STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EMORY WARREN ROBERTS,

APPELLANT

APPELLATE CASE NO 2017-001676

INITIAL BRIEF OF APPELLANT

SUSAN B. HACKETT
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

Constitutional Provisions

Statutory Provisions

STATEMENT OF ISSUE ON APPEAL

Whether Appellant's right to self-representation pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution was violated when the trial judge denied his request to proceed *pro se*?

STATEMENT OF THE CASE

In a multi-count, multi-defendant indictment, the state grand jury indicted Appellant for trafficking in heroin in the amount of twenty-eight grams or more, three counts of distribution of heroin, trafficking in heroin between four and fourteen grams, possession of a firearm during the commission of a violent crime, and possession with intent to distribute methamphetamine (2016-GS-47-02) on April 12, 2016. R. *(indictment). The jury found Appellant guilty as charged. Tr. 892, l. 7 – Tr. 893, l. 9. Judge Jefferson sentenced Appellant to twenty-five years imprisonment for trafficking heroin in the amount of twenty-eight grams or more, fifteen years for each count of distribution of heroin, fifteen years for trafficking heroin between four and fourteen grams, five years imprisonment for the firearm, and fifteen years imprisonment for possession with intent to distribute methamphetamine. Tr. 907, ll. 1-22; R.*(sentence sheets). She ordered all sentences to be served concurrently. Tr. 907, ll. 24-25; R. *(sentence sheets).

On July 31, 2017, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

"Whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel is a mixed question of law and fact which appellate courts review de novo." State v. Samuel, Op. No. 27768 (S.C. Ct. filed Feb. 28, 2018)(Shearouse Adv. Sh. No. 9 at 43)(citing United States v. Lopez-Osuna, 242 F.3d 1191, 1198 (9th Cir. 2000)). Appellate courts review "a circuit judge's findings of historical fact for clear error," but "review the denial of the right of self-representation based upon those findings of fact de novo." Id. When reviewing a trial judge's refusal to permit an individual to proceed *pro se*, the appellate court "must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request." Id. (citing United States v. Singleton, 107 F.3d 1091, 1097 (4th Cir. 1997)).

ARGUMENT

Appellant's right to self-representation pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 14 of the South Carolina Constitution was violated when the trial judge denied his request to proceed *pro se*.

Relevant facts

On July 19, 2017, Appellant moved to relieve trial counsel and for the appointment of new counsel or the opportunity to retain new counsel. Tr. I. 4, ll. 9-18. The judge indicated she would not appoint new counsel, but she would allow Appellant to retain new counsel as long as counsel was ready for trial on the following Monday. Tr. I. 4, ll. 16-24. Thereafter, trial counsel indicated he had some concerns about Appellant's competency. Tr. I. 5, ll. 17-21. Trial counsel explained that Appellant refused to cooperate with him, resulting in trial counsel asking a doctor to evaluate Appellant. Tr. I. 5, l. 23 – Tr. I. 6, l. 4. Trial counsel expressed "concerns about his capability to understand really what's going on." Tr. I. 7, ll. 3-6.

The doctor indicated that Appellant refused a formal evaluation. Tr. I. 8, ll. 2-8. Appellant "stated that he ha[d] the UCC-1308 code" as the "reason for his refusal." Tr. I. 8, ll. 7-15. The doctor indicated Appellant could not work with his attorney and the doctor did not think that it was "all volitional on his part." Tr. I. 8, ll. 22-24; Tr. I. 10, ll. 11-12. However, the doctor was unable to render any opinion. Tr. I. 8, ll. 17-18. According to the doctor, Appellant "pays attention" and has "understanding of some legal proceedings." Tr. I. 12, ll. 23-25. According to the doctor, Appellant was "cognitively" "able to represent himself or stand trial." Tr. I. 14, ll. 9-11. The doctor noted Appellant had "the cognitive capacity to pay attention and assist," but she explained there was "a paranoid flavor" to his relationship with counsel. Tr. I. 14, ll. 16-19. The doctor was unsure if it were "a pathological one" or "functional given some of his views." Tr. I.

