STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenwood County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRENCE O'NEIL FRAZIER,

APPELLANT

APPELLATE CASE NO 2015-002464

FINAL BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUES ON APPEAL

Whether Appellant is entitled to a new trial because he did not knowingly and intelligently waive his right to counsel where the record does not demonstrate that Appellant's decision to represent himself was made with an understanding of the risks of self-representation?

STATEMENT OF THE CASE

On or about November 13, 2015, the Greenwood County Grand Jury returned indictments against Appellant Terrence Frazier for carjacking, leaving the scene of an accident, breaking into a motor vehicle, grand larceny of a motor vehicle valued over ten thousand dollars, and trafficking methamphetamine, all alleged to have occurred on July 9, 2015. R. 577.

On November 16-19, 2015, Frazier appeared for trial before the Honorable Eugene C. Griffith, Jr. and a jury. Frazier represented himself *pro se*, but was assisted by standby counsel Patricia Bolen and Elizabeth Able for a portion of the proceedings. The State was represented by assistant solicitors Brian Moroney and Micah Black. R. 10.

The jury returned verdicts of guilty as to the offenses of leaving the scene of an accident, breaking into a motor vehicle, grand larceny of a motor vehicle valued over ten thousand dollars, and trafficking methamphetamine. The jury found Frazier not guilty of carjacking, but convicted him of the lesser offense of using a vehicle without permission. R. 563, l. 11 – 564, l. 24. Judge Griffith sentenced Frazier to concurrent terms of twelve months for leaving the scene of an accident, thirty-six months for using a vehicle without permission, sixty months for the breaking into a motor vehicle, sixty months for grand larceny, and twenty years for trafficking methamphetamine. R. 572, l. 19 – 573, l. 9.

This appeal follows.

STATEMENT OF FACTS

Introduction

Frazier was accused in a string of incidents that began at a Chick-fil-A restaurant in Greenwood, South Carolina. Frazier allegedly stole patron Susannah Chatos' white truck from the parking lot of Chick-fil-A and subsequently crashed the truck into Bessie Williams' Lincoln MKZ that was parked beside the Frank's Carwash down the street. R. 98, l. 2 – 182, l. 20; R. 234, l. 24 – 243, l. 1; R. 270, l. 13 – 271, l. 23. The suspect got into Kimberly Searles' 2014 Chrysler 300 that was being dried outside of the carwash and drove away. R. 256, l. 2 – 282, l. 23. That car was driven down to the World Finance, where it was used to block in Gwendolyn Callaham's Saturn SUV. R. 303, l. 16 – 314, l. 5; R. 314, l. 13 – 318, l. 7. When Officer Donald Trotter arrived, the suspect was seated in the driver's seat of the Saturn and the back of the car was open. Frazier was arrested and taken to the local jail. R. 337, l. 3 – 342, l. 10; R. 346, l. 21 – 350, l. 6.

The jail refused Frazier admittance due to suspicion that he was under the influence, so he was taken to the emergency room at Self Regional Hospital. R. 342, l. 11 – 344, l. 6; R. 345, l. 17 – 346, l. 4; R. 350, l. 7 – 351, l. 14. According to the hospital security guard, Travis Rogers, the hospital has a protocol of stripping and searching the clothing of anyone in a "C-pod" room for staff safety. Rogers did not elaborate on what patients are brought into that section of the hospital. R. 359, l. 13 – 373, l. 21; R. 376, l. 8 – 378, l. 3. During a search of Frazier's right front pants pockets, Rogers found what he believed to be drugs. Rogers gave the material to officer Trotter, who called officer Mitch McCallister to collect the alleged drugs and log them into evidence. R. 344, l. 7 – 345, l. 16; R. 343, l. 1 – 345 l. 22; R. 373, l. 22 – 375, l. 4; R. 383, l. 19 – 404, l. 1. Douglas Robinson, of the South Carolina Law Enforcement Division

("SLED"), testified that the material collected tested positive as methamphetamine and weighed 19.92 grams without packaging. R. 419, l. 19 – 428, l. 16.

