

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Richland County
Hon. G. Thomas Cooper, Circuit Court Judge
Appellate Case Tracking No. 2017-002205

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S.C. SUPREME COURT

The State,

Respondent,

v.

John Henry Dial, Jr.,

Petitioner.

Opinion No. 2017-UP-339 (S.C. Ct. App. filed August 9, 2017)

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON CERTIORARI.....	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW	3
ARGUMENT	4
I. The circuit court properly affirmed Petitioner’s conviction because the Record demonstrates Petitioner understood the dangers of self-representation.....	4
CONCLUSION.....	9

TABLE OF AUTHORITIES

Cases

<u>Chapman v. Computers, Parts & Repairs, Inc.</u> , 334 S.C. 387, 513 S.E.2d 120 (Ct. App. 1999) ...	7
<u>Faretta v. California</u> , 422 U.S. 806, 807 (1975)	4, 5, 6
<u>State v. Brockmeyer</u> , 406 S.C. 324, 338, 751 S.E.2d 645, 653 (2013).....	6
<u>State v. Bryant</u> , 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009).....	4, 6
<u>State v. Cash</u> , 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992).....	6, 7, 8
<u>State v. Dixon</u> , 269 S.C. 107, 236 S.E.2d 419 (1977)	4
<u>State v. Knighton</u> , 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999).....	6
<u>State v. McLauren</u> , 349 S.C. 488, 493 94, 563 S.E.2d 346, 348 49 (Ct. App. 2002).....	5, 8
<u>State v. Samuel</u> , Op. No. 27768 (S.C. filed Feb. 28, 2018).....	3
<u>Watts v. State</u> , 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001).....	5
<u>Wroten v. State</u> , 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990)	5

Statutes

S.C. Code Ann. § 18-7-80 (1985).....	6
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STATEMENT OF ISSUES ON CERTIORARI

- I. The circuit court properly affirmed Petitioner's conviction because the Record demonstrates Petitioner understood the dangers of self-representation.

STATEMENT OF THE CASE

Procedural History

The State agrees with Petitioner's procedural Statement of the Case.

STANDARD OF REVIEW

This Court recently announced the standard of review for considering whether a defendant properly waived his right to counsel:

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. Specifically, we review a circuit judge's findings of historical fact for clear error; however, we review the denial of the right of self-representation based upon those findings of fact de novo. In doing so, this 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.

State v. Samuel, Op. No. 27768 (S.C. filed Feb. 28, 2018) (internal citations omitted).

ARGUMENT

I. The circuit court properly affirmed Petitioner's conviction because the Record demonstrates Petitioner understood the dangers of self-representation.

The circuit court properly affirmed Petitioner's conviction and sentence because the record demonstrates Petitioner understood the dangers of self-representation. The evidence presented indicates he knew he had a right to counsel and voluntarily waived that right to counsel. Further, the Record demonstrates he understood the dangers of self-representation and was aware of the requirements which would be placed on him during trial. Accordingly, this Court should affirm Petitioner's conviction and sentence.¹

"The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975). A defendant may waive the right to counsel. "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); see also, State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) ("It is beyond question that an accused person may waive counsel and represent himself. However, it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver."). "To effectuate a valid waiver, the accused must (1) be advised of the right to counsel and (2) be adequately warned of the dangers of self representation." Bryant, 383 S.C. at 414, 680 S.E.2d at 13 (citing State v.

¹ While the Court of Appeals properly affirmed the conviction and sentence, it incorrectly found the issue could not be reviewed because it was not presented to the magistrate court. The issue in this case, whether a court improperly allowed a defendant to proceed *pro se*, need not satisfy the usual preservation requirements in order to be raised to the appellate court. See State v. Rocheville, 310 S.C. 20, 25 n.4, 425 S.E.2d 32, 35 n.4 (1993) ("A notable exception to this general rule requiring a contemporaneous objection is found when the record does not reveal a knowing and intelligent waiver of the right to counsel. The pro se defendant cannot be expected to raise this issue without the aid of counsel."); Ex parte Jackson, 381 S.C. 253, 261 n.3, 672 S.E.2d 585, 589 n.3 (Ct. App. 2009) (same).

McLauren, 349 S.C. 488, 493 94, 563 S.E.2d 346, 348 49 (Ct. App. 2002)); see also, Faretta, 422 U.S. at 835.

Faretta requires 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.” 422 U.S. at 835. “While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge’s advice but rather the defendant’s understanding.” Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). If the trial court fails to explicitly address the disadvantages of proceeding *pro se*, as required by the second prong of Faretta, this Court may look to the record to determine whether petitioner had sufficient background to understand the dangers of self-representation or was apprised of his rights by some other source. See Watts v. State, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001).

Factors this Court considers in determining if an accused had sufficient background to understand the disadvantages of self-representation include:

- (1) the accused’s age, educational background, and physical and mental health;
- (2) whether the accused was previously involved in criminal trials;
- (3) whether he knew of the nature of the charge and of the possible penalties;
- (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self representation in his particular case;
- (5) whether he 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 he knew of legal challenges he could raise in defense to the charges 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.

See State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992); see also, Bryant, 383 S.C. at 415, 680 S.E.2d 11 at 14.