14, ll. 19-21. Appellant displayed "good eye contact" with the doctor and was able to communicate. Tr. I. 14, l. 23 – Tr. I. 15, l. 1. The doctor recommended the appointment of a guardian *ad litem* if Appellant were to continue with the same attorney. Tr. I. 16, ll. 7-13.

When the judge explained that she would not permit Appellant to represent himself *and* have counsel represent him simultaneously, she told Appellant that if he wanted to represent himself, he could talk all he wanted. Tr. I. 13, ll. 14-15. She also told Appellant that he would have to waive counsel with his "eyes wide open knowing that everything [he said] can be used against [his] best interest." Tr. I. 13, ll. 15-17.

At the conclusion of the presentation regarding competency, the judge stated she did "not perceive that he is incompetent." Tr. I. 24, ll. 1-2. In her estimation, Appellant had "a more than adequate understanding of the system." Tr. I. 24, ll. 2-3. In the judge's estimation, Appellant "probably ha[d] a better grasp of it than others." Tr. I. 24, ll. 3-4. She perceived his refusal to cooperate with counsel and the doctor as "dilatory." Tr. I. 24, ll. 4-6. The judge did "not perceive" that Appellant had "some cognitive deficits that prevent him from doing what he needs to do." Tr. I. 25, ll. 8-9. Regarding, his intelligence, the judge opined he was "probably average standard if not slightly above average I.Q." Tr. I. 25, ll. 10-12.

The judge then encouraged Appellant to take advantage of trial counsel's representation. Tr. I. 26, ll. 8-15. However, if Appellant chose not to avail himself of representation that was "fine" by the judge. Tr. I. 26, ll. 16-17.

At the start of trial, the judge asked trial counsel if Appellant desired a formal arraignment. Tr. 12, ll. 7-10. When trial counsel indicated Appellant wanted to represent himself, the judge remarked that was "fine," but she required trial counsel to remain as "shadow counsel." Tr. 12, ll. 9-12. Thereafter, the judge inquired of Appellant personally regarding an

arraignment, his request for a bond, his desire for minutes from the statewide grand jury proceedings, and access to audio/visual elements of the discovery materials. Tr. 12, l. 23 – Tr. 27, l. 7. During the discussions of those matters, Appellant requested "a moment" and the judge agreed. Tr. 22, ll. 12-14. Then Appellant asked, apparently in reference to trial counsel, "He's supposed to shadow me, right?" Tr. 22, l. 15. The judge responded:

> Well, I would suggest to you that you keep him as your attorney because he knows the rules and you don't. And you tell him what questions you want asked of witnesses so that he can phrase them the way that they should be phrased so that you don't inadvertently incriminate yourself in anything. And I would strongly suggest you take advantage of a very seasoned criminal record.

Tr. 22, ll. 16-23. When Appellant protested that trial counsel was not working in his interest, the judge responded that he was working in Appellant's interest and that he would not risk losing his law license to collaborate with the state. Tr. 22, l. 24 – Tr. 23, l. 9.

After these preliminary matters were discussed, the judge asked trial counsel if he were ready to proceed with jury selection. Tr. 29, ll. 6-7. Trial counsel indicated Appellant was prepared to go forward as his own lawyer. Tr. 29, ll. 8-9. The judge responded that she was not going to relieve trial counsel "at this late stage or juncture." Tr. 29, ll. 10-11. She did not think it was "prudent to relieve [trial counsel] as counsel." Tr. 29, l. 12. Recognizing Appellant's constitutional right to act as his own counsel, the judge stated she did not "perceive" that Appellant had "sufficient grasps of the rules such that he would be able to protect his own interests." Tr. 29, ll. 17-21. Thus, she refused to relieve trial counsel and permit Appellant to represent himself. Tr. 29, ll. 20-21. Despite Appellant's protestations, the judge refused to permit him to proceed *pro se*. Tr. 29, l. 22 – Tr. 30, l. 15.