Proceedings Prior to "*Faretta*" [1] Colloquy

Frazier's first interaction with Judge Griffith occurred at his October 15, 2015 bond hearing. R. 1. In response to Judge Griffith's inquiry as to why he did not have a lawyer, Frazier responded:

> Because my family can't afford a lawyer and I am trying, I look at the cases [as] very frivolous and I understand, I am not saying I am the smartest but I feel like I am smart enough to get through this myself and I know a little about the law to make it through.

R. 5, l. 24 – 6, l. 5. Judge Griffith responded: "You can represent yourself, I can't force a lawyer on you. These young lawyers are smart." R. 6, ll. 6-7. Frazier agreed but said that he was going to try to get out on bond and then try to retain an attorney. Though he was unemployed, he said that he could afford a modest bond with the help of his brother and a friend. R. 6, ll. 8-18. Bond was set at one hundred thousand dollars and Frazier noted his desire to have a speedy trial. R. 7, l. 21 – 8, l. 23.

One month later, Frazier appeared for trial without a lawyer. The proceedings began with Judge Griffith asking Fraizer: "Are you prepared to represent yourself?" R. 17, l. 11. Frazier responded: "Yes, sir." R. 17, l. 12. Next, Frazier's rejection of the state's plea offer to cap the sentence at ten years in exchange for guilty pleas to strong armed robbery and drug trafficking was placed on the record. R. 17, ll. 13-21. Judge Griffith then asked: "Now, have you had an opportunity to speak with a lawyer of your choosing to see if you wanted help and assistance in defending yourself in this matter? Are you prepared to go to trial?" and "Are you ready to go

---

[1] Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975).

trial?" R. 17, l. 22 – 18, l. 2. Frazier responded "yes, sir." R. 18, ll. 1-3. Frazier explained that he had several preliminary motions, which the trial court agreed to hear after jury selection. R. 18, l. 4 – 21, l. 5. Following selection of the jury, Judge Griffith held a bench conference during which the prosecutor provided race-neutral reasons for the exercise of his strikes. R. 39, l. 22 – 40, l. 19.

The trial court granted the prosecution's preliminary motion to exclude mention of any plea negotiations. R. 40, l. 21 – 42, l. 18. The court then heard Frazier's myriad of preliminary motions. Framed as a motion to "change venue and transfer," Frazier complained that he was uneducated and had not been given access to a law library at the local jail in order to prepare a proper defense. R. 42, l. 22 – 43, l. 19. Judge Griffith denied the motion, ruling that "[v]enue is not based on the access to a law library. It's based on access to a jury of a trial by your peers." R. 44, ll. 12-19. Frazier reiterated that without access to any law books he could not be properly prepared to represent himself. R. 45, l. 20 – 46, l. 4. Judge Griffith responded:

> It certainly doesn't help your case not having access to books, but the State is not required to provide you books to defend yourself. You get to defend yourself and you're tasked with knowing the rules as they are written, but you don't get -- you don't have a Constitutional Right to be transferred to a different jail because they have a better library.

R. 46, ll. 5-11. Frazier asked if he could be granted access to legal books, but the judge said "if it's not available, it's not available." R. 46, ll. 13-16. Judge Griffith disagreed with Frazier's assertion that he would not have a fair trial, stating: "No, it means that you don't know all the rules . . . . It means you get a fair trial. I'm going to do everything that I can to give you a fair trial." R. 46, ll. 17-23. Thus, he maintained his denial of Frazier's request to be transferred to another facility where he could have access to a law library. R. 46, l. 24 – 47, l. 7.

