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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the South Carolina Court of Appeals
Unpublished Opinion No.: 2017-UP-406 (S.C.Ct.App. filed October 25, 2017)

APPEAL FROM CALHOUN COUNTY
Court of General Sessions
Maite Murphy, Circuit Court Judge

The State, Respondent,

v.

Jerry McKnight, Sr., Petitioner.

Appellate Case No. 2018-000018

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

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]?

RESPONDENT'S COUNTER STATEMENT QUESTION PRESENTED

Did the Court of Appeals err in affirming Petitioner's murder conviction where the record supports the trial judge did not abuse her discretion in declining to imply a waiver of the right to counsel when Petitioner requested only to dismiss appointed counsel for lack of preparation, but did not request to represent himself?

STATEMENT OF THE CASE

A Calhoun County grand jury indicted Petitioner, Jerry McKnight, Sr., ("Petitioner"), in January 2015, charging him with the murder of Kymmarrah Randolph; possession of a firearm by a person convicted of a violent crime; and, kidnapping. (App. pp. 6-11; R. pp. 4-9 [indictments]). Petitioner stood trial with his brother and co-defendant, Bryant McKnight, on March 2-6, 2015, before the Honorable Maité Murphy and a jury. The jury convicted Petitioner as charged. (App. p. 83; R. p. 81, lines 7-15).[1] Judge Murphy sentenced Petitioner to life imprisonment for murder; thirty (30) years for kidnapping; and, five (5) years on the firearm conviction. (App. pp. 84-85; R. p. 82, line 20 – p. 83, line 9). Petitioner timely sought a direct appeal.

Petitioner filed his final brief appellant, and also his final reply brief, in the Court of Appeals on June 23, 2016. Petitioner raised one issue:

> 1. Did the trial court err in denying Mr. McKnight's request to discharge his trial counsel because the trial judge thought it "would not be good thing for [him] to proceed without an attorney," when well-established precedent precludes consideration of the wisdom of a criminal defendant's choice?

(App. p. 94; FBOA, p. 1). Respondent filed its final brief on June 29, 2016. The South Carolina Court of Appeals affirmed in a *per curiam*, unpublished opinion issued October 25, 2017. (App. pp. 127-128). Petitioner filed a petition for rehearing on November 3, 2018, which was denied on December 14, 2017. (App. pp. 129-133).

On January 5, 2018, Petitioner filed a petition for writ of certiorari in this Court, seeking review of the Court of Appeals opinion. This return follows.

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[1] Bryant McKnight was convicted of murder and kidnapping for his part in the crime. (App. p. 83; R. p. 81, lines 1-6). Judge Murphy sentenced him to life for murder and thirty (30) years for kidnapping. (App. p. 85; R. p. 83, lines 10-15). Bryant McKnight also appealed. His appellate counsel filed an *Anders* Brief on March 28, 2016. (Appellate Case No. 2015-000569).

RESPONDENT'S STATEMENT OF FACTS

The victim, Kymmarra Randolph ("Randolph") was kidnapped, shot and killed on the night of February 13, 2015. At the time of her murder, Randolph had been romantically linked with Petitioner's brother Bryant McKnight ("Bryant"). Bryant lured Randolph to accompany him that evening which eventually led to Randolph being taken to an isolated area where Petitioner and Bryant repeatedly shot her in the face and chest.

Trial testimony showed Bryant and Petitioner had at some point become suspicious of Randolph as having been involved in a home invasion at their mother's home. The home invasion occurred approximately two weeks prior to the murder. Bryant told friend Stephon Green ("Green") that money and drugs were taken during the robbery. (App. p. 54; R. p. 52, lines 6-22). Petitioner and Bryant both indicated they would kill whomever had committed the home invasion. (App. pp. 53, 55, and 67; R. p. 51, lines 15-25; p. 53, lines 2-5; p. 65; lines 6-19). Bryant reasoned that Randolph, who had been at the home before the robbery and "probably knew where everything was" in the home, had played some role in the home invasion. (App. pp. 53 and 55; R. p. 51, lines 8-12; p. 53, lines 6-17). Randolph's mother testified that, though she did not believe it to be true, there were rumors in the community that implicated her son, the vicitm's brother. (App. pp. 20-21; R. p. 18, line 9 – p. 19, line 21).