Even at the start of jury selection, Appellant continued to express his desire for self-representation, but he was rebuffed. Tr. 30, ll. 12-14; Tr. 63, l. 23 – Tr. 64, l. 8; Tr. 65, ll. 11-12.

The judge threatened to remove Appellant and his lawyer from the courtroom if he made "any other outbursts." Tr. 64, ll. 9-12. The judge explained she had denied Appellant's motion for self-representation because she did not believe that he understood "the significant jeopardy" that he was placing himself in by invoking his constitutional right to self-representation. Tr. 65, ll. 14-16. She did "not perceive" that Appellant had "any grasp of the rules of evidence or procedure." Tr. 65, ll. 17-18. According to Judge Jefferson, self-representation "would be a substantial constitutional deprivation of [his] rights." Tr. 65, ll. 18-20. Therefore, she denied his motion for self-representation, stating he did not "understand the consequences of [his] decision to proceed without a lawyer." Tr. 65, ll. 20-23. The judge then returned to some matters discussed during pre-trial hearings. "Contrary to what Dr. Maddox observed," the judge "deliberately" made "a conscious and concerted effort to observe" Appellant's "behavior." Tr. 66, ll. 1-3. She determined Appellant was "more than qualified and adaptable and aware of what [was] going on." Tr. 66, ll. 3-4. She was confident that Appellant had "more than adequate ability to assist [his] counsel." Tr. 66, ll. 4-5. Per her observations, Appellant had "been involved in all the proceedings" and had "more than the ability to communicate" with trial counsel. Tr. 66, ll. 5-8.

Throughout the course of the trial, Appellant continued to press his desire for self-representation, explaining his need to protect the record for appeal. Tr. 350, ll. 22-25; Tr. 351, ll. 7-8; Tr. 351, ll. 11-12; Tr. 351, ll. 24-25. Judge Jefferson re-iterated that South Carolina did not permit "hybrid representation" and that if "something" needed "to be protected," trial counsel would "do that." Tr. 351, ll. 1-6.

At the conclusion of the trial, Appellant still expressed his desire for self-representation. Tr. 898, l. 9; Tr. 898, l. 15. After the jury found Appellant guilty, Appellant asked if he could

represent himself on appeal. The judge responded that if he wanted an appeal, trial counsel would file "a motion to appeal." Tr. 898, ll. 11-12. Thereafter, "Indigent Defense" would "step in and take over." Tr. 898, ll. 12-13. When Appellant reiterated his desire for self-representation, the judge told him he did not "want to do that" because "[t]hey have a whole group of lawyers who all they do is appeals. They are very good at it. Take advantage of their services, at no charge to you." Tr. 898, ll. 16-19.

During the sentencing portion, trial counsel echoed his sentiments from pre-trial proceedings: "I still believe, Your Honor, as when I asked for that evaluation, I truly believe that there is something going on. I really think that he needs some help. And that at some point with the right kind of help, he could be a citizen and a productive citizen, Your Honor." Tr. 902, ll. 18-22. The judge responded that while trial counsel may have "concerns" regarding Appellant's "need for potentially an evaluation of some type to see if he needs counseling, medication, or otherwise," she had "no concern about his ability to have assisted in his representation, to understand the nature of these proceedings." Tr. 905, ll. 1-6. It was "clear" to the judge that Appellant had been "cognizant of place and time," and that he was "well aware of the nature of these proceedings." Tr. 905, ll. 6-8. Furthermore, "due to the breadth of his criminal history," the judge had "no concern that he understands the legal process, that he understands the nature of his right to a jury trial, his right to a defense, and the other rights attendant constitutionally to him, as he has more than on many events during the court of this trial articulated for the Court." Tr. 905, ll. 8-14.

Discussion

A criminal defendant "has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014)(citing State v.

Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)); see also State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010)(explaining "[a]n accused may waive the right to counsel and proceed *pro se*" and "[t]he request to proceed *pro se* must be clearly asserted by the defendant prior to trial"). "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975); see also McKaskle v. Wiggins, 465 U.S. 168, 174 (1984)(explaining "Faretta's holding was based on the long-standing recognition of a right of self-representation in federal and state courts, and on the language, structure and spirit of the Sixth Amendment"); United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir. 1997)(stating "the Sixth Amendment implicitly provides an affirmative right to self-representation").[1] According to the Fourth Circuit, the right to self-representation is "mutually exclusive" of the right to counsel. United States v. Bush, 404 F.3d 263, 270 (4th Cir. 2005).

The right to self-representation "must be preserved even if the court believes that the defendant will benefit from the advice of counsel." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)(citing United States v. Singleton, 107 F.3d 1091 (4th Cir. 1997)). In fact, even if the decision to proceed *pro se* is to the defendant's detriment, the decision "must be honored out of that respect for the individual which is the lifeblood of the law." Faretta, 422 U.S. at 834; see also State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). "So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta." Barnes, 407 S.C. at 35, 753 S.E.2d at 550.

---

[1] The South Carolina Constitution explicitly provides for the right of self-representation: "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense by himself or by his counsel or by both." S.C. Const. Art. I, § 14.

"When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." Faretta, 422 U.S. at 835. Thus, the decision to proceed *pro se* must be made knowingly, intelligently, and voluntarily. Id. "The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding." Brewer, 328 S.C. at 119, 492 S.E.2d at 98 (citing Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992)). "A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial of the right to self-representation; the only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel." Id. "A decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one." Id. at 120, 492 S.E.2d at 99.

"Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel." Barnes, 407 S.C. at 36, 753 S.E.2d at 550; see also State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977)(explaining "it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver"). "Faretta requires that a defendant 'be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.'" Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990)(quoting Faretta, 422 U.S. at 835). "To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." Prince v. State, 301 S.C. 422, 423-424, 392 S.E.2d 462, 463 (1990).

According to the South Carolina Supreme Court, "a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred." Id. The trial judge must "make a meaningful inquiry into [a defendant's] background to determine whether [the defendant] had sufficient experience or knowledge to waive counsel." Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001).

The United States Supreme Court held that when a defendant requests to proceed *pro se*, "a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948). "To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Id. at 724. Thus, a judge must make "a penetrating and comprehensive examination of all the circumstances." Id.; see also United States v. Stanley, 739 F.3d 633, 345 (11th Cir. 2014)(noting the "ideal method" for determining an exercise of the right to self-representation is to conduct a pre-trial hearing, informing the defendant of the charges, basic trial procedures, and the hazards of self-representation).

"The judicial inquiry and educative effort concerning the importance of legal representation that must necessarily precede any knowing and intelligent waiver of counsel cannot be cursory or by-the-way in nature." United States v. Belanger, 936 F.2d 916, 918 (7th Cir. 1991). At a minimum, a court must inform a defendant "of the crimes with which he was charged, the nature of those charges, and the possible sentences they carry." Id. Also, "a defendant should be made aware of the 'difficulties he would encounter in acting as his own counsel.'" Id. at 919 (quoting United States v. Moya-Gomez, 860 F.2d 706, 733 (7th Cir. 1988)); see also United States v. McBride, 362

F.3d 360, 366 (6th Cir. 2004)(explaining the Sixth Circuit's "model inquiry" for courts to use when confronted with a request for self-representation).

However, "[t]he ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is the defendant's understanding." State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998).

According to the Fourth Circuit Court of Appeals, an assertion of the right to self-representation must be (1) clear and unequivocal, (2) knowing, intelligent, and voluntary, and (3) timely. See United States v. Ductan, 800 F.3d 642, 650 (4th Cir. 2015); United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). Recently, the South Carolina Supreme Court adopted this three-part test as well. City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 791 (2017).

Clear & unequivocal invocation

"The right to appear *pro se* must be clearly asserted by the defendant before trial." State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991); see also Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995)(invocation of right to self-representation must be clear and unequivocal); United States v. Treff, 924 F.2d 975, 979 (10th Cir. 1991)(explaining the request must be unequivocal to avoid a "cat and mouse" game).