Frazier further moved to exclude the drug evidence due to discrepancies in the weight listed in the various police reports and arrest warrant. R. 43, l. 20 – 44, l. 8; R. 45, ll. 12-19. Judge Griffith ruled that the prosecution would be limited to the weight listed in the SLED report of 19.92 grams. R. 44, l. 20 – 45, l. 11; R. 47, l. 8 – 48, l. 22. Frazier also made several motions related to the state's proposed *voir dire*, the indictment, and inconsistencies in the police reports, none of which resulted in any favorable rulings for the defense. R. 48, l. 23 – 56, l. 3. Judge Griffith agreed that the prosecution was required to produce the drugs at the trial and instructed Frazier to say he has "got a matter of law" if there was anything that the prosecution tried to introduce at trial that they did not disclose in discovery. R. 56, l. 5 – 61, l. 8. The remainder of Frazier's motions were denied and related to service and discrepancies in the warrant, requests to subpoena officers from the local detention center, the lack of evidence of force to support a conviction for carjacking, and requests for transcripts of his prior preliminary and bond hearings. R. 61, l. 9 – 72, l. 7.

"*Faretta*" Colloquy

Following the conclusion of the preliminary motions, the prosecutor said: "Your Honor, we wanted to do a *Faretta* Warning about -- his rights this afternoon, to get that out of the way." R. 72, ll. 8-10. Judge Griffith asked who did the *Faretta* warning previously. The prosecutor averred that Frazier was brought before a Judge Miller, but said: "It was something that probably took five minutes. I don't think it was near in-depth." [2] R. 72, ll. 11-15.

Judge Griffith asked Frazier about his educational and work background. Frazier was twenty-five years old and completed the ninth grade. R. 72, ll. 16-19. He had worked cutting

[2] Despite consultation with the assistant solicitor, Greenwood County Clerk of Court's office, and multiple court reporters, Counsel for Appellant was unable to procure the transcript of any hearing before a Judge Miller.

grass and remodeling houses with his cousin's father. R. 72, l. 20 – 73, l. 4. Frazier said that he understood that Judge Griffith could appoint him a public defender. R. 73, ll. 5-7. Judge Griffith responded: **"Do you want one? I mean you are doing fairly well this afternoon pointing out these motions and pretrial matters. You are doing a very nice job of being organized."** R. 73, ll. 8-11 (emphasis added). Frazier asked if getting a lawyer would "start his case all the way over and take more time?" R. 73, ll. 12-14. Judge Griffith remarked that "[y]ou don't hear that often." R. 73, l. 15. He then said: "It could, but -- now, would you like me to see if I can get a lawyer to sit with you to help advise you on procedural matters, like the Court Rules?" R. 73, ll. 16-18. Frazier said: "Yeah, that will work." R. 73, l. 19. He told Frazier that he would still handle the case and witnesses himself, since he was "familiar with the facts." R. 73, ll. 20-21. Frazier responded again: "Yes sir, that will work." R. 73, l. 22. However, he inquired about whether he could seek a bond reduction if he applied for a public defender and the date of trial was pushed further out. Judge Griffith responded that he "technically" could but said "you probably wouldn't get it." R. 73, l. 23 – 74, l. 3. Frazier responded that he "really want[ed] to get this over with." R. 74, ll. 4-5.

Judge Griffith asked Frazier if he felt comfortable representing himself, to which Frazier responded "Yeah, I feel – I feel comfortable with the facts of the evidence." R. 74, ll. 6-12. Frazier asked that a public defender be able to sit with him, and Judge Griffith said he would see if he could get someone. Frazier had not had a public defender previously in this case, but said that was represented by Thomas Adducci in a prior matter. Judge Griffith said that he would speak with Patricia Bolen to see if she or someone else in the office was available, but said that they would "help you with the rules" but have "no responsibility for defending you." R. 74, l. 16 – 75, l. 17. Court was then adjourned for the day. R. 75, ll. 18-23.

