

STATE OF SOUTH CAROLINA
In the Supreme Court

Certiorari to Greenville County
Court of Common Pleas
The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case Number 2017-002580

RECEIVED

JUN 25 2018

S.C. SUPREME COURT

Darryl Joseph Williams Respondent,

v.

The State of South Carolina..... Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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The right to engage in self-representation is separate and distinct from the right to receive assistance from appointed counsel. Respondent carried his burden of proving that he did not knowingly and intelligently waive his right to counsel. The post-conviction relief court did not commit error in granting Respondent a new trial.

STATEMENT OF THE ISSUE ON CERTIORARI

Does the fact Respondent was not incarcerated following his conviction after a pro se bench trial alleviate the trial judge of the duty to provide Faretta warnings?

STATEMENT OF THE CASE

Respondent was arrested for Third Degree Domestic Violence on June 26, 2015. He appeared in Mauldin Municipal Court on October 14, 2015 and represented himself at a bench trial. (Appx. p. 3, lines 14-17). At the end of trial, Judge Jessica Salvini found Respondent guilty of domestic violence and fined him \$850.00. (Appx. p. 83).

Respondent filed this post-conviction relief action on October 12, 2016. (Appx. pp. 18-24). The State served a Return and Motion for More Definite Statement on July 10, 2017. (Appx. pp. 25-29). Respondent's Amended Post-Conviction Relief Application specifically alleged that "[Respondent's] trial judge never afforded him the opportunity to knowingly and intelligently waive his right to counsel." (Appx. p. 31). Respondent's amended application was filed on September 28, 2017. (Appx. pp. 30-43).

The case proceeded to an evidentiary hearing on October 26, 2017 and, by written order dated October 26, 2017, the Honorable Letitia Verdin granted Respondent post-conviction relief application. In relevant part, the stated grounds for relief included the fact that Respondent's decision to represent himself was not knowingly and intelligently made as he was never warned of the dangers of self-representation as required by Faretta v. California. (Appx. pp. 59-63). Petitioner filed a Motion to Alter or Amend Judgment Pursuant to 59(e), SCRPC. (Appx. pp. 64-67). Respondent filed a return. (Appx. pp. 68-74). Judge Verdin denied Petitioner's motion. (Appx. pp. 75-76). This appeal followed.

STATEMENT OF THE FACTS

On October 14, 2015 Respondent appeared in Mauldin Municipal Court before Judge Salvini. He chose to represent himself and elected a bench trial instead of a jury trial. At the conclusion of the bench trial, Judge Salvini convicted him.

Before Respondent's bench trial began, Judge Salvini gave a collective address to everyone assembled in the courtroom. Respondent was present for this address. (Appx. p. 50, lines 3-21). During this address, Judge Salvini collectively informed the defendants:

[Y]ou also have the right to have an attorney present with you during every stage of every criminal proceeding. If you're present here this morning and you do not have counsel and you need additional time to either go out and hire counsel or see if you qualify for appointed counsel, when I call your case all you need to do is let me know. I will reschedule your case once . . . and will continue it to the next court date for the purpose of you seeing if you qualify for appointed counsel or for you to go out and hire counsel.

(Appx. p. 38, lines 4-11).

After Judge Salvini convicted Respondent, he discovered that he could not longer cross the international border into Canada. A commercially licensed driver by trade, he previously hauled commercial loads between the Upstate of South Carolina and Canada. However, after his conviction for a crime of domestic violence, the Canadian authorities denied him entrance into Canada. (Appx. p. 53, lines 17 to 25).

At the beginning of the post-conviction relief hearing, Petitioner and Respondent stipulated that the excerpts from Judge Salvini's collective address that were attached to and incorporated into Respondent's Amended Post-Conviction Relief Application were complete and accurate. (Appx. p. 48, lines 17-25).

ARGUMENT

A. Respondent's Argument

Respondent received no Faretta warnings, so his decision to proceed without counsel was not made intelligently and voluntarily. South Carolina case law supports his position. "In order to waive the right to counsel, the accused must be (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation." Watts

v. State, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (S.C. 2001) (citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.E.2d 562 (1975)).

The question presented in Faretta was “whether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.” Faretta, 422 U.S. at 807, 95 S.Ct. at 2527, 45 L.E.2d at ____ (emphasis added). The Faretta Court held that “[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to chose self-representation, he should be made aware of the dangers and disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice is made with eyes open.” Id. at 835, 95 S.Ct. at 2541, 45 L.E.2d at ____ (internal citations omitted). “The trial judge has the **responsibility to ensure** that the accused is informed of the dangers and disadvantages of self-representation, and makes a knowing and intelligent waiver of the right to counsel.” Dearyburry v. State, 367 S.C. 34, 39-40, 625 S.E.2d 212, 215 (S.C. 2006) (emphasis added).

At his post-conviction relief hearing, Respondent testified that Judge Salvini did not warn him of the dangers of self-representation as required by Faretta. (Appx. p. 51, lines 5-7). Respondent further testified that, had he been warned as to the dangers of self-representation, “I would have hired a lawyer to help me out.” (Appx. p. 54, lines 7-13). In the written order granting Respondent relief, the Honorable Letitia Verdin found that the testimony of Respondent was credible. (Appx. p. 60). The Court did not err in granting Respondent a new trial. The undisputed record is that, while Respondent was told of the right to seek counsel, he was never warned of the dangers of self-representation, which is required by Faretta v. California.

