

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

ROBERT HENRY OSBEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001038

BRIEF OF PETITIONER

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S.C. SUPREME COURT

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ISSUE PRESENTED

The PCR court erred in finding that Petitioner Osbey had knowingly and voluntarily waived his right to counsel at his guilty plea and therefore failed to prove that his *pro se* guilty plea was unintelligently and involuntarily made which was prejudicial to Petitioner Osbey because he never received nor saw the discovery in his case.

STATEMENT

On March 25, 2014 in Spartanburg County, a confidential informant (CI) met with narcotics officers and was fitted with audio-video equipment and provided with five hundred dollars in order to purchase drugs. Later the CI met with Petitioner Osbey who allegedly sold to the CI 13.12 grams of crack cocaine. App. 11, ll. 13 – 23.

On April 15, 2014, narcotics officers again met with a CI in order for the CI to purchase drugs from Petitioner Osbey. The CI was fitted with audio and video equipment and given five hundred dollars again for drugs. The CI purchased 12.7 grams of crack cocaine from Osbey. App. 11, ll. 24 – App. 12, ll. 6.

On April 18, 2014, the narcotics officers executed a search warrant at Osbey's place of residence. Found during the search were scales, some marijuana, and 1.92 grams of crack cocaine. Petitioner Osbey was charged with two counts of trafficking crack cocaine and one count of PWID crack cocaine. App. 8, ll. 8 – App. 10, ll. 3; App. 50 – App. 61.

April 1, 2015, Petitioner Osbey appeared before the Honorable J. Derham Cole, and entered a guilty plea to the three charges as indicted. Petitioner Osbey represented himself, and the state was represented by Hunter Christopher Blouin. App. 1.

At the guilty plea hearing, the judge told Osbey that he had the right to an attorney. The judge explained that one could be appointed if he did not have the money. Osbey told the judge that he had not applied for a public defender. He said he had talked to the public defenders' office the week before his guilty plea, but was told that the office needed at least two weeks to have one appointed. When the judge asked him if he had knowingly and intelligently made the decision not to have a lawyer assist him on his case, Osbey replied: "No sir. I just---I was trying to get one. Just didn't have the money." App. 3, ll. 1 – App. 5, ll. 19.

The judge pointed out that Osbey had had a year as he was arrested April 18, 2014, to get an attorney. The judge found based on Osbey's waiting to get an attorney that Osbey had waived his right to counsel by his conduct. App. 5, ll. 17 – App. 6, ll. 2. The judge then accepted Osbey's plea and sentenced him to eight years on each of the two trafficking crack charges to run concurrent. The sentence on the PWID crack was five years to run consecutive to the other two charges but it was suspended to three years probation. App. 13, ll. 18 – App. 14, ll. 8.

Petitioner Osbey did not appeal his convictions nor sentences. App. 34, ll. 18-19. On February 23, 2016, Osbey filed an application for post-conviction relief (PCR). The state filed a return on October 13, 2016. App. 42. An evidentiary hearing was held February 1, 2017 before the Honorable Edward W. Miller. Petitioner Osbey was represented by Susannah C. Ross, and the state was represented by Caitlin B. Hastings. App. 32.

At the PCR hearing, PCR counsel argued a due process violation based on the Fifth and Fourteenth Amendments and Article 1, Section 3 of the South Carolina Constitution. Counsel explained that Osbey's plea was *pro se*, and there was nothing in the record to indicate that the judge issued any warnings about the dangers of self-representation. She argued that no Faretta warnings were given. Therefore, he lacked sufficient understanding to make a knowing and voluntary waiver of counsel. PCR counsel continued to report that he did not have standby counsel either. Counsel argued that the plea judge made a ruling that Osbey had voluntarily waived his right to counsel because he failed to get a lawyer because he waited too long. Counsel reported that he was never ordered to get a public defender, and then was told by the public defender's office that there was not time to get a defender before trial. Counsel cited the case of Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002).

Petitioner Osbey testified at the PCR hearing that he was trying to save the money to get a lawyer but every time he got the money for a “down payment,” child support “would come and take it.” App. 36, ll. 20 – App. 37, ll. 6; App. 39, ll. 8 – 19. He never saw any evidence against him as he did not receive a discovery package or anything concerning the evidence. App. 37, ll. 7 – 20. When he called the public defender’s office before his court date, he was told they needed more than two weeks to have an attorney for him. App. 37, ll. 18 – App. 38, ll. 8.

PCR counsel argued in closing again that there was no evidence in the record that Osbey was warned of the dangers of self-representation. Counsel argued that pursuant to Gardner v. State, Id., Osbey did not meet the required elements for a knowing and voluntary waiver of his right to counsel. App. 40, ll. 1 – 11.

The PCR judge found Osbey’s testimony to be “neither credible nor legally relevant.” App. 43. The PCR judge found that the plea judge was correct in finding that Osbey had waived his right to counsel. Therefore, the judge found that Osbey failed to prove that his guilty plea was unintelligently and involuntarily made. App. 45; App. 47. The judge denied Osbey’s PCR application and dismissed it with prejudice. App. 48.

