

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DENNIS TEMPLE,

APPELLANT

Appellate Case No. 2011-182806

ANDERS BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred by what was in effect coercing appellant to appear pro se at trial because although appellant waived his right to counsel prior to trial; ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial.

STATEMENT OF THE CASE

Appellant Dennis Temple was convicted per jury trial of two counts of first degree criminal sexual conduct, grand larceny, and kidnapping during the December 2010 term of the Oconee County General Sessions Court before Judge J. Cordell Maddox. **Appellant appeared pro se at trial.** Kurt Travernier appeared as stand-by counsel at trial. Appellant was sentenced to imprisonment for a period of one-hundred (100) years.

Appellant appealed. This brief follows.

ARGUMENT

The trial judge erred by what was in effect coercing appellant to appear pro se at trial because although appellant waived the right to counsel prior to trial; ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial.

At trial, Catherine McGough testified that around 4:30 pm on the afternoon of May 9, 2010, she was putting her dormitory items in her storage unit at All Safe Storage located in Seneca, South Carolina, and then began walking to her car when she encountered a black male (whom she identified as appellant at trial and after viewing a photograph layout after the incident)¹ who wanted her to purchase shoes he was selling at that time. McGough stated that she showed no interest, and entered her car and began to leave until she realized that she left open the door to her storage unit. McGough explained that when she went back to close the door, appellant pushed her down in the unit and managed to place a belt around her neck. Thereafter, appellant managed to guide her to another storage unit whereinafter he placed his penis and a bottle of solution into her vagina, and then kept her tied up inside the storage room while he fled in her vehicle. McGough stated that she managed to call 911 from a cell phone and waited for police to arrive. Tr. 84, l. 5-p. 124, l. 7.

Oconee Officer Neill Burkett testified that he was dispatched to the crime scene soon after the 911 call came in at 1:04 a.m. on May 10, 2010. Tr. 158, l. 7 – p. 162, l. 6. Officer Brian Danielson transported McGough from the incident location to the local hospital. Tr. 214, l. 18 – p. 215, l. 21. Subsequently, Officer Greg Reed created a photographic lay-out, which he showed to McGough, who in turn identified the picture of appellant as the perpetrator. Tr. 259, l. 6 – p. 267, l. 21; Tr. 277, l. 23 – p. 278, l. 1.

¹ Tr. 259, l. 6 – p. 267, l. 21; Tr. 227, l. 23 – p. 278, l. 1.

From the outset of the case, appellant expressed his unhappiness with all three of his court appointed attorneys assigned to represent him in the case. At the pretrial hearing dated June 30, 2010, Judge Alexander S. MacCaulay appointed Wilson Burr to represent appellant. Tr. 5, l. 5 – p. 6, l. 14. Later, the case was sent out of Burr’s office and assigned to trial counsels Sarah Drawdy and Keith Denny. During another pretrial hearing held before Judge Maddox on July 29, 2010, appellant requested that counsels Drawdy and Denny be removed from his case and asked for time in which to obtain private counsel to represent him. Both of appellant’s requests were granted by Judge Maddox. Tr. 4, l. 3 – p. 10, l. 4. On another pretrial hearing held on September 14, 2010, Judge Maddox learned that appellant had not retained private counsel and went on to appoint Kurt Travernier to represent appellant the case. Tr. 4, l. 6 – p. 6, l. 3; Tr. 9, l. 22 – p. 12, l. 20; Tr. 17, l. 6 – p. 19, l. 7. See Order of Appointment of Counsel dated September 27, 2010. Tr. 78. Then later, during a hearing held on October 21, 2010, Judge Maddox accepted appellant’s voiced displeasure with Kurt Travernier and his apparent decision to represent himself at trial by default, and then appointed Kurt Travernier as stand-by counsel for trial. Tr. 3 l. 22 – p. 23, l. 11. See Order of Appointment of Stand-by Counsel dated November 8, 2010. Tr. 111-118. On December 7, 2010, Judge Maddox accepted appellant’s apparent pro se status for trial and again reiterated that Kurt Travernier would remain seated as stand-by counsel at trial. Tr. 79, l. 18 – p. 87, l. 18.

Next, on the actual trial date and minutes after the jury was selected appellant requested the full assistance of appointed of counsel (presumably Travernier) to represent him at trial, which was in effect appellant’s plea to neither proceed pro se nor receive stand-by legal assistance, but rather to receive the full assistance of appointed counsel in the case. Travernier advised the trial judge that appellant was requesting “a continuance or that in same way or form that I might be able to

represent him in the trial.” Tr. 60 l. 7-10. The state argued that this case was fast-tracked due to appellant’s speedy trial motion and that a reversal of appellant’s waiver of his right to counsel would place an undue burden on the prosecution. Tr. 61, l. 10-p. 62, l. 10. The Court ruled as follows:

The Court: I understand your motion. And like I said, one of the main things I want to do is protect your rights, as we talked about last week in answer for an appeal. At this late date, after all the questioning that I’ve done, I’m gonna deny your motion for a continuance....I understand at this point—I’ve been concerned all along that we would get up here and you might be overwhelmed with the legal proceedings, but I’m gonna continue to order that Mr. Tavernier sit with you and respond to your questions. Tr. 66, lines 12 – 22.

