STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2014-002693

Jerod Keykendall Harris,.....Petitioner,

v.

State of South Carolina,.....Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Should this Court deny review of whether the post-conviction relief court erred in allowing Petitioner to proceed *pro se* because the issue was not preserved where Petitioner relieved his appointed counsel, never objected to proceeding forward *pro se*, never requested counsel be appointed, and the post-conviction relief court never ruled upon the issue?

II. Should this Court affirm the lower court's ruling because the post-conviction relief judge did not err in allowing Petitioner to proceed *pro se* at his evidentiary hearing where Petitioner had his appointed attorney removed seven months earlier, was admonished on the record that he would not be allowed to have another court-appointed attorney, did not request another attorney, and did not object to proceeding *pro se*?

III. Should this Court affirm the lower court's ruling because there is no Sixth Amendment right to counsel in a post-conviction relief proceeding and Faretta v. California and its progeny are inapplicable?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Petitioner was indicted at the May 2011 term of the Spartanburg County Grand Jury for attempted murder (2011-GS-42-2429). Robert Hall, Esquire, represented Petitioner. On May 31, 2012, Petitioner pleaded guilty as indicted before the Honorable J. Mark Hayes, II. Pursuant to a negotiated sentence, Judge Hayes sentenced Petitioner to confinement for a period of fifteen years. Petitioner did not appeal.

Petitioner filed an application for post-conviction relief ("PCR") on November 5, 2012. Respondent made its Return on February 25, 2014, requesting that an evidentiary hearing be held. A hearing was convened on April 7, 2014, at the Spartanburg County Courthouse before the Honorable J. Derham Cole. Petitioner was present and represented by J. Brandt Rucker, Esquire. Suzanne H. White, Esquire, represented Respondent. At the start of the hearing, Petitioner requested to relieve counsel and to continue the evidentiary hearing so that he could retain private counsel. Respondent took no position on the matter. From the bench, Judge Cole granted Petitioner's motion and relieved Rucker.

Thereafter, Judge Cole issued a written order dated July 18, 2014, continuing the matter and formally relieving post-conviction relief counsel. (Supp. App. pp. 2-3). Judge Cole further instructed Petitioner the court would not appoint further counsel if Petitioner was unable to retain an attorney. (Supp. App. pp. 2-3).

A subsequent evidentiary hearing into the matter was convened on November 4, 2014, at the Spartanburg County Courthouse before the Honorable R. Keith Kelly. Petitioner was present and proceeded *pro se*. Suzanne H. White, Esquire, of the South Carolina Attorney General's

Office represented Respondent. Petitioner and plea counsel testified during the evidentiary hearing. By written order signed November 26, 2014, and filed December 2, 2014, Judge Kelly denied and dismissed the matter with prejudice. (Supp. App. pp. 4-9).

Petitioner filed a notice of appeal on December 5, 2014. On October 13, 2015, a petition for a writ of certiorari was filed on Petitioner's behalf by John H. Strom, Esquire. Respondent made its Return on March 2, 2016. On February 10, 2017, this Court granted Petitioner's petition for a writ certiorari and dispensed with further briefing. Petitioner filed his brief of petitioner on March 7, 2017. This brief follows.

STANDARD OF REVIEW

This Court must affirm the post-conviction relief court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should not reverse the PCR court unless the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010).

ARGUMENTS

I. Whether the post-conviction relief court erred in allowing Petitioner to proceed *pro se* is not preserved for this Court's review, where Petitioner relieved his appointed counsel, never objected to proceeding forward *pro se*, never requested counsel be appointed, and the post-conviction relief court never ruled upon the issue.

Initially, the issue of whether Petitioner waived his right to post-conviction relief counsel was never raised to or ruled upon by the post-conviction relief court and therefore is not preserved for appellate review. Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974) (holding it is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal); see also State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding argument advanced on appeal was not raised and ruled on below and therefore was not preserved for review). This same standard is employed on appellate review of PCR matters. See Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010) (noting an issue that was neither raised to nor ruled upon by the PCR court is not preserved for appellate review).