First, the magistrate specifically indicated: "On November 1, 2010 Mr. Dial entered a plea of not guilty and requested a jury trial. He is advised of his right to be represented by an attorney either private or appointed but states he will represent himself." The magistrate noted on April 25, 2011 prior to jury selection, Petitioner "again assures the court he wants to represent himself." (Magistrate's Return of Appeal; R. 13-14²). These findings coupled with the fact Petitioner began filling out the paperwork for an appointed attorney, but ultimately concluded he wished to represent himself, indicate he was aware of the dangers of self-representation. (Affidavit of Indigency and Application for Counsel; R. 120-123). Without transcripts of the hearings before the magistrate on November 1, March 18, and April 25, it is impossible to know exactly what wording was used to make Petitioner aware of his right to counsel.³ However, in responding to his Faretta challenge on appeal to the circuit court, the magistrate indicated all three hearings contained warnings to Petitioner and ended with Petitioner insisting on representing himself. Additionally, if Petitioner believed the Return submitted was inadequate to answer the question presented on appeal, the he was required to ask the circuit court to direct a more thorough and adequate response from the Magistrate. See e.g., S.C. Code Ann. § 18-7-80 (1985); Chapman v. Computers, Parts & Repairs, Inc., 334 S.C. 387, 390, 513 S.E.2d 120, 122

² All references to the Record on Appeal can be found in Appendix Divider G of the Appendix.

³ It is Petitioner's burden to provide the Court with the necessary Record in order to evaluate the issues presented. See State v. Brockmeyer, 406 S.C. 324, 338, 751 S.E.2d 645, 653 (2013) (finding it impossible to evaluate the merits of an issue because the appellant failed to include the relevant material in the record on appeal); State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999) (finding appellant has burden of presenting an adequate record which is sufficiently complete to permit this Court to review lower court's actions).

(Ct. App. 1999) (“When the return provided is inadequate, the appropriate remedy is for the circuit court to direct the magistrate to file an amended return”). Accordingly, the Record sufficiently demonstrates Petitioner was properly informed of his rights and the dangers of self-representation and validly waived his right to counsel. To the extent the Record is insufficient, it is Petitioner’s burden to provide a complete and proper Record for the Court to review. In any event, this Court should affirm Petitioner’s conviction and sentence.

Additionally, the Record clearly demonstrates Petitioner had the requisite understanding to be able to properly represent himself. In looking at the Cash factors, Petitioner was born in May 1977, making him almost 34 at the time of trial. (Incident Report; Affidavit of Indigency and Application for Counsel; R. 115; 120-123). The Record divulges no indication he had any physical or mental impairment which would have prevented or hampered his ability to proceed *pro se*. He acknowledged he was on probation from a prior conviction at the time of trial, so he clearly had some exposure to the legal system. (T.82; R. 96). In responding to several forms in which he indicated he wished to proceed *pro se*, Petitioner indicated the charges against him were three counts of third degree assault; thereby demonstrating an awareness of the charges against him. (Jury Trial Request form; Pontiac Magistrate Court Trial Information and Plea Sheet; R.124; 125-126).⁴

Further, the Record demonstrates Petitioner was able to fully participate in his trial. He conducted an opening statement, cross-examined the State’s witnesses, objected to the admission of evidence, sought to bring in good character evidence, and presented his own witnesses, as well as, his own testimony. Prior to trial, Petitioner recognized the importance of seeing the evidence the State had against him and this was ordered by the magistrate. Immediately prior to trial,

⁴ These forms are handwritten, presumably in Petitioner’s handwriting so it is clear he was aware of the charges against him.

Petitioner sought to obtain copies of the victim's and other's statements in the possession of the State so he could use those statements at trial. (T.3-4; R. 17-18). Further, he cross-examined witnesses regarding their biases, sought to bring out alternate versions of the events, and tried to impeach witnesses using the statements he obtained prior to trial. He even asked that one witness not be excused in the event he needed to recall the witness. (T.49-50; R. 63-64). In addition, he knew of the significance of the trial and the ability to present a defense because he acknowledged during a discussion with the court that he attempted to "read a little bit" before he came to trial. (T.65; R. 79). Significantly, the jury acquitted Petitioner of one of the charges against him, indicating he related to the jury and was able to convince them of at least part of his defense strategy. Finally, there is absolutely no evidence he was coerced or forced into proceeding *pro se*, and all of his interactions with the court demonstrate a requisite knowledge of the proceedings and their significance.

Accordingly, even if the Record is insufficient to demonstrate Petitioner was adequately warned of the dangers of proceeding *pro se*, his decision to proceed without representation was knowing and voluntary. The Record demonstrates a sufficient background and ability to make a valid waiver pursuant to the Cash factors. See State v. McLauren, 349 S.C. 488, 496, 563 S.E.2d 346, 350 (Ct. App. 2002). Therefore, this Court should affirm Petitioner's convictions and sentences.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that Petitioner's convictions and sentences should be affirmed.

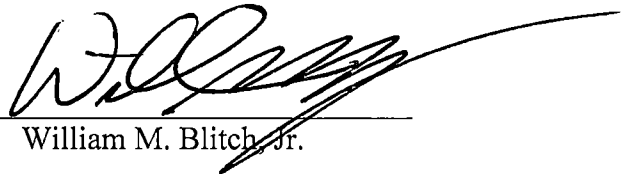
Respectfully submitted,

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May 24, 2018

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PROOF OF SERVICE

I, ANNE A. MUELLER, certify that I have served the within Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 24th day of May, 2018.

Anne Mueller

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