Proceedings After "*Faretta*" Colloquy

When the parties returned the next day, Judge Griffith advised Frazier that there would be a member of the public defender's office present to help with "advice on procedures" but the jury would be instructed that Frazier was representing himself. R. 77, ll. 2-11; R. 78, ll. 16-24. He explained:

> So she's going to tell you any rules that you might not know.... But you get to handle the witnesses. You got to cross-examine. You got to stand up when you speak to the court and all those sort of things. She's only giving you procedural advice. She's not going to handle a single witness. She's not going to do opening statement for you or nothing like that. You get to do all that.... If somebody on the State's side says objection or you say objection, that's code for everybody to stop and kind of let me hear the objection, but the witness, I'm going to make them stop answering the question once I hear that word objection and I want to know the rule as to why it's not allowed to be answered. If I say sustained means that I agree with you. If I say overruled, I disagree with you. So if you say objection to the State's witness, they can't say that. That's not on relevant. Sustained means I'm sorry, you are wrong, going forward so you can answer the question.... If I say -- sustained means they got to stop. Overruled –

R. 77, l. 13 – 78, l. 12. Frazier responded: "Means that you overruled it." R. 78, l. 13. Frazier said that he understood. R. 78, ll. 14-15. Judge Griffith then explained the purpose of opening statements and the process of calling witness and cross-examination. R. 78, l. 25 – 79, l. 18.

Despite the fact that the burden of proof always remains on the prosecution in a criminal trial, during Frazier's opening statement he told the jury about what he would prove to them. R. 94, l. 25 – 95, l. 1; R. 96, ll. 13-15. Frazier's questions tended to be repetitive and often elicited hearsay or evidence that he had previously objected to during direct examination. See, e.g., R. 119– 138; R. 169 – 182; R. 192 – 201; R. 288 – 302; R. 307 – 314; R. 319 – 335; R. 346 – 359; R. 391 – 404; R. 411 – 418. Though the trial judge sustained Frazier's objection to testimony that Frazier was acting out sexually toward the nursing staff at the hospital, there was no accompanying motion to strike. R. 375, ll. 8-24.

At the beginning of the third day of trial, Judge Griffith advised Frazier that he could still enter a plea of guilty and that the court would "take into account the acceptance of responsibility in passing the sentence." R. 232, ll. 2-15. Frazier said that he had tried to negotiate with the state but they were unwilling to offer him a plea to any lesser-included offenses. Thus, he wanted to continue with the trial. R. 232, ll. 15-21. Not understanding that the State had not completed the presentation of its case, Frazier then moved for directed verdict and asked to hold a hearing on the suppression of the drug evidence. Judge Griffith said that he would deal with the admissibility of the drugs after the state attempted to lay the foundation for their admission. R. 232, l. 22 – 234, l. 13.

Following the actual close of the state's case, Frazier argued his motion for directed verdict. R. 446, l. 13 – 453, l. 22. He further complained that some of the indictments, witness statements, and the SLED report were not given to him until the day of trial, such that he did not have adequate time to review them. Judge Griffith said that had Frazier asked for a continuance on that basis before the jury was sworn, he would have "probably granted it" but that it was too late. R. 453, l. 23 – 457, l. 22.

Frazier presented no evidence on his behalf and the case proceeded to closing arguments. R. 464, l. 22 – 471, l. 17; R. 480, l. 19 – 529, l. 11. Frazier was interrupted several times by the trial judge, just as he was during Frazier's cross-examination of witnesses. R. 502 – 504; R. 508 – 509; R. 513 – 514; R. 523 – 525; R. 529. At sentencing, Frazier simply told the judge "it's up to you" and "it's at your discretion." R. 571, ll. 8-12; R. 572, l. 18.

ARGUMENT

Appellant is entitled to a new trial because he did not knowingly and intelligently waive his right to counsel where the record does not demonstrate that Appellant's decision to represent himself was made with an understanding of the risks of self-representation.

Introduction

At twenty-five years old and with a ninth grade education, Terrence Frazier was facing a potential of sixty-six years in prison if convicted as indicted on all offenses and sentenced to consecutive maximum terms.[3] R. 72, ll. 17-19. During his pre-trial bond hearing, Frazier initially said that he was unrepresented because his family could not afford to retain an attorney. He further said that he viewed the case against him as frivolous and thought that he was "smart enough" and knew "a little about the law" in order to "make it through." R. 5, l. 24 – 6, l. 5. When Judge Griffith responded that he could not force an attorney upon Frazier but "[t]hese young lawyers are smart," Frazier said that he was trying to get out on bond and "then work on trying to get an attorney, pay an attorney." R. 6, ll. 6-10. Frazier also mentioned that he had filed a speedy trial motion, with which the prosecutor indicated it intended to comply. R. 8, l. 7-21.