Prior to the trial, Appellant invoked his constitutional right to self-representation, and the judge agreed he had a right to self-representation. Appellant clearly and unequivocally requested to exercise his constitutional right to self-representation, and the judge appeared to agree that Appellant could represent himself when she explained it was "fine" with her if Appellant chose not to avail himself of appointed counsel. Nevertheless, the pre-trial hearings continued with trial counsel acting as Appellant's advocate.

When the parties reconvened on the day of trial, trial counsel indicated Appellant wanted to represent himself, and again, the judge appeared to agree that Appellant could do so. Her only caveat was that appointed counsel would have to act as "shadow counsel." After directly engaging on legal matters with Appellant, the judge then insisted that appointed counsel was Appellant's advocate for the proceedings and she would not permit Appellant to invoke his right to self-representation. Rather than engaging in the proper inquiry as required by law, the judge voiced her opinion that Appellant did not have "sufficient grasps of the rules such that he would be able to protect his own interests." She re-iterated her view that Appellant did not have "any grasp of the rules of evidence or procedure." According to the judge, Appellant's decision to waive counsel placed him in "significant jeopardy." Yet, he did *not* waver from his desire to represent himself. See People v. Longuemire, 257 N.W.2d 273, 275 (Mich. Ct. App. 1977)(holding a defendant's invocation unequivocal even when the "the defendant may have been unhappy with all of the alternatives available to him on the day his trial began, his choice to represent himself ... was unequivocal and unconditional"); Barnes v. State, 528 S.W.2d 370, 372-373 (Ark. 1975)(finding a defendant's invocation clear where on the day of trial, the defendant moved to represent himself because he had been deceived by everyone, including his lawyer, but his explanation on this point "was vague, to say the least").

Knowing, intelligent, and voluntary invocation

While the trial court failed to engage in an adequate colloquy with Appellant in regard to his desire to proceed pro se, as discussed *infra*, evidence in the record revealed Appellant's request for self-representation was made knowingly, intelligently, and voluntarily.

"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 reviewing court] will look to the record to

determine whether [the defendant] had sufficient background or was apprised of his rights by some other source." Prince, 301 S.C. at 424, 392 S.E.2d at 463. In other words, "[i]f the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." Wroten, 301 S.C. at 294, 391 S.E.2d at 576.

A variety of factors may be considered by a reviewing court when determining if an accused has sufficient background to comprehend the dangers of self-representation, 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 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.

In re Christopher H., 359 S.C. 161, 167-168, 596 S.E.2d 500, 504 (Ct. App. 2004).

Appellant had significant contacts with the criminal justice system as indicated by his criminal record. Tr. 899, l. 17 – Tr. 901, l. 13. In fact, Appellant had been convicted of an offense just three years prior to his trial. Tr. 901, ll. 9-10. The judge aptly explained that "due to the breadth of his criminal history," Appellant understood "the legal process" and his constitutional rights. Tr. 905, ll. 8-14. According to the judge, Appellant was "well aware of the nature of the[] proceedings." Tr. 905, ll. 6-8.

Appellant was thirty-eight years old at the time of the trial. Tr. 902, ll. 15-16. Appellant had a family, including two children. Tr. 903, ll. 19-20. According to the trial judge, Appellant exhibited average or above average intelligence. Tr.I. 25, ll. 10-12. During the sentencing, the

judge remarked that Appellant had "articulated" his rights to the court over the course of his trial. Tr. 905, ll. 8-14. Thus, the evidence in the record, albeit limited due to the judge's failure to engage in the proper inquiry, pointed to Appellant's invocation as knowing, intelligent, and voluntary.

