STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APR 05 2018

S.C. SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2017-002632

Travis Hines, ... Petitioner,

vs.

State of South Carolina ..... Respondent.

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Did the Post Conviction Relief Judge err in failing to find that the sentencing judge failed to establish that Travis Hines was adequately informed of the dangers of self representation and the advantages of having an attorney represent him at the time of the plea hearing when the record established that such issues were only dealt with in a *pro forma* fashion?

Did the Post Conviction Relief Judge err in failing to find the State committed misconduct when Travis Hines was required to plea without having the opportunity to review the video and did not obtain from the plea judge a waiver to his right to review the video?

STATEMENT OF THE CASE

Procedural History

Travis Hines entered a plea to distribution of heroin on December 17, 2015. He entered his plea pro se. He was sentenced to 14 years in prison. On December 9, 2016 he filed his Post Conviction Relief Petition. App. at 69. The State filed its Return on May 22, 2017. App. at 75. A hearing on the Post Conviction Relief hearing was held on July 31, 2017 before the Honorable R. Lawton McIntosh. By Order Dated November 14, 2017 his Post Conviction Relief petition was denied. Mr. Hines filed his Notice of Appeal on December 28, 2017

Factual History

Travis Hines was arrested on December 26, 2014 on a charge of distribution of heroin that allegedly occurred on May 21, 2014. App. at 84. He was originally appointed Mike McKinnon of the office of the York County Public Defenders Office. Discovery in this case was sent to Mr. McKinnon, but it did not include the drug report or the video of the alleged buy. App. at 58. The State, while Mr. McKinnon was representing Mr. Hines offered a 10 year sentence for a guilty plea. Some time before July 7, 2015, Mr. Hines retained the services of Christopher Welborn as his attorney. Mr. Welborn sent the State his Rule 5 discovery request and his *Brady* motion. Mr. Welborn also originally received a 10 year plea offer. App. at 33, ll12-13. The State advised Mr. Welborn that the plea offer was based upon Mr. Hines not viewing the video tape of the alleged buy. App. at 35, ll 3-5. Mr. Welborn advised Mr. Hines that the proposal by the State to withhold the discovery unless the plea offer was rejected was "legally suspect." App. at 35, ll 15-18. Mr. Welborn further testified that Mr. Hines in fact knew who the informant was without looking at the video tape. App. at 35, l 12-13.

Without formal rejection of the 10 year plea offer by Mr. Hines, the offer was increased to 18 years. App. at 35, l23 to 36, l 7. Subsequently, the offer to Mr. Welborn was reduced to 15 years. Mr. Welborn further testified that as of August 12, 2015, Mr. Hines did not want to take the offer especially as he had not seen the video tape of the alleged buy. App. 37, ll 4-15. As Mr. Welborn stated "[P]ressure, sort of extortive process by which you give up your right to Discovery and take the 18." App. 37, ll 10-12.

Mr. Welborn further testified that he received the drug report on October 23, 2015. App. at 37, l 25. As of November 4, 2015 the offer was still 18 years. Mr. Welborn still had not seen the video. As he stated "I was not recommending that to my client at that time that he plead guilty without looking at the video." App. at 38, ll 6-7. On November 13, 2016 Mr. Welborn received an email from the solicitor stating that Mr. Welborn could view the portion of the video that the state determined to be relevant but Mr. Welborn would have to sign a protective order. Mr. Welborn was able to review the relevant portion of the video on November 17, 2015. App. 39, ll 5-20.

Assistant Solicitor Ryan Robert Newkirk confirmed the testimony of Mr. Welborn as to not showing the video to the defendant in a criminal case until the plea offer has been rejected and the case is going to trial. App. 56. ll 7-20. He acknowledged that it took from July until November 17 for Mr. Welborn, but not Mr. Hines, to be able to view the video. He testified that he did provide Mr. Welborn some stills from the video. Mr. Newkirk acknowledged that some defendants plea without ever looking at the video. He testified:

> I know that certainly defendants have - - can and have plead waiving the drug report and waiving the right to see the video. I know that has happened. I wouldn't say that is an uncommon

practice. App. at 59, ll 5-8.