One month later, Frazier's case was called for trial. R. 10. While the trial judge asked Frazier if he was prepared to represent himself, it was not until after the rejection of the State's plea offer, the selection of the jury, and completion of the preliminary motions that the prosecutor mentioned giving the Faretta warnings. R. 17, l. 11 – 72, l. 10. The prosecutor

---

[3] S.C. CODE ANN. § 44-53-375(C)(1)(b) (trafficking methamphetamine of ten or more, but less than twenty-eight grams, second offense, carries penalty of five to thirty years imprisonment); S.C. CODE ANN. § 16-3-1075(B)(1) (carjacking carries penalty of up to twenty years imprisonment); S.C. CODE ANN. § 16-13-30(B)(2) (grand larceny of property valued over ten thousand dollars carries penalty of up to ten years imprisonment); S.C. CODE ANN. § 16-13-160 (breaking into motor vehicle carries penalty of up to five years imprisonment); S.C. CODE ANN. § 56-5-1220 (leaving the scene of an accident carries penalty of up to one year imprisonment).

conceded that any prior advisement to Frazier regarding his right to counsel was not sufficient. R. 72, ll. 11-15. During the colloquy that ensued, the trial judge told Frazier that he was "doing fairly well" and "a very nice job of being organized." R. 73, ll. 8-11. Obviously intent on going forward with the jury that had just been selected, the judge offered to provide standby counsel to Frazier to "help advise [him] on procedural matters, like the Court Rules." R. 73, ll. 12-21. Concerned about delaying his trial, Frazier accepted the appointment of standby counsel and proceeded to represent himself at trial. R. 73, l. 22 – 74, l. 17.

Though Frazier argues that he did not voluntarily waive his right to counsel at any point during the proceedings, it is important to note that significant portions of the proceedings – rejection of the plea offer, jury selection, and preliminary motions – were all conducted prior to any mention of a Faretta colloquy. The colloquy eventually conducted did not satisfy the requirements of Faretta because it did not warn Frazier of the dangers of self-representation. Even so, whether completely absent or utterly insufficient, in determining whether there was a valid waiver of counsel "the ultimate test is not the trial judge's advice but rather the defendant's understanding. Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). In this case the record does not demonstrate that Frazier's "decision to represent himself was made with an understanding of the risks of self-representation." Thus, there was not a valid waiver of Frazier's right to counsel and he is entitled to a new trial.

Applicable Law

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527 (1975); accord Gideon v. Wainwright, 372 U.S. 335, 339–40,

83 S.Ct. 792, 794 (1963). The Constitution further requires that "no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Scott v. Illinois, 440 U.S. 367, 367, 99 S.Ct. 1158, 1159 (1979). "The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages." State v. George, 323 S.C. 496, 508, 476 S.E.2d 903, 911 (1996).

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." United States v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044 (1984). The erroneous deprivation of a defendant's fundamental right to the assistance of counsel is *per se* reversible error. State v. Boykin, 324 S.C. 552, 555, 478 S.E.2d 689, 690 (Ct. App. 1996) (citing Chapman v. California, 386 U.S. 18, 23 n. 8, 87 S.Ct. 824, 828 n. 8 (1967)). "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." McKnight v. State, 320 S.C. 356, 358, 465 S.E.2d 352, 353 (1995) (quoting Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067 (1984)).