Moreover, Petitioner did not file a Rule 59(e), SCRCP, motion requesting the PCR court rule on the merits of this claim. This Court has held "that to properly preserve an issue for appellate review, it is incumbent upon a party in a PCR action to file a Rule 59(e) motion in the event the PCR court fails to make specific findings of fact and conclusions of law regarding an issue." Burgess v. State, 402 S.C. 92, 95, 738 S.E.2d 264, 265 (Ct. App. 2013) (citing Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007)); Al-Shabazz v. State, 338 S.C. 354, 364-65, 527 S.E.2d 742, 747 (2000) (citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) (issue must

be raised to and ruled on by the PCR judge in order to be preserved for review); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992) (same)). The "notable exception to [the] general rule requiring a contemporaneous objection [...] when [the] record does not reveal a knowing and intelligent waiver of the right to counsel" is not applicable in this case, where Petitioner made a valid waiver. Ex parte Jackson, 381 S.C. 253, 261 n.3, 672 S.E.2d 585, 589 n.3 (Ct. App. 2009) (citing State v. Rocheville, 310 S.C. 20, 25 n.4, 425 S.E.2d 32, 35 n.4 (1993)).

Here, the issue was not raised to or ruled upon by the post-conviction relief court. When the post-conviction relief hearing commenced, the judge asked Petitioner if he was "going to represent [himself] in [the] matter" and Petitioner replied, "Yes sir. I'm going to have to, sir[,]" and stated he "was told [he] had to." (App. p. 42, lines 8-12). Respondent then told the judge that Petitioner "had an attorney that had been appointed" and that he "asked for that attorney to be relieved[,]" and that Judge Cole had "informed him that if he wanted to relieve his appointed attorney, he would not be allowed to have another appointed attorney, but he could retain an attorney or proceed pro se." (App. p. 42, lines 15-19). Petitioner did not object or otherwise indicate he did not wish to proceed without counsel. (App. pp. 42-52). The issue was not raised to or ruled upon by the post-conviction relief judge and his Order of Dismissal did not address or make any findings on the issue. (Supp. App. pp. 4-9). Additionally, Petitioner did not file a motion pursuant to Rule 59(e), SCRCP, or otherwise request that the post-conviction relief court reconsider his order. Accordingly, the issue was not preserved for appellate review.

II. This Court should affirm the post-conviction relief court's ruling because the post-conviction relief court did not err in allowing Petitioner to proceed *pro se* at his evidentiary hearing where Petitioner had counsel removed seven months earlier, was admonished on the record that he would not be allowed to have another court-appointed lawyer, did not request another attorney, and did not object to proceeding *pro se*.

Without waiving its argument that the issue is not preserved, the post-conviction relief court did not err in allowing Petitioner to proceed *pro se* at his post-conviction relief hearing. There is no constitutional right to counsel in a post-conviction relief action. Pennsylvania v. Finey, 481 U.S. 551, 556-57 (1987); Richardson v. State, 377 S.C. 103, 105-06, 659 S.E.2d 493, 494-95 (2008) ("[T]here is no constitutional obligation to appoint counsel in a PCR matter in South Carolina."). However, "[a]n indigent applicant who is granted a [post-conviction relief] hearing has a statutory right to be represented by a court-appointed attorney," Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000) (citations omitted), "or a knowing, intelligent waiver of the right to counsel must be obtained." Richardson v. State, 377 S.C. at 106, 659 S.E.2d at 495 (citing S.C. Code Ann. § 17-27-60 (2003); Rule 71.1(d), SCRCP; Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992)). "A waiver is a voluntary and intentional abandonment or relinquishment of a known right." Sanford v. S.C. State Ethics Comm'n, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009). "Waiver requires a party to have known of a right and known that right was being abandoned." Id. at 496–97, 685 S.E.2d at 607. "The determination of whether one's actions constitute waiver is a question of fact." Id. at 497, 685 S.E.2d at 607.

Nevertheless, "a PCR applicant is not entitled to appointed counsel of choice." Id. Though he "*may* have the right to reject or discharge court-appointed counsel and proceed *pro se*

or retain his own counsel, he does not have the right, without a showing of satisfactory cause to refuse or dismiss the counsel appointed and have other counsel appointed." Id. (citing State v. Jones, 270 S.C. 587, 243 S.E.2d 461 (1978)).