At one point in the trial, Appellant explained that he wanted trial counsel to introduce records to show he was incarcerated in New York when one of the state's witnesses claimed Appellant was engaged in criminal activity in South Carolina. Tr. 616, ll. 10-14. Appellant indicated his counsel was "fighting against" him regarding presenting that evidence. Tr. 616, l. 14. When the judge was inquiring about the potential alibi evidence, trial counsel indicated he feared that introducing the evidence of his incarceration in New York would "open[] the door." Tr. 619, ll. 21-22. The judge indicated the evidence was "a double-edge" sword. Tr. 619, l. 23. Appellant explained that the charges against him were "by far the worst" of any prior accusations or convictions. Tr. 619, ll. 24-25. Trial counsel indicated he had been discussing with Appellant that the jury had "no idea who he" was at that point, but that if Appellant "open[ed] the door" to allow the state to introduce "his entire record," then the jury would have a "preconceived mind." Tr. 620, ll. 2-6.

In response, the judge told Appellant the evidence of his incarceration in another state when alleged drug purchases were being made from him would be "prejudicial" to him. Tr. 620, l. 7. The judge told Appellant that as long as he were silent, there was nothing the state could say. Tr. 620, ll. 12-13. She informed Appellant that he could not "just get on the stand and say, I was in Nassau County." Tr. 620, ll. 15-16. If Appellant took the stand, the state would "get to ask [him] about everything else." Tr. 620, ll. 16-17. She opined that was "a dangerous road to go down. It's a rabbit hole." Tr. 620, ll. 17-18. She agreed with trial counsel that it was "not in [his] interest." Tr. 620, ll. 18-19. Despite trial counsel's and the judge's indication that presentation of the evidence

was not in Appellant's best interest, Appellant's desire to present the evidence of an alibi showed he had an understanding of the charges against him and the defenses available to him.

The judge's factual findings regarding Appellant's prior criminal history, intelligence, and understanding of the proceedings supported Appellant's request to make a knowing, voluntary, and intelligent waiver of counsel. Yet, the trial judge refused to permit Appellant to waive counsel because she did not believe it was "prudent to relieve" trial counsel and she did not perceive that Appellant had "sufficient grasps of the rules such that he would be able to protect his own interests." Tr. 29, l. 12; Tr. 29, ll. 17-21. Just as the trial judge in Samuel noted "how intelligent and articulate she found Samuel to be," Judge Jefferson repeatedly noted Appellant's intelligence and clear understanding of the legal proceedings. See State v. Samuel, Op. No. 27768 (S.C. Ct. filed Feb. 28, 2018)(Shearouse Adv. Sh. No. 9 at 43). Also, like Samuel, Appellant repeated expressed his desire for self-representation despite the judge's "persistent attempts to dissuade him." See id.

While the trial judge never found that Appellant's motion to waive counsel was an attempt to manipulate the proceedings, any argument to that effect would be meritless. Appellant expressed his understanding of the statutory scheme governing the state grand jury and requested the state be required to abide by that scheme. For example, Appellant requested the "minutes" from the state grand jury proceedings. Tr. 15, ll. 5-6. When the judge indicated Appellant would not be able to learn of anything during the grand jury proceedings, the state acknowledged that although the transcript from the state grand jury was not a public record, Appellant was permitted to read it according to the statute and controlling case law. Tr. 15, ll. 14-18. When Appellant informed the judge he had been trying to order the transcript from Court Administration, the judge informed him he had been requesting the transcript from the wrong entity. Tr. 15, l. 19 – Tr. 18, ll. 9.

When the judge questioned what Appellant believed he would learn from the documents related to the grand jury, Appellant indicated he hoped to prove that "no State Grand Jury even occurred." Tr. 19, ll. 11-12. To this, the judge explained the grand jury met as evidenced by the indictments. Tr. 19, ll. 13-14. Without question, Appellant's desire to view the documents related to the grand jury proceedings was well-founded in the law. See Evans v. State, 363 S.C. 495, 509-514, 611 S.E.2d 510, 518-520 (2005)(explaining a multitude of ways a criminal defendant may challenge an indictment based upon the state grand jury's proceedings and the documents to which a defendant is entitled during the discovery phase regarding the state grand jury's proceedings).

