THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO THE COURT OF APPEALS
Appeal from Richland County
G. Thomas Cooper, Circuit Court Judge

RECEIVED
APR 27 2018
S.C. SUPREME COURT

Appellate Case No.: 2017-002205

The State ....Respondent

v.

John Henry Dial Jr...Petitioner

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS....................i

TABLE OF AUTHORITIES....................ii

ISSUE PRESENTED....................1

STATEMENT OF THE CASE....................2

ARGUMENT

The Court of Appeals erred by holding that the circuit court, acting as an appellate court in a case heard by the magistrate, cannot consider questions that have not been presented to the magistrate when the pro se Appellant was not warned of the dangers of proceeding without an attorney......3

CONCLUSION....................8

TABLE OF AUTHORITIES

Cases

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)................3, 4, 6

Gardner v. State, 351 S.C. 407, 412-13, 570 W.E.2d 184, 186-87 (2002)...................... 5

In re Christopher H. 359 S.C. 161, 596 S.E.2d 500 (S.C. App. 2004).......................... 4, 6

Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) 4, 6

State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009).......................... 6

State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991).. 6

State v. Dixon, 269 S.C. 107, 236 S.E. 2d 419 (1977)... 7

ISSUE PRESENTED

DID THE COURT OF APPEALS ERR BY HOLDING THAT THE CIRCUIT COURT ACTING AS AN APPELLATE COURT IN A CASE HEARD BY THE MAGISTRATE, CANNOT CONSIDER QUESTIONS THAT HAVE NOT BEEN PRESENTED TO THE MAGISTRATE, WHEN THE PRO SE APPELLANT WAS NOT WARNED BY THE MAGISTRATE COURT OF THE DANGERS OF PROCEEDING WITHOUT AN ATTORNEY?

STATEMENT OF THE CASE

The Appellant, John Henry Dial, Jr., was arrested for three counts of Assault and Battery 3d degree on August 25, 2010. The Appellant requested a jury trial on November 1, 2010 with a pretrial hearing occurring on March 18, 2011. Jury selection for the case occurred on April 25, 2011 and the case went to trial before the Pontiac Magistrate Court jury on April 26, 2011. The jury returned a verdict of guilty on two counts of Assault and Battery 3d degree and not guilty on one count of Assault and Battery 3d degree. An appeal to Richland County Circuit Court was timely filed on April 29, 2011.

A hearing was held before the Honorable G. Thomas Cooper, Circuit Court Judge for Richland County on January 17, 2014. An Order denying the appeal was issued on June 2, 2014 and received on June 16, 2014 by the attorney for the Appellant. A timely Motion to Alter Judgment Pursuant to SCRCP 59(e) was filed on June 26, 2014. An order denying the Motion to Alter Judgment was issued on October 9, 2014 and received by the attorney for the Appellant on October 20, 2014. The Notice of Appeal was timely filed.

Petitioner's conviction was affirmed by the South Carolina Court of Appeals in State v.John Henry Dial, Jr. 2017 UP-339 (August 9, 2017) Appendix Divider D. Petitioner sought rehearing. Appendix Divider E Rehearing was denied. Appendix Divider F.

The petition for a writ of certiorari was filed on November 13, 2017. Respondent filed a return dated December 13, 2017. Petitioner filed a reply on December 27, 2017. On March 28, 2018, the Court issued an order granting the Petition.

This brief of petitioner follows.

ARGUMENT

THE COURT OF APPEALS ERRED BY HOLDING THAT THE CIRCUIT COURT ACTING AS AN APPELLATE COURT IN A CASE HEARD BY THE MAGISTRATE, CANNOT CONSIDER QUESTIONS THAT HAVE NOT BEEN PRESENTED TO THE MAGISTRATE, WHEN THE PRO SE APPELLANT WAS NOT WARNED BY THE MAGISTRATE COURT OF THE DANGERS OF PROCEEDING WITHOUT AN ATTORNEY

The Appellant was charged in the Pontiac Magistrate Court with three counts of Assault and Battery 3d degree arising out of the allegations that he sprayed pepper spray on the victims, David Hutchinson, Shelby Hutchinson and Cherish Douglas. The case was called before a jury on April 26, 2011. The Appellant proceeded pro se at the jury trial. The trial court advised him of his right to be represented by an attorney but did not proceed further by advising him of the dangers of proceeding without an attorney. (Appendix Divider G, Return of Appeal p. 1, R. p. 13)

The State called David Hutchinson, Cherish Douglas, Shelby Hutchinson and Wendy Bass to testify. The Defense called Sam Green, John Dial, Sr. and the Appellant, John Dial, Jr. to testify. The Appellant testified that he did not spray the individuals with pepper spray. (Appendix Divider G, Trial Transcript p. 67, R p. 81 l. 13,T p. 68, R. p. 82 ll18-19, Tp.70, Rp 84 l. 17). After deliberation, the jury found the Appellant guilty of two of the charges of Assault and Battery 3d degree. An appeal to Richland County Circuit Court was timely filed on April 29, 2011. This appeal followed after the denial of appeal by the Circuit Court.