Petitioner relies on Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992), to support his argument that the post-conviction relief court erred in allowing him to proceed *pro se*. This case is distinguishable from Whitehead. In Whitehead, the petitioner filed a second, successive post-conviction relief application and a petition for *habeas corpus* and a motion for appointed counsel. At a hearing on his *habeas corpus* petition, the judge consolidated the PCR application with the *habeas corpus* petition. Regarding the motion for appointment of counsel, the post-conviction relief judge noted the appointment of counsel for indigent defendants in successive post-conviction relief actions is discretionary, and therefore, declined to appoint counsel. The petitioner then proceeded *pro se* on his claims. On appeal, this Court reversed the post-conviction relief court and remanded the matter for a new hearing, holding,

> [a] PCR judge must appoint counsel or obtain a knowing and intelligent waiver of that right by the applicant. To establish a valid waiver of the right to counsel, the PCR applicant must be made aware of the right to counsel and the dangers of self-representation. See e.g., Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (199).

Id. at 535.

Here, unlike the petitioner in Whitehead, Petitioner *was* appointed an attorney. J. Brandt Rucker, Esquire, was appointed as counsel for Petitioner at the outset of his PCR action. (Supp. App. p. 1). On the date that his evidentiary hearing was initially scheduled, Petitioner moved to *relieve* his appointed counsel so that he could hire private counsel. (App. p. 36, lines 14-16). In

response to this motion, his attorney stated, "my client informs me that he would rather have a private, retained attorney at this time after thinking the case over. And that's all he's told me about that issue." (App. p. 36, lines 8-11). Petitioner replied, "I didn't feel comfortable that Mr. Brandt Rucker was in my best interest, so I wanted to go ahead and get me a paid attorney." (App. p. 36).

Judge Cole admonished Petitioner if it granted his motion to relieve counsel, the court would not appoint him a second attorney in the future, stating, "[i]f I terminate [your attorney's] services today and I continue [the evidentiary hearing] so you can hire a lawyer, do you understand in the future you're not going to get another court-appointed lawyer? You'll either have to hire one or you'll be representing yourself." (App. p. 37, lines 6-11). Judge Cole asked him if he still wished to relieve his attorney, asked several more times if he understood, and informed him again that he would not receive another court-appointed attorney. (App. p. 37, lines 13-22). In response to Judge Cole's question, "[d]o you still want to release him from any further obligation[,]" Petitioner responded, "[y]es, sir." (App. p. 37, ll. 15-17). In response to Judge Cole's question, "you're going to hire somebody or represent yourself[,]" Petitioner responded, again, "[y]es, sir." (App. p. 37, ll. 18-20). Petitioner indicated he understood. (App. p. 36, line 19-p. 37, line 25). The Court also issued a written order to that effect, which was filed July 21, 2014. (Supp. App. pp. 2-3).

Additionally, the record demonstrates Petitioner's familiarity with the criminal justice system and understanding of his rights based on his lengthy prior record. (App. p. 15, ll. 5-9) This Court held in State v. Roberson, 382 S.C. 185, 675 S.E.2d 732 (2009), that a waiver of the right to counsel can be inferred from a defendant's actions. (citing State v. Cain, 277 S.C. 210,

284 S.E.2d 779 (1981). In Roberson, the appellant waived his Sixth Amendment right to counsel when he disregarded the instructions of the court and inexcusably failed to appear for trial. Id. This Court, in finding Roberson waived by conduct, considered in its analysis the fact that Roberson's criminal history showed a familiarity with the court system. Id. at 188.

Similar to Roberson, Petitioner has twelve prior convictions spanning back to 1999. (App. p. 15, ll. 5-9). The record also demonstrates that Petitioner took responsibility and fully acknowledged and accepted his guilt at his plea hearing. (App. p. 19, ll. 4-10). The plea court found the plea was made "freely, voluntarily, knowingly, and intellectually." (App. p. 19, ll. 15-16). Petitioner pled pursuant to a negotiated sentence of fifteen years' imprisonment and dismissal of another drug charge. (App. p. 10, ll. 10-15). Petitioner clearly knew and understood the charges against him and the benefit he was receiving by way of the negotiated plea and sentence.