Next, Appellant explained he had questions about his indictments not being "certified." Tr. 19, ll. 21-23. Appellant explained that during a pre-trial hearing, the judge indicated the indictments were not certified and did not have to be certified, but on the day of the trial, the judge indicated the indictments were certified. Tr. I. 23, ll. 10-20; Tr. 19, ll. 17-23. The judge told Appellant that "once something is in a court order, sir, it's already certified." Tr. 19, ll. 24-25. She told Appellant that only documents going out of state would need to be certified. Tr. 20, ll. 1-2. According to the judge, "never, under any circumstances," would an individual receive "certified indictments." Tr. 20, ll. 2-4. Certainly, Appellant's request for certified indictments was not unreasonable or an attempt at manipulation in light of the statutory requirement that an indictment be certified. See S.C. Code Ann. § 14-7-1640 (stating that if an indictment is returned by the state grand jury, "it must be certified").

Later when Appellant expressed his concerns that his right to a speedy trial had been violated, the judge told him that the issue was "moot" because a trial date had been set. Tr. 84, ll. 6-11. According to the judge, "[t]he only remedy for a speedy trial motion is to set a trial

date." Tr. 84, ll. 9-11. After explaining that other people were in jail awaiting trial for much longer than Appellant, the judge remarked that she denied demands for speedy trial "all the time" because the case law was not in the defendants' favor. Tr. 84, ll. 12-23. She further told Appellant that "the remedy for a speedy trial is to set a trial date," and there was "no other remedy." Tr. 84, ll. 23-25. Specifically, she told Appellant that the "[r]emedy for speedy trial is *not* to *dismiss* [the] charges. Doesn't make them go away. Purpose of speedy trial is to get [the defendant] in front of a court and get [the defendant] to trial. Cases don't get away or get *dismissed* on a speedy trial motion." Tr. 85, l. 25 – Tr. 85, l. 4 (emphasis added). Later, when the judge was discussing the state's plea offers with Appellant and Appellant's concerning about a guilty plea waiving his right to pursue matters on appeal, the judge again told Appellant that a violation of his right to speedy trial would not result in a dismissal. Tr. 234, ll. 15-23.

Certainly, Appellant's interest in asserting his right to a speedy trial could not be deemed an attempt at manipulation. Rather, it showed Appellant's understanding of the legal process and his understanding of possible legal remedies he could pursue. Contrary to the judge's assertion that the remedy for a speedy trial violation was not dismissal of the charges, the South Carolina Supreme Court and the United States Supreme Court held the only remedy for a speedy trial violation is dismissal of the charges. See Barker v. Wingo, 407 U.S. 514, 522 (1972)(holding that if a court concludes a defendant's right to a speedy trial has been violated, dismissal of the charges "is the only possible remedy"); State v. Hunsberger, 418 S.C. 335, 342, 794 S.E.2d 368, 371 (2016)(same).

In addition to all the evidence in the record indicating Appellant was not attempting to manipulate the criminal justice system when he moved to waive counsel, "a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-

representation." State v. Samuel, Op. No. 27768 (S.C. Ct. filed Feb. 28, 2018)(Shearouse Adv. Sh. No. 9 at 43)(citing State v. Barnes, 413 S.C. 1, 3 n.1, 774 S.E.2d 454, 455 n.1 (2015)).

All of the judge's factual findings regarding Appellant's intelligence, ability to understand, and comprehension of the legal proceedings are supported by the record. However, those factual findings militate in favor of concluding Appellant's invocation was knowing and voluntary. Thus, the judge's factual findings, which must be accorded deference, support a legal conclusion that Appellant's request to waive counsel was made with his "eyes wide open." The judge's legal conclusion, which must be reviewed de novo, was error.

