, their docket, and prevent shameless manipulation of the system.

But that is not what happened in this case. Here, petitioner Vincent Missouri did everything we ask of a criminal defendant who legitimately wants to represent himself. Missouri asked the court to proceed *pro se* well in advance of trial. The Court of Appeals found that the trial judge's summary denial of Missouri's request because Missouri's charges were too serious was error. Nevertheless, the court refused to overturn Missouri's convictions because, on the day of trial when Missouri was unprepared to represent himself because of the earlier wrongful denial of his Sixth Amendment right, Missouri hesitated to proceed *pro se*.

The rule adopted by the Court of Appeals punishes defendants who truly want to represent themselves and do it the right way. The court's rule would require a defendant who abided by a judge's ruling that his attorney would represent him to switch horses at the last minute and try his case himself. Most lawyers could not prepare to try a case in thirty minutes—much less an incarcerated layman. A *pro forma* Sixth Amendment inquiry on the day of trial does not cure the structural error of an earlier denial of the right to self-representation. This Court should grant certiorari to consider this important constitutional question.

The Denial of Missouri's Request to Represent Himself Five Months Before Trial

The Court of Appeals unanimously found that Judge Verdin erred in denying Missouri's request to represent himself at a hearing five months before trial. App. 3. Missouri sent numerous documents to the Pickens County Clerk of Court asserting his right to represent himself. Supp. R. 1 – 40. From the beginning of the hearing, it is clear that Missouri had multiple motions he intended to make, but the trial judge stated she would only consider the motion to relieve counsel. R. 4, ll. 11 – 16. Missouri then told the court he was ready to represent himself rather than proceed with his attorney. R. 5, ll. 12 – 17.

The trial judge did not conduct an inquiry pursuant to Faretta v. California, 422 U.S. 806 (1975), and refused to consider Missouri's request. R. 5, l. 18 – 7, l. 23. The trial judge asked Missouri's attorney what charges he faced and after the lawyer's reply, the trial judge ruled, **"Pro se is not in the realm of possibility right now."** R. 7, ll. 22 – 23 (emphasis added). The trial judge further told Missouri that he did not need to "change horses in midstream" even though the trial was five months away. R. 9, l. 22 – 10, l. 15. Judge Verdin ordered Missouri to "make everything go through your lawyer." R. 11, l. 6 – 12, l. 2. Missouri responded, "So in other words, I have to keep him." R. 12, ll. 3 – 4. The court responded, "Bottom line, you got to keep him. You're going to be happy with him." R. 12, ll. 5 – 6.

The Court of Appeals agreed that Judge Verdin's ruling was erroneous. App. 3. The trial judge's decision was not based on the relevant considerations under Faretta, but solely on the seriousness of the charges against Missouri. R. 7, ll. 18 – 23. The trial judge never seriously considered appellant's request to represent himself at this hearing and this violates the Sixth Amendment. Raulerson v. Wainwright, 469 U.S. 966 (1984) (Marshall, J., dissenting from denial of certiorari). Justice Marshall's dissent in Raulerson indicates that a trial judge should

immediately conduct a Faretta colloquy upon a defendant's request to represent himself. In Raulerson, the defendant sent the trial judge a letter unequivocally demanding to represent himself. Id. at 967. The trial judge "provided a copy of the letter to counsel and did nothing more." Id. Justice Marshall wrote that "once a defendant affirmatively states his desire to proceed *pro se*, **a court should cease other business and make the required inquiry.**" Id. at 970 (emphasis added). Justice Marshall continued:

> [I]f a trial court judge holds a *Faretta* hearing when the accused clearly asserts his desire to proceed *pro se*, the result will not do harm to the right to counsel. At the same time, the *failure* to hold a *Faretta* inquiry at this time *will* do injury to the right recognized in *Faretta*. Delay in holding a hearing after the right is unequivocally asserted undermines that right by forcing the accused to proceed with counsel in whom he has no confidence and whom he may distrust.

Id. at 970 (emphasis in original). The benchbook for federal district judges advises that representation issues, including a Faretta colloquy if necessary, should be decided at the defendant's first appearance. Jona Goldschmidt, Has He "Made His Bed, and Now Must Lie in It?" Toward Recognition of the Pro Se Defendant's Sixth Amendment Right to Post-Trial Readmonishment of the Right to Counsel, 8 DePaul J. for Soc. Just. 287, 312-13 (2015).

Justice Marshall's dissent in Raulerson demonstrates that the trial judge erred in not even conducting a Faretta hearing and taking seriously Missouri's assertion of his Sixth Amendment right. The evil recognized by Justice Marshall—forcing Missouri to proceed with an attorney he did not trust—is succinctly summed up by Missouri's response to Judge Verdin's comment that he would be happy with the attorney he could not fire: "Oh, boy." R. 12, l. 7.

The Judge's Inquiry into Missouri's Representation on the Day of Trial

Missouri's case was set for trial before Judge Barber. When Judge Barber learned that Judge Verdin had earlier denied Missouri's motion to represent himself, he stated, "Well, that motion's been taken care of." R. 24, ll. 14 – 20. Judge Barber told Missouri that he lacked the ability undo Judge Verdin's ruling. R. 25, ll. 2 – 8. Judge Barber stated, "And if there's an error in that regard, then you will have to deal with it in the future." R. 25, ll. 2 – 12.