The Appellant proceeded to trial in this case without an attorney and he did not make a knowingly and intelligent waiver of his Sixth Amendment right to counsel. After reviewing the transcript of the trial and the Return of Appeal, it is apparent that Magistrate Judge Surles failed to fully advise the Appellant of the dangers of self representation pursuant to Faretta v. California, 422

U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Judge Surles states in the Return of Appeal that he advised the Appellant of his right to an attorney on November 1, 2010 and March 18, 2011 and that Appellant assured the court that he wanted to represent himself on April 25, 2011. (Appendix Divider G. R. P. 13, Return of Appeal p. 1) However, there is no mention of an advisement of the dangers of self representation.

"Faretta allows an accused to waive his right to counsel if he is (1) advised of his right to counsel, and (2) adequately warned of the dangers of self representation." Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) as quoted in In re Christopher H. 359 S.C. 161, 596 S.E.2d 500 (S.C. App. 2004). In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense as required by the second Faretta prong, [the appellate court] will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source. To determine if an accused has sufficient background to comprehend the dangers of self-representation , courts consider 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 of merely *pro forma* answers to *pro forma* questions; and

(10) whether the accused's waiver resulted from either coercion or mistreatment. Gardner v. State, 351 S.C. 407, 412-13, 570 W.E.2d 184, 186-87 (2002).

The Return of Appeal and Transcript are silent on these factors and, therefore, this court does not have the ability to determine whether the Appellant had sufficient background or was apprised by any other source of the dangers of self-representation. In the Magistrate's Return on Appeal, Magistrate Surles states that Appellant was advised of his right to an attorney but is silent on the issue of whether he was warned of the dangers of self representation. (Appendix Divider G, R.p. 13, Return of Appeal p. 1). During the trial, objectionable information was introduced without objection by the Appellant. The opening statement of the prosecuting officer included a statement that the Appellant was on probation. (Appendix Divider G, R.p. 31, Trial Transcript p. 17 ll. 11-12). Since the Appellant did not have counsel, there was no objection to this prejudicial statement. Also, no curative instruction was given to the jury by the trial court. Furthermore, objectionable hearsay evidence which was not a statement against interest of the accused was introduced during the testimony of David Hutchinson. (Appendix Divider G, R.p. 36, Trial Transcript p. 22 ll. 1-3). The witness also raises bad character evidence of the accused. (Appendix Divider G, R.p. 42, Trial Transcript p. 28 ll. 11-15). The Appellant being on probation is again raised by witness Wendy Bass. (Appendix Divider G, R.p. 58, Trial Transcript p. 44 ll. 15-19). Also, the Appellant attempted to produce good character evidence and was denied this opportunity by the trial court. (Appendix

Divider G, R.p. 74, Trial Transcript p. 60 ll. 1-19, R.p. 76-77, Trial Transcript. p. 62 l. 20-p. 63 l.4, R.p. 79, Trial Transcript.p.65 ll. 6-13). Clearly, legal issues arose during the trial where the *pro se* Appellant was disadvantaged by being unrepresented by counsel. The objectionable evidence and statements clearly prejudiced the Appellant. Appellant was denied his Sixth Amendment right to counsel since he was not advised of the dangers of self-representation and the record is silent as to the factors to determine whether the Appellant had sufficient background to comprehend the dangers of self-representation.

Since Appellant was not an attorney and was not warned of the dangers of self representation it would be highly improbable that he would have objected to the failure of the magistrate court to warn of the dangers of self representation. One of the dangers of self representation of which Appellant was not warned is the danger of not objecting to objectionable evidence or proceedings. Preservation of the record cannot be accomplished on the issue of the failure to be warned of the dangers of self representation by someone not warned of the dangers of self representation. "Faretta allows an accused to waive his right to counsel if he is (1) advised of his right to counsel, and (2) adequately warned of the dangers of self representation." Prince v. State, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) as quoted in In re Christopher H. 359 S.C. 161, 596 S.E.2d 500 (S.C. App. 2004). See Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

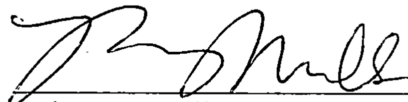
"It is the trial court's responsibility to determine whether there was a knowing and intelligent waiver by the accused." State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009). Therefore, a knowing and intelligent waiver of Appellant's Sixth Amendment right to counsel is a proactive duty of the trial court and not a responsibility of the Appellant to raise. Furthermore, as Respondent argued in their Court of Appeals brief citing State v. Cash, 304 S.C. 223, 225, 403

S.E.2d 632, 634 (1991), "except in extraordinary cases where it is clear that a hearing on remand would serve no useful purpose, the remedy when the record fails to show a knowing and intelligent waiver of the right to counsel will be a remand for a Dixon hearing." See State v. Dixon, 269 S.C. 107, 236 S.E. 2d 419 (1977). It is counterintuitive to conclude that someone not warned of the dangers of self representation could preserve the record on the issue of the failure to be warned of the dangers of self representation. Therefore, the Court of Appeals erred by holding that the circuit court, acting as an appellate court in a case heard by the magistrate, cannot consider questions that have not been presented to the magistrate when the pro se Appellant was not warned of the dangers of proceeding without an attorney.

CONCLUSION

By reason of the foregoing argument, a new trial should be granted.

Respectfully Submitted,



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April 27, 2018

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PROOF OF SERVICE

I certify that I have served the BRIEF OF PETITIONER on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on April 27, 2018 addressed to:

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April 27, 2018