STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Greenwood County

RECEIVED

Honorable Eugene C. Griffith, Circuit Court Judge

MAR 29 2018

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TERRENCE O'NEIL FRAZIER,

APPELLANT

APPELLATE CASE NO 2015-002464

FINAL REPLY BRIEF OF APPELLANT

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The factors pointed to by Respondent do not reflect that Appellant was properly warned of the dangers of self-representation or had sufficient background to comprehend the dangers of self-representation.

As an initial matter, despite diligent efforts and consultation with the solicitor, the recording of the preliminary hearing held before the Honorable Municipal Judge Lee Miller on September 1, 2015, was not discovered during counsel's preparation of Appellant's brief. However, Respondent provided a copy of the recording to Appellant's counsel upon receipt of it. At the preliminary hearing, the following exchange occurred:

> JUDGE MILLER: Mr. Frazier is here without an attorney. Mr. Frazier, you understand that I have cautioned you that you should not go forward without an attorney. Is that correct, sir?
>
> DEFENDANT FRAZIER: I understand that.
>
> JUDGE MILLER: And you've waived – you waive your rights to an attorney at this critical stage of a preliminary hearing and you want to go forward today, is that correct?
>
> DEFENDANT FRAZIER: I'll represent myself and waive my rights.

Recording of Prelim. Hr'g (on file with this Court). Notably, the substance of the words of "caution" that Judge Miller referenced in his initial statement were not a part of the recording and thus are not a part of the record in this case. As a result, this recording does not provide any evidence that Frazier was warned of the dangers of self-representation by Judge Miller. Further, the transcript of the subsequent bond hearing reflects that Frazier was hoping to be given an affordable bond and potentially retain counsel for trial. R. 5, l. 24 – 6, l. 18. Though Frazier did not ultimately hire a private attorney, his statements at the bond hearing reflect that he was not adamant about self-representation.

Respondent attempts to analogize this case to that of State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002). Resp. Br., pp. 13-15. In his criminal trial for practicing law without a license, this Court found that McLauren freely and voluntarily waived the right to counsel despite the absence of any express colloquy regarding the dangers of self-representation. 349 S.C. at 495-96, 563 S.E.2d at 349-50. McLauren was a self-proclaimed "jailhouse lawyer," which was confirmed by two employees of Allendale Correctional Institution and five prisoners who had either received McLauren's assistance personally or were aware that he assisted others in the jail. Id. at 490, 495, 563 S.E.2d at 347, 349. McLauren was described by the Court as a "mature man" with "both formal and informal education." Id. at 495, 563 S.E.2d at 349. He had a criminal record dating back to 1965 at the time of his trial in 2000, making him likely in his early to mid-50s. Id.

In the present case, Frazier was only twenty-five years old at the time of trial and possessed merely a ninth grade education. R. 72, ll. 16-19. Frazier had several criminal charges resulting in convictions, the oldest of which was from 2008. R. 568, l. 3 – 570, l. 21. He advised the trial court that Thomas Adducci had represented him in a prior matter. R. 74, l. 24 – 75, l. 4. The 2009 sentencing sheet from Frazier's prior possession of cocaine case reflects that he was represented by counsel and pled guilty. R. 575 (Court's Ex. 3). Thus, Frazier lacked the multi-decade record and life experience of McLauren. Respondent's contention that Frazier "accumulated a substantial criminal record which was probably the source of his legal knowledge" is misleading and speculative. Resp. Br., p. 14.

Respondent points to Frazier's comment during his closing that he decided to represent himself because he had "a little knowledge about the law, know[s] wrong from right, especially common sense." Resp. Br., p. 8; R. 501, ll. 2-7. Frazier espoused that "the law is common

sense" but also that "the law contradicts itself." R. 501, ll. 4-8. Frazier had also just explained that he had only been at the detention center for four months and saw others waiting years to go to trial, ostensibly because they were represented by lawyers. R. 500, l. 22 – 501, l. 3. This was consistent Frazier's earlier concerns expressed to the court that the appointment of a public defender would delay his case. R. 7, l. 21 – 8, l. 23; R. 73, ll. 12-15.