Mr. Hines testified he did not understand how the plea offer went from 10 years to 15 years without his or his lawyer ever seeing the video. App. 13, ll 1-2. His complaint about Mr. Welborn was that Mr. Welborn had not obtained the video for him to view. App. 13, ll 20-22. On December 15, 2015 he appeared before Judge Daniel Hall to relieve Mr. Welborn as his attorney. At that hearing Mr. Hines expressed a desire to hire another attorney. When asked by Judge Hall if he was going to represent himself, Mr. Hines responded "no." App. 113, ll 14-19.

At the hearing to relieve Mr. Welborn the state formerly notified Mr. Hines that they would be seeking life without parole. App. 118, ll 4-8. At that hearing Judge Hall erroneously informed Mr. Hines "And you understand that regardless who your lawyer is, the solicitor controls the docket . . . ." App. 114, ll 10-12. Mr. Hines expressed a desire to hire another lawyer that day. App. 114, l 17-19.

Two days later Mr. Hines was before Judge John C. Hayes entering his plea without an attorney. At that plea the solicitor represented to the Court:

> I have no doubt in his intelligence or his understanding of the proceedings. He was advised of his right to counsel by Judge Hall on Tuesday when he relieved Mr. Welborn of his services. App. 101, ll 2-5.

After inquiring about his educational background, Judge Hayes had the following colloquy with Mr. Hines concerning his right to self representation:

> THE COURT: You have the right to have an attorney represent you in regard to this charge and if you cannot afford one the State would be required to appoint an attorney to represent you within some limits. That is you would be appointed an attorney to represent you if you wish. If you could not afford one the limitation being that you are assigned an attorney and that would

be your attorney. Its dangerous for you to proceed without an attorney since you're not one and there is a benefit in having an attorney to represent you.

Do you understand that?

MR. HINES: Yes, sir.

THE COURT: Do you wish to have n attorney in regard to this charge or give up that right?

MR. HINES: I give up that right.

THE COURT: I find Mr. Hines has freely voluntarily knowingly and intelligently understanding the benefits of counsel and the danger of self representation exercises his right to proceed pro-se. App. 102, ll 2-20.

After this discussion, Judge Hayes accept the plea and sentenced Mr. Hines to 14 years in prison. Mr. Hines still had not seen the video. Judge Hayes did not ask if there were any outstanding discovery issues.

Argument

Question I

Did the Post Conviction Relief Judge err in failing to find that the sentencing judge failed to establish that Travis Hines was adequately informed of the dangers of self representation and the advantages of having an attorney represent him at the time of the plea hearing when the record established that such issues were only dealt with in a *pro forma* fashion?

A defendant under the Constitution of the United States of America has the right of self representation. *Faretta v. California,* 422 U.S. 806 (1975). This is subject to one rule - the defendant must be adequately informed of the dangers and disadvantages of self representation. Among those dangers is the knowledge that an attorney can be of assistance in handling and investigating the case. The record in this case fails to establish that Travis Hines proceeded to waive his right to counsel with a full understanding of those rights and the consequences of self representation.

The South Carolina Supreme Court in *Watts v. State*, 347 S.C. 399, 556 S.E.2d 368, ___ (2001) said "The judge did not ask Petitioner a single question about why he relieved his counsel or if he wished to have counsel present." The same is true in this case. At the previous hearing to relieve counsel with whom Mr. Hines was not satisfied, Mr. Hines expressed every intent to obtain his own counsel. The judge accepting his plea never asked if he had contacted another attorney, why he dismissed his former attorney, whether that attorney had discussed with him the dangers of self representation or any defenses he may have to the charges. The plea judge never asked Mr. Hines if he had had the opportunity to review the discovery so that he could make an

intelligent decision to plea guilty.