A defendant may waive his Sixth Amendment right to counsel. A waiver is an intentional and voluntary relinquishment of a known right. State v. Thompson, 355 S.C. 255, 262, 584 S.E.2d 131, 134 (Ct. App. 2003). The courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights. Id. To effectuate a valid waiver of the right to counsel, the two-pronged Faretta test must be met in which the accused is (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. Id. at 262, 584 S.E.2d at 134-35 (citing Prince v. State, 301 S.C. 422, 423–24, 392 S.E.2d 462, 463 (1990)). Where the trial judge fails

to address the disadvantages of appearing *pro se,* as required by the second prong of *Faretta,* the appellate court must look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source. Id.; Watts v. State, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001); Gardner v. State, 351 S.C. 407, 411-12, 570 S.E.2d 184, 186 (2002); Wroten, 301 S.C. at 294, 391 S.E.2d at 576. However, where the record fails to demonstrate the defendant made an informed choice to proceed pro se, with eyes open, then a knowing and voluntary waiver of counsel is not effectuated and the case should be remanded for a new trial. Watts, 347 S.C. at 402-03, 556 S.E.2d at 370.

Discussion

In the present case, the rejection of the State's plea offer, selection of the jury, and preliminary motions all occurred without any mention of Faretta. Gomez v. United States, 490 U.S. 858, 872–73, 109 S. Ct. 2237, 2246 (1989) ("Even though it is true that a criminal trial does not commence for purposes of the Double Jeopardy Clause until the jury is empaneled and sworn, other constitutional rights attach before that point. Thus in affirming *voir dire* as a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present, the Court wrote: '[W]here the indictment is for a felony, the trial commences at least from the time when the work of empanelling the jury begins.'" (internal citations omitted)). Frazier was merely asked if he was prepared to represent himself – not advised of his right to counsel or warned of the dangers of self-representation. R. 17, l. 11 – 18, l. 3. The trial judge's failure to conduct any advice of rights prior to these critical stages of the process itself entitles Frazier to a new trial.

Once the prosecutor requested the Faretta warnings be given, the trial judge merely told Frazier that he "could appoint [him] a public defender." R. 73, ll. 5-7. He never advised Frazier that he had an important constitution right to be represented by an attorney. Moreover, there was no warning to Frazier regarding the dangers of self-representation. Rather, the trial judge seemingly encouraged Frazier that he had been handling things well and was familiar with the facts. R. 73, ll. 8-11. Notably, one of Frazier's preliminary motions, which he lost, related to access to legal materials. Thus, the trial judge knew that Frazier was concerned about his inability to access the law and rules. Unable to make bail and hopeful that he would be released, Frazier was also concerned about delaying his trial. Notably, his trial was being held just over four months after the incident date. Judge Griffith sought to assuage these concerns by offering standby counsel to offer advice on the court rules and procedures. R. 43 – 47; R. 73, l. 12 – 75, l. 17.

In light of the failure of the trial judge's to mention the dangers of self-representation, this Court must look to the record to determine if Frazier had sufficient background to comprehend the dangers of self-representation. Gardner v. State, 351 S.C. 407, 412, 570 S.E.2d 184, 186 (2002). In making this determination, the Court considers a variety of factors, including:

> (1) the accused's age, educational background, and physical and mental health;
> (2) whether the accused was previously involved in criminal trials;
> (3) whether the accused knew the nature of the charge(s) and of the possible penalties;
> (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation;
> (5) whether the accused was attempting to delay or manipulate the proceedings;
> (6) whether the court appointed stand-by counsel;
> (7) whether the accused knew he would be required to comply with the rules of procedure at trial;
> (8) whether the accused knew of the legal challenges he could raise in defense to the charge(s) against him;

(9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and
(10) whether the accused's waiver resulted from either coercion or mistreatment.

Id. at 412-13, 570 S.E.2d at 186-87 (citing State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992)). Application of the Gardner factors in this case cannot support a finding that Frazier's waiver of his right to counsel was knowing an intelligent. See Gardner v. State, 351 S.C. 407, 413–14, 570 S.E.2d 184, 187 (2002).