An additional distinguishing fact is that McLauren was appointed stand-by counsel at his arraignment. 349 S.C. at 492-93, 563 S.E.2d at 348. Frazier was not appointed stand-by counsel until after he had formally rejected the State's plea offer, the jury was selected, and the pre-trial motions were argued and ruled upon. R. 17, l. 11 – 77, l. 21. Further, this case is uncommon in that the trial court inflated Fraizer's confidence in his own abilities, likely because of the time already been spent on the case that would have been wasted had Frazier chosen to exercise his right to counsel. R. 73, ll. 8-21.

Respondent avers that Frazier, who is serving a twenty year sentence for the offenses for which he was convicted, "proved effective in his defense." Resp. Br., p. 11. Respondent repeatedly cites to Frazier's acquittal on the carjacking charge. Resp. Br., pp. 9, 11, 14, 15. Frazier was instead convicted of the lesser offense of use of vehicle without permission. R. 563, l. 17 – 564, l. 24. It should hardly be remarkable that the jury recognized that the State overcharged Frazier because a carjacking requires the use of force, violence, or intimidation. Further, the United States Supreme Court explained in Faretta v. California, 422 U.S. 806, 836 (1975), that the defendant's "technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." See also State v. Samuel, Op. No. 27768 (S.C. Sup. Ct. filed Feb. 28, 2018) (Shearouse Adv. Sheet No. 9 at 43, 48) ("[W]hether a defendant is capable of effectively representing himself has no bearing upon his

ability to elect self-representation."). It is not Frazier's ability, or lack thereof, to represent himself that controls this Court's decision. Rather, this Court is solely concerned with "whether the accused made a knowing and intelligent waiver of the right to counsel." State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). For these reasons and those articulated in the brief of appellant, Frazier lacked the sufficient background to comprehend the dangers of self-representation and was not apprised of the dangers by the trial court or another source. This Court should accordingly find that his waiver was not knowingly and intelligently made.

A new trial is the proper remedy in this case because remand for a factual determination as to whether the waiver was knowingly and intelligently made would be futile.

Respondent contends that, to the extent the record falls short of showing that Frazier's waiver of counsel was knowingly and intelligently made, the proper remedy would be a remand to enable the trial court to hold an evidentiary hearing to establish whether the waiver was knowingly and intelligently made. Resp. Br., p. 15. Respondent cites to In re Christopher H., 359 S.C. 161, 596 S.E.2d 500 (Ct. App. 2004) and State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977). While such a remand hearing was ordered in Dixon, in In re Christopher H. this Court did not find remand for an evidentiary hearing to be the proper remedy. Rather, this Court noted that an appellant can be granted a new trial without an evidentiary hearing "if it is clear that a hearing on remand would serve no useful purpose." In re Christopher H., 359 S.C. at 169, 596 S.E.2d at 505 (citing State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991)). The Christopher H. Court chose to remand for a new trial instead because "the record clearly reflects that the family court failed to adequately advise Christopher of the right to counsel, failed to make a specific inquiry as to Christopher's knowledge of the dangers of self-representation, and demonstrated that Christopher has an insufficient background to comprehend the dangers of self-

representation." Id.; see also Watts v. State, 347 S.C. 399, 404, 556 S.E.2d 368, 371 (2001) (remanding for new trial following PCR hearing); Wroten v. State, 301 S.C. 293, 295, 391 S.E.2d 575, 577 (1990) (same). In the present case, there was no advisement or inquiry regarding the dangers of self-representation and the facts the record demonstrates that Frazier had an insufficient background to comprehend the dangers of self-representation. Thus, remand for an evidentiary hearing would be futile and a new trial is the proper remedy.

CONCLUSION

For the reasons set forth herein and in the Brief of Appellant, Appellant Terrence Frazier respectfully requests that this Court reverse his convictions and sentences and remand his case for 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 Reply 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

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