Osbey filed a notice of appeal. A petition for a writ of certiorari was filed by appellate counsel with the Supreme Court on August 29, 2017. The Supreme Court granted the petition on May 2, 2018. This brief of petitioner follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue before the Court. The Appellate Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The Appellate Court reviews questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The PCR court erred in finding that Petitioner Osbey had knowingly and voluntarily waived his right to counsel at his guilty plea and therefore failed to prove that his *pro se* guilty plea was unintelligently and involuntarily made which was prejudicial to Petitioner Osbey because he never received nor saw the discovery in his case.

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, and the right to trial by jury. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must show with certain certainty that the plea is “an intentional relinquishment or abandonment of a known right or privilege.” State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982). Judges are required to give the defendant an explanation of the defendant’s waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

An accused may waive his right to counsel and proceed *pro se*. However, the accused must be advised of his right to counsel and adequately warned of the dangers of self-representation. Faretta v. California, 422 U.S. 806 (1975). The right must be preserved even where the court – as here and almost always – 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); State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997); State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1988). The Faretta Court wrote that the Sixth Amendment guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation when he voluntarily and intelligently elects to do so.

In Wroten v. State, 301 S.C. 293, 391 S.E.2d 575 (1990), the Supreme Court reversed and remanded the case because the record did not demonstrate that the petitioner was sufficiently aware

of the dangers of self-representation to make an informed decision to proceed without counsel. The Court wrote that the ultimate test was not the judge's advice, but the defendant's understanding.

In Gardner v. State, *supra*, the Supreme Court reversed the PCR court's denial of Gardner's PCR and remanded his case. The Court held that the evidence was insufficient to support a finding that the defendant understood the dangers of self-representation and knowingly and intelligently waived his right to counsel when he pleaded guilty.

The Court in Gardner identified the factors a court must consider to determine if the defendant has a sufficient background to understand the dangers of self-representation:

- (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 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.

Osbey's case is extremely similar to the issues in Gardner's case. Gardner could not afford to continue paying a private attorney and a public defender was never appointed. Gardner had been represented by a public defender on a prior charge. Gardner had been informed by the magistrate that he had a right to an attorney. Gardner's plea court also found that he had been advised at arraignment that he had a right to a public defender. And the court found that Gardner was completely familiar with the court system.

However, the Supreme Court wrote that in a PCR action, if the record failed to demonstrate that the petitioner made an informed choice to proceed *pro se* with his “eyes open,” then the petitioner did not make a knowing and voluntary waiver of counsel.

Osbey did not make a knowing and voluntary waiver of counsel because he told the plea judge when asked that he did not make the decision not to have a lawyer, he “just didn’t have the money.” He said that he was trying to get one. App. 4, ll. 20 – 24.

There was no evidence in the record that the plea court inquired about the ten factors listed in Gardner that a court must consider when a defendant was representing himself. Osbey did not know enough to ask for his discovery, and the judge did not ask him if he had seen it.

In Hilton v. State, 422 S.C. 204, 810 S.E.2d 852 (2018), the Supreme Court found that the PCR court obtained a valid waiver from Hilton of his right to counsel before he was allowed to represent himself at the PCR hearing. The Court held that the PCR court repeatedly informed Hilton that he had the right to counsel and that Hilton affirmed his understanding. Hilton declined the PCR court’s offer to explain the things an attorney might do to help him. The Court found that the record indicated that Hilton knew an attorney could assist him in “conducting discovery, amending his PCR application, and meeting his burden of proof.”

Osbey’s case is distinguished from Hilton as Hilton wrote motions to the court stating: “I fully understand my claims, and ...I have the ability to represent my own claims before the Honorable Court.” Hilton also attached an affidavit to his motions in which he swore that he “made the waiver to dismiss his court appointed attorney with the full understanding of the dangers of self-representation and the consequences of proceeding *pro se*.”

Osbey on the other hand, told the plea court that he had tried to obtain an attorney but could not afford one.

Although Hilton concerned counsel for a PCR hearing, the Supreme Court cited Prince v. State, 301 S.C. 422, 423-24, 392 S.E.2d 462 (1990), where the Court said the same structure in Prince, which applied to counsel at a guilty plea, applied to a PCR proceeding.

In Prince v. State, id., the Supreme Court reversed the PCR court and remanded the case for a new trial because the PCR court erred in finding a valid waiver of counsel by Prince. The Court found that the record did not demonstrate that Prince was “sufficiently aware of the dangers of self-representation to make an informed decision to proceed *pro se*” at his guilty plea.

The PCR court erred in finding that Osbey voluntarily and knowingly waived his right to counsel at his guilty plea.

CONCLUSION

Based on the above, Petitioner Osbey's convictions and sentences should be vacated, and his case remanded for a new hearing.

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a large initial "L" and a decorative flourish at the end.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

ROBERT HENRY OSBEY,

PETITIONER

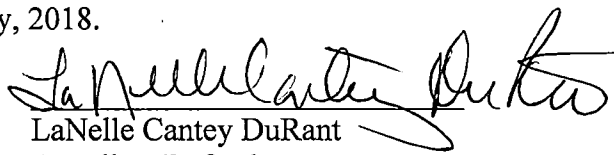
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STATE OF SOUTH CAROLINA,

RESPONDENT

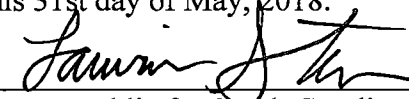
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Jordan A. Cox, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Robert Henry Osbey, #299910, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 31st day of May, 2018.



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 31st day of May, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.