Timely invocation

Appellant's request was timely. See Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999)(declining "to hold that a motion to proceed *pro se* made on the day of trial, but before the commencement of trial proceedings, is either timely or untimely as a matter of law" and recognizing the "variety of reasons which might excuse a last minute request by a defendant to proceed *pro se*"). Pierce v. State, 209 S.W.3d 364, 371 (Ark. 2005)(holding a defendant timely asserted his right to self-representation when he invoked his right prior to trial in chambers); Blankenship v. State, 673 S.W.2d 578, 585 (Tex. Crim. App. 1984)(finding invocation of self-representation time when made prior the empaneling of the jury); Barnes, 528 S.W.2d at 372-373 (Ark. 1975)(finding a defendant's invocation timely where on the day of trial, the defendant moved to represent himself). Just as in Fuller, Appellant's request to proceed *pro se* "was made in an atmosphere of his escalating dissatisfaction with his attorney" and Appellant "complained to the trial court that his counsel had been ineffective in preparing for trial." See Fuller, 337 S.C. at 242, 523 S.E.2d at 171. Appellant's "purpose in making the request was not to delay or stall the proceedings, but rather to address his growing concerns about his attorney." See id. Not only did Appellant moved to represent himself

on the day of trial, but he made his request the week prior to trial when the parties were gathered for the pre-trial hearings. According to the judge, this was the first hearing in Appellant's case; thus, it was the first time that Appellant could invoke his right to self-representation. See Tr. I. 9, ll. 4-5.

The judge's comment that she would not relieve counsel at that late "stage or juncture" was belied by the record because the judge appeared to grant the motion and permit Appellant to discuss several legal matters. See Tr. 12, ll. 9-12. In fact, on the day of the pre-trial hearing, the judge told Appellant that it was "fine" by her if he wanted to represent himself at trial. Tr. I. 26, ll. 16-17. The judge stated she was "comfortable" with "whatever" Appellant felt was "acting in [his] best interest." Tr. I. 26, ll. 17-19. Again, the judge reiterated that she was "fine" if Appellant "plan[ned] to represent [himself]" and that "[w]hatever decision [he] ma[d]e [was] on [him]." Tr. I. 27, ll. 3-4.

Adequate hearing

The inquiry that followed Appellant's request had little do to with the *only* inquiry that mattered – whether Appellant was making a knowing and voluntary decision to waive his right to counsel. Instead, the judge focused on whether Appellant's decision to waive counsel was "prudent" and whether Appellant sufficiently grasped the rules "such that he would be able to protect his own interests." Tr. 29, ll. 12-21. Although the judge agreed with Appellant that he had a constitutional right to self-representation and advised Appellant that by waiving counsel he risked "inadvertently incriminate[ing]" himself, the judge did not engage in a colloquy with Appellant to determine if decision to waive was knowingly and voluntarily made. See Tr. 22, ll. 16-23. While the judge's benevolent and paternalistic instincts are laudable, they have no place in determining whether an individual may waive his right to counsel. See Reed, 332 S.C. at 41, 503 S.E.2d at 750 (explaining "[a] decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one"); see also, Frazier-El, 204 F.3d at 558 (re-iterating a

long-standing principle that a request to waive counsel must be honored without regard to whether the defendant would benefit from the advice of counsel).

Conclusion

The trial judge failed to honor Appellant's clear and unequivocal invocation of his right to self-representation as required by the state and federal constitution. The right to self-representation must be honored with no regard to the ability of counsel to represent the individual. The judge failed to engage in the proper colloquy regarding Appellant's invocation. Nevertheless, the evidence in the record demonstrates Appellant knowingly, voluntarily, and intelligently waived his right to counsel. The judge's factual findings regarding Appellant's ability to comprehend in general, and his ability to comprehend the legal proceedings specifically, supported a conclusion that Appellant was waiving counsel knowingly, voluntarily, and intelligently. Despite those factual findings, the judge erred when she denied Appellant's motion based upon her perception that Appellant could not act in his own best interest and did not have a good enough grasp of the rules. This Court should reverse his convictions and remand for a new trial in light of the trial judge's erroneous denial of Appellant's right of self-representation.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EMORY WARREN ROBERTS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Joshua R. Underwood, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Emory Warren Roberts, #373393, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 4th day of May, 2018.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of May, 2018.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027

NEOPOST FIRST-CLASS MAIL

05/04/2018
US POSTAGE $003.52[0]

ZIP 29201
041M11285206

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1433

Hon. Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED
MAY 07 2018
SC Court of Appeals