At the time of her death, Randolph lived with Tameka Williams ("Williams"). Williams testified that the afternoon of February 13, 2015, Randolph told Williams she was waiting for "B" to pick her up. Williams knew was Bryant was who she was referring to by the nickname "B." (App. p. 22; R. p. 20, lines 6-25).

Jamaal Pearce ("Pearce"), a friend to Bryant, testified that he and Bryant, along with another friend, James Keller ("Keller"), went to Williams' home around 4:30 pm, picked up

Randolph then went back to Keller's home. (App. pp. 23-25; R. p. 21, line 10 – p. 23, line 24). Pearce testified they "smoked a blunt together." (App. p. 26; R. p. 24, lines 22-24). The group began to disperse around the time Keller's grandfather returned to the home. (App. pp. 27-28, 38-40; R. p. 25, line 15 – p. 26, line 3; p. 36, line 8 – p. 37, line 2; p. 38, lines 4-23). Bryant left with Randolph on foot. (App. p. 28; R. p. 26, lines 4-5). Bryant called his cousin Jonathan McKnight ("McKnight") at approximately 6:00 pm to come give him a ride, since he did not have a car, which McKnight did. (App. pp. 41-42; R. p. 39, line 16 – p. 40, line 22).

McKnight testified that after eventually picking up Bryant and Randolph about ten or fifteen minutes after the call, he drove to Bryant's grandmother's house (also Petitioner's aunt) where he picked up Petitioner. (App. p. 43; R. p. 41, lines 2-21).

At approximately 7:00 pm, Bryant sent a text to Green and indicated he was thinking of killing the girl he was with. (App. p. 58; R. p. 56, lines 5-23).

When in McKnight's car, Petitioner asked to be taken to a girlfriend's house. He then began giving directions to McKnight which led the group down a rural stretch of South Carolina Highway 6 in Calhoun County. Petitioner eventually asked McKnight to stop so Petitioner could urinate. (App. pp. 44-46; R. p. 42, line 21 – p. 44, line 7). Petitioner exited the car, but went to the back passenger door and asked Randolph to get out of the car. When Randolph refused, Petitioner forcibly removed her, dragged her to the rear of the vehicle, "and opened fire." (App. pp. 46-47; R. p. 44, line 16 – p. 45, line 1). After emptying his gun, Petitioner handed the gun to Bryant. McKnight testified, "Bryant unloaded and reloaded again and shot a couple of more times." (App. p. 47; R. p. 45, lines 14-17). Petitioner then moved the body into the woods off of the highway. (App. p. 48; R. p. 46, lines 5-6). Petitioner and Bryant returned to the car and McKnight took them back into town to a convenience store. (App. p. 48; R. p. 46, lines 7-25).

Bryant got out at the store, and McKnight saw Bryant place Randolph's personal belongings into a trash bag. (App. p. 49; R. p. 47, lines 9-13). McKnight then drove Petitioner back to McKnight's grandmother's home. (App. p. 49; R. p. 47, lines 13-16). Petitioner began to visit McKnight regularly to ensure his silence. (App. pp. 50-51; R. p. 48, line 22 – p. 49, line 18).

Bryant texted Green again, this time asking for a ride. It was Green that Bryant was meeting at the convenience store at approximately 7:30 pm that evening. Bryant also asked Green to take him to Pearce's home. (App. pp. 60-62; R. p. 58, line 8 – p. 60, line 10).

Pearce testified Bryant called him after 8:00 pm and then showed up at Pearce's house. (App. pp. 29-30; R. p. 27, line 22 – p. 28, line 8). Bryant told Pearce that he "had to smoke that girl." (App. p. 30; R. p. 28, lines 17-23). Pearce understood "smoked" to mean that Bryant had shot her. (App. p. 31; R. p. 29, lines 1-11). Pearce testified he knew Bryant had a gun the night of February 13, 2015, because he had shown the gun to Pearce as they were going to pick up Randolph. (App. pp. 34-35; R. p. 32, line 22 – p. 33, line 9). (See also App. pp. 36-37; R. p. 34, line 6 – p. 35, line 14).