In *Gardner v. State*, 351 S.C. 407, 570 S.E.2d 185 (2002) the South Carolina Supreme Court listed ten factors to be considered by the trial judge determining if the defendant knowingly and intelligently waived his right to Counsel and elected to represent him self. Among those factors is "whether the exchange between the accused and the court consisted of merely *pro forma* answers to *pro forma* question." *Id.* at 413, 570 S.E.2d at 187. Here the questions were in fact mere *pro forma* questions. When Mr. Hines was asked about the dangers of self representation, it was part of a series of three factors being stated by the plea judge. He simply answered "Yes, sir" to all three without any inquiry by the judge as to whether he understood each factor individually. App. 102, ll 2-13. He was never told what the dangers of self representation were. What Mr. Hines understood to be the dangers of self representation is not known, if he even understood that to be a separate issue from the other two factors.

Another factor the judge seeking a waiver of counsel must determine is "whether the accuse's waiver resulted from either coercion of mistreatment." *Id.* Both are present in this case. The plea judge was told that just two days before when Mr. Hines relieved his counsel and was going to obtain other counsel, the State gave Mr. Hines their notice to seek life without parole. Notwithstanding this coercive factors, the plea court was never asked Mr. Hines if the fact the state was going to seek life without parole was the deciding factor in his determination to plea guilty. The plea judge was not informed that Mr. Hines had not had the opportunity to review all the discovery. While this was not physical mistreatment, it certainly was mistreatment in preventing Mr. Hines from knowing all the facts about his case before he entered his plea.

If the plea judge had asked Mr. Hines "Have you had the opportunity to review all the

discovery" and Mr. Hines had said "no," the plea judge would not have taken the plea without a further waiver of the right of Mr. Hines to review the evidence against him. Had the plea judge conducted a basic inquiry as to why Mr. Hines relieved his previous counsel the discovery issue would have been revealed.

"In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed pro se with 'eyes open,' then the petitioner did not make a knowing and voluntary waiver of counsel and the case should be remanded for a new trial." *Gardner* at 402-403, 556 S.E.2d at ___. The record in this case does not demonstrate that Mr. Hines proceeded with his "eyes open." Further demonstrating this is the fact that while the plea judge informed Mr. Hines of his rights, he did so in a group so that the record is not clear as to whether Mr. Hines understood each individual right. The plea judge never informed Mr. Hines that the burden of proof on the state was to prove the case against him beyond a reasonable doubt. In *Gardner* the South Carolina Supreme Court took note of the failure of the plea judge to inform the defendant of her rights under *Boykin v. Alabama*, 395 U.S. 238 (1969). The Court said:

> [A]lthough the guilty plea proceedings did not consist merely of *pro forma* questions and answers, the transcript on its face poses several other problems which would indicate the plea itself was not knowing and voluntary. This Court and the United States Supreme Court have held that before a court can accept a guilty plea, a defendant must be advised of the federal and state constitutional rights he or she is waiving. *Id.* at 413, 570 S.E.2d at ___.

The record in this case establishes both that the waiver of counsel and the dangers of self representation were mere *pro forma* and did not fully inform Mr. Hines of the rights he was waiving. The South Carolina Supreme Court has since 2014 mandated that a "Faretta Warning" form be signed by every defendant proceeding pro se in magistrate's court. *See* Form SCCA 684.

The rights on that form are more substantial than the rights read to Mr. Hines in this case. A defendant facing 14 years in prison should be informed of the dangers of self representation on a level at least equal to one facing 30 days in jail. The record in this case as a matter of law is inadequate to establish Travis Hines was properly informed of the dangers of self representation. He should be granted a new trial.

Question II

Did the Post Conviction Relief Judge err in failing to find the State committed misconduct when Travis Hines was required to plea without having the opportunity to review the video and did not obtain from the plea judge a waiver to his right to review the video?