It is well established that per Faretta v. California, 422 U.S. 806 (1975), that an accused may waive his Sixth Amendment right to counsel and proceed pro se at trial. State v. Roberts, 369 SC 580, 632 S.E. 2d 871 (2007), State v. Thompson, 355 SC 255, 584 S.E. 2d 131 (2003), State v. Boykin, 324 SC 552, 478 S.E. 2d 689 (1996). To effectuate a valid waiver of the right to counsel, the two-pronged Faretta test requires that the accused be advised of his right to counsel and adequately waived of the dangers of self-representation. State v. Thompson, supra. Although appellant was advised under the Faretta requirements; nonetheless, immediately after the jury selection, appellant put forth a waiver of his prior waiver of the right to trial counsel’s assistance at trial, but the trial judge failed to grant the waiver of his counsel waiver.

A waiver is the intentional relinquishment of a known right. Johnson v. Zerbst, 304 U.S. 458 (1938). Therefore, inasmuch as appellant had a right to waive counsel and appear pro se, he also had a right to waive his right to appear pro se and then re-assert his right to counsel de novo. It is apparent from the record that his second waiver was a valid waiver because appellant stated that he indeed wanted the continuance to consult with Tavernier so that he (Tavernier) could represent

him; however, he “got tied up” on other motions (venue changes and pretrial publicity) and forgot to ask, but he was asking for Travernier to represent him at trial. Tr.60, l. 24 – p. 61, l. 7; Tr. 62, l. 12 – p. 63, l. 10. Therefore, since appellant validly waived the known right to self representation, which really occurred by default prior to trial, and then chose to re-assert his Sixth Amendment right to counsel, this second waiver (of self representation) should have been received and the full appointment of counsel re-instated as opposed to a summary dismissal of the second waiver.

Furthermore, it appeared as though appellant’s request for counsel was dismissed in part due to the fact that appellant was displeased with all assigned attorneys, which led to the assumption that the counsel issue was being used as a dilatory tactic to delay his trial. However, in cases where it is believed that intentional delay is suspected when a client makes motions regarding counsel’s assistance, the trial judge is required to inquire as to the reason for a request regarding counsel and ascertain whether there is good cause for the request. See United States v. Goldberg, 67 F3d 1092 (3rd Cir. 1995). Here, it appears that appellant had good cause for re-asserting his right to counsel to the extent that his pre-occupation with his pre-trial motions rendered him with the inability to approach the court again about his pro se waiver and the re-assertion of his right to the full assistance of counsel in the case.

At best, due process requires a hearing on “the record,” especially in waiver of counsel questions “to be sure, the...record is competent” regarding the matter in keeping with Johnson v. Zerbst, *supra*, see Superintendent of the Powhatan Correction Center v. Barnes, 221 Va. 780, 273 S.E. 2d 558 (1981), and United States v. Goldberg, *supra*. As it stood, appellant did not receive his required Faretta warnings **again prior to trial** that he had a right to counsel and that there were dangers and disadvantages associated with self representation.

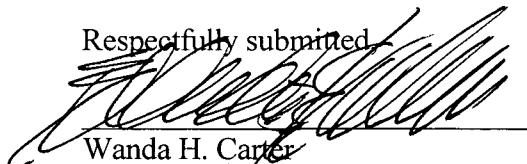
The Sixth Amendment clearly states that in all criminal cases, the accused shall have the assistance of counsel for his defense and if indigent, the accused shall have appointed counsel. Gideon v. Wain Wright, 372 U.S. 335 (1963). The erroneous deprivation of a defendant's fundamental right to the assistance of counsel is per se reversible error and never harmless error. Chapman v. California, 386 U.S. 18 (1967).

The trial judge erred in allowing appellant to be tried without the assistance of counsel because although appellant waived the right to counsel prior to trial, he rescinded that waiver after the jury was selected and re-asserted his right to the assistance of appointed counsel to represent him at trial. This error violated appellant's Sixth Amendment right to counsel, which is also guaranteed under article 1, §14 of the South Carolina State Constitution.

CONCLUSION

Based on the following argument, appellant requests that his convictions and sentences be vacated and his case remanded for a new trial complete with the appointment of counsel.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of September, 2012.

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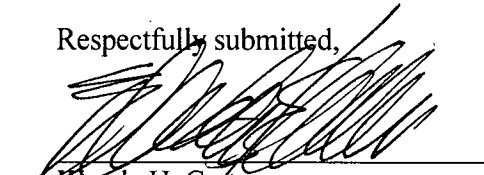
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dennis Temple states:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge J. Cordell Maddox, Jr., which was held on December 15, 2010, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Dennis Temple.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

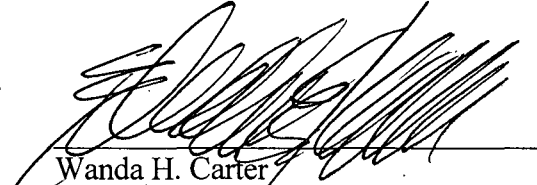
ATTORNEY FOR APPELLANT

This 28th day of September, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 28th, 2012



Wanda H. Carter
Deputy Chief Appellate Defender

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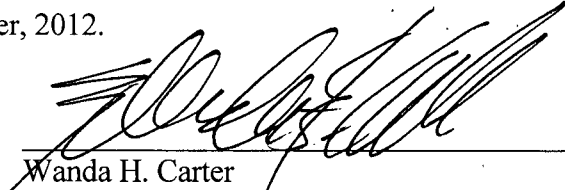
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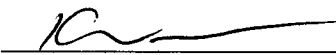
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and record on appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at P.O. Box 50666, Columbia, SC; and on Dennis Temple, #274802 at Lieber Correctional Institution, this 28th day of September, 2012.


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of September, 2012.



Notary Public for South Carolina (L.S.)

My Commission Expires: October 2, 2013.