Green testified that Bryant asked him to take Bryant to Derrick Sumter's ("Sumter") house. (App. p. 63; R. p. 61, line 8-18). Bryant had told Green he had "messed up and shot the girl." (App. p. 63; R. p. 61, lines 18-25). Bryant had also asked for help in disposing of the body, but Green refused. (App. pp. 65-66; R. p. 63, line 21 – p. 64, line 4). Green, however, took Bryant to Sumter's home where Bryant gave Sumter the trash bag with Randolph's belongings. (App. p. 64; R. p. 62, lines 1-7). Bryant asked Sumter to dispose of these items. (App. pp. 69-70; R. p. 67, line 4 – p. 68, line 2). Bryant put his gun inside the bag before handing it to Sumter. (App. p. 70; R. p. 68, lines 10-15). Sumter complied by dumping the revolver into the Congaree River then tossing the bag into a wooded area off of South Carolina

Highway 48. (App. pp. 71-74; R. p. 69, line 17 – p. 72, line 4). After having completed this task for Bryant, Bryant then asked Sumter to pick up Petitioner and drive him back to the scene of the murder. Sumter did as Bryant asked. He and Petitioner recovered Randolph's body, and drove to a swampy area called "Four Holes" where Petitioner left Randolph's body. (App. pp. 74-80; R. p. 72, line 19 – p. 78, line 18).

The pathologist who conducted the autopsy testified that Randolph had been shot twelve times – six times in the head and six times in the chest. Randolph suffered damage to several major organs including her brain. (App. p. 81; R. p. 79, lines 19-23). Death would not have been immediate but Randolph would only have lived at the most several minutes before dying from the wounds. (App. p. 82; R. p. 80, lines 5 – 13).

ARGUMENT

The record well-supports the trial judge did not abuse her discretion in declining to imply a waiver of the right to counsel based upon Petitioner's request to dismiss counsel when Petitioner made no request to represent himself. Thus, the Court of Appeals did not err in affirming Petitioner's murder conviction.

Relevant Facts:

Prior to trial, Petitioner sent a letter to the Supreme Court of South Carolina asking that his lawyer be removed from his case. Judge Murphy questioned Petitioner about the letter. Petitioner expressed to Judge Murphy that he had made the request because Petitioner did not believe he was being "represented right." Petitioner requested that his attorney, Mr. Leiendecker, be dismissed. (App. p. 13; R. p. 11, lines 3-12). Petitioner stated that he did not believe Mr. Leiendecker was prepared for trial. He complained Mr. Leiendecker had only recently been appointed and had not communicated with him sufficiently. (App. p. 13; R. p. 11, lines 16-22).

Mr. Leiendecker informed the Court that while he agreed that appointed had been initially delayed, he had met with Petitioner approximately six (6) times, discussed the evidence with Petitioner, had worked with investigators and analyzed the evidence, and was fully prepared for trial. (App. pp. 14-16; R. p. 12, line 14 – p. 14, line 3).

Petitioner continued to assert that he was not sufficiently informed of the process and also asserted that he was upset that he was not allowed bond while others who had been involved had been allowed bond. (App. pp. 16-17; R. p. 14, line 10 – p. 15, line 1).

Judge Murphy asked Petitioner about any legal training or knowledge. (App. p. 17; R. p. 15, lines 2-9). Petitioner admitted he had no formal training, "just what [he would] hear from guys that been through stuff like this from doing time on drug charges up the road." (App. p. 17; R. p. 15, lines 10-12).

Judge Murphy resolved:

> ... 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 [the] 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 gong to deny your request to remove him from your case.

(App. p. 18; R. p. 16, lines 5-15).

Petitioner and Mr. Leiendecker thereafter conferred. (App. p. 18; R. p. 16, line 16). The trial judge also advised that Petitioner could have additional time to confer until the jury panel arrived. Further, the trial judge advised that "during the trial if things come up where you have a question and need to talk to him, just ... let me know and I will grant that request," to which Petitioner responded, "All right." (App. pp. 18-19; R. p. 16, line 17 – p. 17, line 5). Again, Petitioner made no request to represent himself at trial.