The testimony in this case establishes that while Christopher Welborn had the opportunity to review the portion of the video that the State deemed relevant, Mr. Hines never had the opportunity to do more than review a couple of still pictures. The testimony shows that Mr. Hines wanted to review the video and that Mr. Welborn agreed that he should have the opportunity.

Over ten years before this case arose, then Chief Justice Jean H. Toal issued a Memorandum dated March 1, 2004 saying the it was a violation of Rule3.4, RLDE, Rule 407, SCACR to make a plea agreement contingent upon the defendant not viewing all the discovery. As Chief Justice Toal warned in the Memorandum "This practice is going to have adverse consequences in the future with claims of ineffective assistance of counsel based on the claim that the plea was not voluntary because the applicant did not have access to the solicitors file." The future is now here. Assistant Solicitor Ryan Robert Newkirk confirmed that the practice of making the plea contingent up not reviewing the discovery continues as of the date of the

hearing notwithstanding the Memorandum issued by Chief Justice Toal over ten years earlier. App. at 59, ll 5-8.

The lower court found "Mr. Newkirk provided credible testimony that he turned over all evidence as he received it." App. 134 to 125. There is simply no basis in the record to reach this determination. As noted above, Mr. Newkirk testified it is the policy of his office in some cases, and this being one, not to turn over all the relevant evidence unless the defendant rejects the plea offer. There truly can bo no more difficult decision than to be forced to either accept a plea offer of 14 years and not review all the discovery, or view the discovery and run the risk of life without parole. No defendant should be forced to make this decision.

Of course a defendant may waive the right to view the discovery if he believes it is in his best interest to do so. But that did not happen in this case. The State knew Mr. Hines had not seen the discovery. While Mr. Welborn after viewing the relevant portion of the video might conclude that Mr. Hines was involved in drugs in the video, it is not Mr. Welborn's call. App. at 40, ll 12-24. The final decision of a client to enter a plea is that of the client. But a client who has not seen all the discovery that is available truly cannot make an informed decision. While Mr. Welborn may draw one conclusion from the video, Mr. Hines could have as easily pointed out why Mr. Welborn was wrong, if he had had the opportunity to view the view the video.

Thus as Travis Hines, notwithstanding his desire to view the video of the alleged buy, had not seen the video his plea of guilty was as a matter of law not freely and voluntarily given and should be set aside. If this Court does not grant the petition for writ of certiorari in this case, the only thing that can be guaranteed is that more defendants will be entering pleas without having viewed all the discovery. In some cases the result may indeed be proper. In some cases it will

not be proper. No one will know unless the defendant actually views the video or knowingly and intelligently waives that right.

This Court should grant the Petition for Writ of Certiorari, reversed the order of the lower court and grant Travis Hines a new trial.

CONCLUSION

For the foregoing reasons this Court should grant the Petition for Writ of Certiorari and hold that the record in which Travis Hines waived his right to counsel and elected to represent himself fails to establish that the waiver was knowingly and intelligently given and remand this case to the lower court for a new trial.

April 2, 2018

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CERTIORARI FROM YORK COUNTY
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Honorable R. Lawton McIntosh, Circuit Court Judge

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AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on April 2, 2018, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Petition for Writ of Certiorari and Appendix in the above case addressed to Justin Hunter, Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211 and Jenny Abbott Kitchings, Clerk, SC Court of Appeals, P.O. Box 11629, Columbia, SC 29211.

Sandy Traynham

SWORN to and Subscribed
before me this 2 day
of April, 2018.
(L.S.)

Notary Public for South Carolina
My Commission expires: 12/7/2019

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April 2, 2018

Hon. Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Travis Hines vs. The State, Appellate Case No. 2017-002632

Dear Mr. Shearouse:

I am enclosing herewith for filing the original and six copies of the Petition for Writ of Certiorari and the original and 1 bound copy of the Appendix in the above matter together with the original Affidavit of Service. Your help is greatly appreciated.

With kindest regards, I am

Very truly yours,

C. Rauch Wise

CRW/slt

cc SC Court of Appeals
Justin Hunter