Respondent submits that by asking the Court to relieve his court-appointed counsel and maintaining his desire to relieve counsel, after indicating that he understood he would not be allowed to receive a second court-appointed attorney and would be required to either retain counsel or proceed *pro se*, Petitioner waived his statutory right to PCR counsel. In State v. Jacobs, 271 S.C. 126, 245 S.E.2d 606 (1978), this Court found there was an inferable waiver of the Sixth Amendment right to counsel by omissions. Jacobs participated in his trial but did not have counsel. Id. Because Jacobs was not indigent, the court urged him to retain a lawyer and continued the case at least once to enable Jacobs to hire counsel. Id. Although Jacobs never expressly waived his right to counsel, this Court held he waived his right to counsel by his conduct because he was given reasonable time to secure counsel, he was financially able to retain

counsel, and the court advised him to seek counsel. Id.

Similar to Jacobs, Judge Cole warned Petitioner if he did not hire counsel, as Petitioner asserted he would, he would have to proceed *pro se*. Judge Cole also continued the case for seven months to give Petitioner sufficient time to retain counsel, like the court in Jacobs.

In light of his criminal history, his opportunity to work with his appointed attorney, his adamant request to relieve his appointed attorney so that he could retain another, Judge Cole's ample warnings that he would not be appointed a second attorney but must proceed with private counsel or *pro se*, his failure to hire private counsel, request appointed counsel, move for a continuance to find counsel, or otherwise indicate he did not wish to proceed *pro se*, Petitioner waived his statutory right to PCR counsel. Accordingly, the post-conviction court did not err when he allowed Petitioner to proceed *pro se* at his post-conviction relief hearing.

III. This Court should affirm the lower court's ruling because there is no Sixth Amendment right to counsel in a post-conviction relief proceeding and Faretta v. California and its progeny are inapplicable.

Petitioner argues the post-conviction relief court erred in failing to conduct a hearing to determine if Petitioner knowingly, voluntarily, and intelligently waived his right to post-conviction relief counsel pursuant to Faretta v. California, 422 U.S. 806 (1975). However, Faretta involved the waiver of the Sixth Amendment right to counsel. Id. at 807. The Sixth Amendment is not implicated in this case because PCR is a collateral proceeding and there is no constitutional right to counsel in such proceedings. Richardson, 377 S.C. at 105-06, 659 S.E.2d at 494-95. Furthermore, Whitehead does not extend Faretta to post-conviction relief proceedings

Other jurisdictions presented with a similar question have determined there is no constitutional right to post-conviction relief counsel and Faretta is inapplicable. In Colorado, the

Supreme Court of Colorado held that although there is no constitutional right to a post-conviction counsel, there is a limited statutory right to counsel in post-conviction relief proceedings. Silva v. People, 156 P.3d 1164 (2007). The court relied on the Colorado Court of Appeals decision in People v. Duran, 757 P.2d 1096 (1988). In Duran, the court held because a "defendant's right to counsel in [a post-conviction] proceeding is statutory and not constitutional, its waiver must be voluntary and need not be knowing and intelligent." Id. at 1097. Vermont's Supreme Court adopted a similar approach in In re Chapman, 155 Vt. 163, 166, 581 A.2d 1041, 1043 (1990). Indiana also followed suit, and in Carter v. State, the Court of Appeals of Indiana found it unnecessary to apply constitutional standards of waiving the right to post-conviction relief counsel because there is no such constitutional right and declined to extend Faretta to PCR actions. Carter 560 N.E.2d 687 (Ind. Ct. App. 1990). In its opinion, the court relied on the Supreme Court of Indiana's opinion in Baum v. State, 533 N.E.2d 1200 (1989), and reasoned that post-conviction relief is not generally regarded as a criminal proceeding and as such, the constitutional standards for a valid waiver of the right to counsel are not applicable in a post-conviction relief setting. Carter at 689. The court opined because the right to an attorney at post-conviction relief was expressly provided by state statute, a petitioner in a post-conviction relief action must assert his statutory right to counsel. Id.

Similar to the opinions cited above, South Carolina's right to counsel in post-conviction relief actions is statutory. As such, the constitutional standards for a valid waiver of that right are not applicable. Accordingly, Faretta and its progeny are not triggered in this case. Therefore, the post-conviction relief court did not err in failing to conduct a hearing pursuant to Faretta to determine if Petitioner knowingly, voluntarily, and intelligently waived his right to post-

conviction relief counsel.

CONCLUSION

For the reasons stated above, this Court should affirm the post-conviction relief court's order and deny the requested relief.

Respectfully submitted,

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May 19, 2017

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

John H. Strom, Esquire
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This 19th day of May, 2017.

Brianna Arnone

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