The Court of Appeals opinion is as follows:

> PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Fuller,* 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999) ("A defendant's right to waive the assistance ofcounsel is not unlimited. The request to proceed *pro se* must be clearly asserted by the defendant prior to trial."); *State v.Thompson,* 355 S.C. 255, 262, 584 S.E.2d 131,134 (Ct. App. 2003) ("Waiver is most commonly understood as an affirmative, verbal request."); *State v. Sims,* 304 S.C. 409, 415, 405 S.E.2d 377, 380-81 (1991) (finding the defendant had failed to clearly assert his right to appear pro se because he had given "no indication of a desire to proceed pro se prior to trial" and had merely requested to have his attorney dismissed); *State v. Mazique,* 419 S.C. 282, 295, 797 S.E.2d 730, 737 (Ct. App. 2016) (finding no error in the trial court's denial of the defendant's motion to dismiss because the request to proceed pro se must be clearly asserted and the defendant had merely stated he no longer wanted his attorney to represent him and had been "equivocal about whether he wanted to

> represent himself"); *Sims*, 304 S.C. at 415, 405 S.E.2d at 380 (noting the trial court was "entitled to take into account the countervailing state interest in proceeding on schedule" and substituting counsel ten days before the trial could have delayed the trial's start); *id.* at 415, 405 S.E.2d at 380-81 (finding the trial court properly denied the defendant's motion to dismiss trial counsel because the court adequately inquired into the defendant's complaint and the evidence was insufficient to justify substitution of counsel).

(App. p. 128).

Discussion:

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242 (a), SCACR. Petitioner presents a case that demonstrates an ordinary application of clearly established law upon facts supported by the record. He fails to show cause for this Court to grant the petition. Simply, the case law and facts do not support Petitioner's position.

It is beyond question that a criminal defendant may waive his Sixth Amendment right to counsel and represent himself at trial. *Faretta v. California*, 422 U.S. 806 (1975). It is likewise beyond question that a defendant's waiver of the right to counsel shall not be denied simply because the waiver is likely to be contrary to the defendant's best interest. *State v. Brewer*, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997) ("A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed pro se does not justify a denial of the right to self-representation"). See also *State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014) (rejecting provision in *Indiana v. Edwards*, 554 U.S. 164 (2008) that would allow a trial judge to decline to accept a waiver from an individual with severe mental illness that may affect the ability to represent himself). However, a request to waive the right to counsel and "proceed *pro se* must be clearly asserted by the defendant prior to trial." *Brewer*, 328 S.C. at 119, 492 S.E.2d

at 98. See also *State v. Reed,* 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). Courts are loath to find waiver where the request to waive is not clearly reflected on the record:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused-whose life or liberty is at stake-is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

Johnson v. Zerbst, 304 U.S. 458, 465 (1938). See also *Estelle v. Williams*, 425 U.S. 501, 515 (1976) (Powell, J., concurring) ("We generally disfavor inferred waivers of constitutional rights.").

"Waiver is most commonly understood as an affirmative, verbal request." *State v. Thompson*, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003). Here, Petitioner simply did not make a request to waive his right to counsel; rather, he requested only that present counsel be dismissed. At no point did Petitioner seek to represent himself, even after his initial request to relieve counsel based on lack of preparation was denied. In fact, Petitioner relied upon counsel immediately after the discussion which further evidences his desire for counsel. *See Brewer v. Williams*, 430 U.S. 387, 404 (1977) ("waiver requires not merely comprehension but relinquishment, and Williams' consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right"). At any rate, as set out above, the record demonstrates that Petitioner made no request to waive and to represent himself. Thus, contrary to his position on appeal, there was no request for waiver that could be honored. See *United States v. Weisz*, 718 F.2d 413, 426 (D.C.Cir. 1983) ("the right of self-representation is waived unless defendants articulately and unmistakably demand to proceed *pro se*").