After taking up other matters, Judge Barber then reconsidered his earlier decision and told Missouri he could move to represent himself. R. 45, ll. 4 – 23. However, the court was clear that the trial was going forward that day, regardless of whether Missouri represented himself or not. R. 45, l. 4 – 50, l. 6. Missouri protested about "the twenty-three months that I was trying to do this. . . " when the court interrupted him and demanded that he decide immediately whether to move to represent himself. R. 45, l. 20 – 46, l. 15. The trial judge told appellant "If you make the motion. If you don't want to make the motion, that's fine. We're ready to go. What is it you want to do?" R. 46, ll. 12 – 15. When Missouri protested that he was being put "in an awkward position" the trial judge again interrupted him. R. 46, ll. 16 – 22.

Missouri asked whether he would be allowed to litigate the *pro se* motions he filed and whether Judge Barber would "please grant me the right to go over my material as opposed to what Mr. Angell did a poor job of doing this morning. Please give me that right." R. 48, ll. 8 – 13. Judge Barber replied, "No, sir." R. 48, l. 14. Missouri then told the Court, "I need to represent myself completely or not at all." R. 48, ll. 15 – 16. Missouri attempted to bring up the motions he wanted to make, but the trial court rebuffed him. R. 48, l. 17 – 49, l. 24. Judge Barber then stated, "It appears that Mr. Missouri is not prepared to make a motion in the matter, so we will go forward with [the trial]." R. 49, l. 25 – 50, l. 6.

The Court of Appeals' Error

The Court of Appeals ruled that in the face of Judge Barber's demands made right before trial, Missouri abandoned or waived his right to self-representation. App. 3. The court characterized Judge Barber's actions as repeatedly ensuring "Missouri he only need to move for self-representation in order to invoke the right." App. 3. The court found, "Missouri chose to equivocate rather than commit to his own representation." App. 3.

The court erred in determining that Missouri "abandoned or waived" his Sixth Amendment right on the day of trial. The court's ruling punishes Missouri for attempting to litigate the issue of his representation early instead of on the day of trial. Missouri made a timely motion to represent himself five months before the trial. The trial court's erroneous ruling prevented Missouri from litigating his own case and preparing for trial. Requiring Missouri to ask to proceed *pro se* on the day of trial when he was unprepared, instead of far in advance, does not remedy the earlier denial of his Sixth Amendment right.

Faretta does not explicitly say when the court must decide whether a defendant will represent himself. "Well before the date of trial" Faretta asked to represent himself. Faretta, 422 U.S. at 807. The trial judge held two hearings on whether Faretta could represent himself before conducting any substantive proceedings. Id. at 807-11. At the second hearing, the court held that Faretta had no constitutional right to represent himself and forced the public defender upon him. Id. at 809-10. The United States Supreme Court reversed. In reviewing lower court decisions, the Court stated, "We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." Id. at 817.

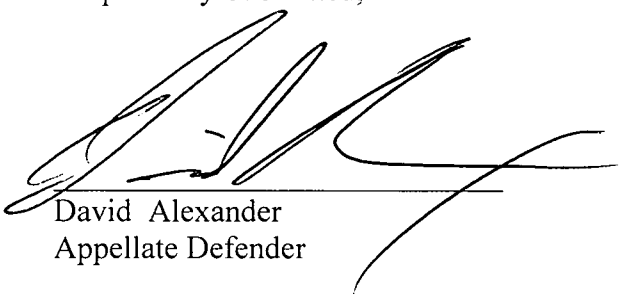
The majority opinion in Faretta hints at when a decision must be made about representation. The majority recognized that decisions on matters of trial strategy are allocated to counsel. Id. at 820. The Court stated this allocation was justified only "by the defendant's consent, **at the outset**, to accept counsel as his representative." Id. at 820-21 (emphasis added). Justice Blackmun's dissent noted "the procedural problems that . . . today's decision will visit upon trial courts in the future." Id. at 852. Among the dissent's list of procedural problems were whether a defendant must be given notice of his right to proceed *pro se* and "when must that notice be given?" Id. Justice Blackmun also asked, "How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*?" Id. The justices in Faretta expressed a clear preference that the question of the defendant's representation be decided early in the case.

Missouri here followed the intent of Faretta and should not be punished for bringing his desire to represent himself to the court's attention at his earliest opportunity. Judge Barber made it clear that Missouri's case would proceed to trial and would not be continued, despite the fact that Missouri assumed he would be represented by counsel because of Judge Verdin's ruling. Giving a defendant the "choice" to proceed himself without being prepared or with counsel after his Sixth Amendment right was denied was no choice at all. Missouri could not meaningfully abandon or waive his right to represent himself given these circumstances. The error here was committed by Judge Verdin and Judge Barber's colloquy with Missouri did not transform that structural error into a waiver. The Court should grant certiorari to consider this important constitutional question.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate relief of reversing petitioner's convictions and granting him a new trial.

Respectfully Submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of February, 2018.

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THE STATE,

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CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Vincent Missouri, #197996, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 5th day of February, 2018.

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

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

(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.