Here, Frazier was twenty-five years old, completed only the ninth grade, and there was some evidence of drug use. R. 72, ll. 17-19; R. 153, ll. 18-19; R. 329, ll. 19-23; R. 342, ll. 1-2. His prior work experience included cutting grass and working on home remodeling through a family member's business. R. 72, l. 20 – 73, l. 4. Frazier had prior convictions for assault and battery of a high and aggravated nature, two counts of simple possession of marijuana, possession of cocaine, and possession of beer or wine by a minor, unlawful carrying of a weapon, driving with an expired vehicle license, and pointing and presenting a firearm. R. 568, l. 5 – 569, l. 17. He had been represented by Thomas Adducci on at least one prior charge, but it is unclear if that or any of the other charges resulted in a trial. However, Frazier had never been represented by an attorney on his pending charges such that there was no indication that he was ever apprised of the dangers of self-representation by another source. R. 74, l. 18 – 75, l. 4. Unlike the defendant in State v. Cash, 309 S.C. 40, 44, 419 S.E.2d 811, 814 (Ct. App. 1992), there is no indication that Frazier "appreciated the difficulty of his particular case." Rather, Frazier characterized the State's case as frivolous and thought he was "smart enough to get through this" himself and knew "a little about the law to make it through." R. 6, ll. 2-5.

At the October bond hearing, the prosecutor stated that Frazier was facing charges for carjacking, trafficking methamphetamine, grand larceny, breaking and entering to an auto, and

leaving the scene of an accident. R. 2, ll. 4-10. Though Frazier was ultimately sentenced as a second time offender, the prosecutor stated that "trafficking methamphetamine first, carries a mandatory, minimum of three to ten years . . . violent and serious." R. 2, ll. 21-23. The indictments were read to the jury, but the potential sentences – including the mandatory minimum for the second time drug offense – were *never* placed on the record. R. 23, l. 15 – 24, l. 8. This is important because Frazier was very clear at both the bond hearing and trial that he wanted his trial to proceed as soon as possible. He made no attempt to delay or manipulate the proceedings. R. 8, ll. 7-10; R. 73, l. 12 – 74, l. 5. Without a real understanding of the potential jail time that he was facing, Frazier could not properly evaluate the benefit to a slight delay in trial in order to gain the insight and assistance of a trained attorney.

Frazier was appointed standby counsel beginning on the second day of the proceedings. He was entirely unassisted on the first day, including during jury selection. R. 73, l. 16 – 74, l. 17; R. 75, ll. 5-17; R. 77, ll. 9-21. Frazier appeared to understand that he would be required to comply with the procedural rules and was appointed stand by counsel for that purpose. Even so, he was interrupted by the trial judge on numerous occasions because he asked irrelevant or redundant questions.

Despite a complete lack of access to legal resources, Frazier was successful in some of his arguments. Most notably, he was convicted of only a lesser-included offense to carjacking. However, that should not detract from Frazier's failure to request a continuance at the beginning of trial to review discovery materials just provided to him, failure to move to suppress the drug evidence as the result of an unlawful search, and framing of his motion for access to legal materials as motion for change of venue. See Ferguson v. City of Charleston, 532 U.S. 67, 121 S. Ct. 1281 (2001) (holding a state hospital's performance of a diagnostic test to obtain evidence

of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure). Further, while he eventually discussed the facts of the case, the beginning of Frazier's closing argument focused on the prosecutors' incentive to win the case in order to boost their own careers. R. 498, l. 1 – 503, l. 18.

The colloquy in this case was not "pro forma," but it still failed to communicate the two requisite matters under Faretta – that he had a constitution right to counsel and the dangers of self-representation. While his waiver was not the result of any explicit coercion or mistreatment, the trial judge falsely praised Frazier's abilities. This likely led Frazier to have a false sense of confidence. See R. 73, ll. 8-11. In light of these facts, Frazier did not have sufficient background to comprehend the dangers of self-representation. Frazier is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Appellant Terrence O'Neil Frazier respectfully requests that this Court reverse his convictions and grant him a new trial.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of March, 2018.

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 April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 29, 2018

Laura R. Baer
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

ATTORNEY FOR APPELLANT