Moreover, while the trial judge here did briefly touch upon the advantages of counsel; that was done so in consideration of the motion to dismiss counsel. "Appellate courts have required more than an equivocal request for self-representation before they engage in a full-blown *Faretta* inquiry." *Reese v. Nix*, 942 F.2d 1276, 1280 (8th Cir. 1991) (collecting cases). Simply requesting counsel be relieved of appointment is not an unequivocal request to waive the right to counsel. *State v. Sims*, 304 S.C. 409, 414-15, 405 S.E.2d 377, 380-81 (1991) (finding no request to "proceed *pro* se" in defendant's complaint that counsel should be dismissed). See also *United States v. Loya-Rodriguez*, 672 F.3d 849, 858 (10th Cir. 2012) (finding defendant's letter "expressing total frustration with his attorney and a desire to speak about something with the court" without counsel was not sufficient evidence defendant "clearly and unequivocally invoked the right to represent himself at trial."). Nor can Petitioner rely on the short discussion on the general dangers of self-representation as evidence of an understanding that he was attempting to waive his right and represent himself.

In *United States v. Light*, 406 F.3d 995, 999 (8th Cir. 2005), the Eight Circuit Court of Appeals acknowleged the district court's reference to "the potential negatives of such a decision" to pursue self-representation while determining, nonetheless, that counsel would participate in the proceedings. The Court of Appeals found the defendant's inquiry on the "rule on representing yourself," was not sufficient to be an "unequivocally express a wish to represent himself." *Id.* The Court then concluded that the district court's dialogue with the defendant "was simply explaining the role of counsel" but resolved that dialogue "did not interfere with Light's right to self-representation" or work to chill any potential request. *Id.* Likewise in the instant case, the trial judge simply explained the benefits of counsel and did not impose counsel upon a defendant actively attempting to waive. Rather, in full support that Judge Murphy did not

construe the instant motion as one insisting upon self-representation, the record shows the judge did not engage in a "full-blown *Faretta* inquiry." When read in context, the record does not support that Petitioner was choosing to conduct his defense *pro se* and was doing so with eyes "wide open" to the dangers and disadvantages. *Faretta,* 422 U.S. at 835, 95 S.Ct. 2525.

That the request consistently remained one concerning counsel is also supported by the judge's reference to the fact she would not appoint another attorney where the trial was imminent. (App. p. 18; R. p. 16, lines 5-15). See *Sims*, 304 S.C. at 415, 405 S.E.2d at 380 (courts are "entitled to take into account the countervailing state interest in proceeding on schedule" and whether "substititute counsel [would have] adequate time to prepare"). In fact, compelling an individual to continue *pro se* after granting a motion to dismiss without discussion as to a specific waiver has been found to be an involuntary waiver of the right to counsel. See *Smith v. Grams*, 565 F.3d 1037, 1045-46 (7th Cir. 2009) (declining to find valid waiver of right to counsel when defendant allowed to dismiss attorney but court did not advise that he would have to proceed *pro se*); *United States v. Meeks*, 987 F.2d 575, 579 (9th Cir. 1993) (declining to find a valid waiver where counsel's motion to withdraw was granted at the same time defendant's motion to substitute counsel was denied, given that the court, not defendant, forced waiver of the right).

Given that courts will "indulge every reasonable presumption against waiver of the right to counsel," *State v. Thompson*, 355 S.C. at 262, 584 S.E.2d at 134, the trial judge did not abuse her discretion in declining to find an implied waiver of the right to counsel based merely upon Petitioner's motion to dismiss counsel in the absence of a specific request to proceed *pro se*.

The Court of Appeals simply affirmed what the record amply shows. (App. p. 128). Petitioner's argument to the contrary should be rejected.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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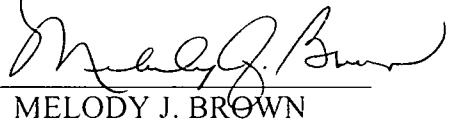
BY: 
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Appellate Case No. 2018-000018

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Return to Petition for Writ of Certiorari* on Petitioner by depositing two (2) copies in the United States mail, postage prepaid, to his attorneys of record, addressed as follows:

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