B. Petitioner's Argument

Petitioner has identified a subset of criminal cases in which this Honorable Court and also the United States Supreme Court has held that certain indigent defendants are not constitutionally guaranteed the right to appointed counsel. These cases involve misdemeanor offenses where an indigent defendant is convicted but not sentenced to active incarceration. Petitioner relies on a line of United States Supreme Court case that culminate in Alabama v. Shelton, 535 U.S. 654, 122 S.Ct. 1794, 152 L.E.2d 888 (2002) and the South Carolina Supreme Court case of Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (S.C. 2007).

The key case upon which Petitioner's argument turns is Alabama v. Shelton, a case that "concerns the Sixth Amendment right of an indigent defendant charged with a misdemeanor punishable by imprisonment, fine, or both, to **the assistance of court-appointed counsel.**" Shelton, 535 U.S. at 657, 122 S.Ct. at 1767, 152 L.E.2d at ____ (emphasis added). Shelton appeared pro se at a bench trial in Etowah County, Alabama, and before trial began, "[t]he court repeatedly warned [him] about the problems self-representation entailed [] but at no time offered him assistance of counsel at state expense." Id. at 658, 122 S.Ct. at 1768, 152 L.E.2d at _____. The Shelton Court held "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded the 'guiding hand of counsel' in the prosecution for the crime charged." Id., 122 S.Ct. at 1767, 152 L.E.2d at ____ (citing Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.E.2d 530 (1971)).

In Scott v. Illinois, another case upon which Petitioner relies, the United States Supreme Court held, "[t]he Federal Constitution does not require a state trial court to

appoint counsel for a criminal defendant such as petitioner.” 440 U.S. 367, 369, 99 S.Ct. 1158, 1160, 59 L.E.2d 383, ___ (1979). Scott had been convicted of shoplifting and fined \$50 after a bench trial; on appeal he argued that the Sixth and Fourteenth Amendments required Illinois to give him appointed counsel at taxpayer expense. *Id.* at 368, 99 S.Ct. at 1159, 59 L.E.2d 383, ___. The United States Supreme Court rejected this contention.

Finally, the South Carolina Supreme Court case cited by Petitioner reaches the same basic result. Talley v. State is a post-conviction relief case where the applicant, a federal inmate, tried to “set aside the two misdemeanor convictions alleging his federal constitutional right to counsel had been violated because he was not represented by counsel in either conviction.” Talley, 371 S.C. at 539, 640 S.E.2d at 879. The Talley Court declined to set aside either conviction.

In reliance on Scott, supra, the Talley Court held that “[a] fine for an uncounseled misdemeanor conviction is valid, and Respondent did not have a constitutional right to counsel for [his first] conviction.” *Id.* at 544, 640 S.E.2d at 882. In reliance on Shelton and Argersinger the Talley Court held “[b]ecause Respondent received an immediately suspended sentence and a fine, we conclude the federal constitutional right to counsel did not apply to Respondent’s [second] conviction.” *Id.* at 545, 640 S.E.2d at 883.

C. Discussion

The entire line of cases on which Petitioner relies addresses instances where the issue before the Court is whether the State is required to furnish an indigent person with appointed counsel. Petitioner even acknowledges Argersinger v. Hamlin holds “[o]nly those proceedings resulting in ‘immediate actual imprisonment’ trigger the right to **state-appointed counsel.**” Nevertheless Petitioner argued to the PCR Court that “[b]ecause

[Respondent's] sentence did not result in actual imprisonment, he was not entitled to counsel." (Appx. p. 65). Similarly, the Petition for Writ of Certiorari states: "[i]n this case, Williams was not entitled to counsel as such there was no violation of his Faretta warnings."

With due respect to Petitioner's argument, Respondent maintains that the right to assistance from appointed counsel is separate and distinct from the right to engage in self-representation. Respondent never argued that he was entitled to appointed counsel. Rather, his argument has always been that, because he was never provided Faretta warnings, his decision to represent himself was not made intelligently and voluntarily. In the end, Petitioner's reliance on Shelton and Talley is misplaced, and Respondent requests that this Honorable Court deny the Petition for a Writ of Certiorari.

The right to proceed without counsel – which is a decision to be made knowingly and voluntarily after having been informed by the trial judge of (1) the right to counsel and (2) **warned of the dangers of self-representation** – is vastly different from the right to assistance from a court appointed lawyer. Respondent respectfully submits that, if this Honorable Court were to accept Petitioner's argument that Respondent was not entitled to receive Faretta warnings, then the following rule would result: In cases where the right to appointed counsel does not attach, the defendant is also not entitled to Faretta warnings.

Such a rule must be rejected for three reasons. First, the dangers inherent in self-representation extend beyond the possibility of actual incarceration, and collateral consequences of a conviction manifest no matter what sentence is imposed. The case before this Honorable Court is a prime example. As testified to at the post-conviction relief hearing, Respondent has been denied entry to Canada and lost his job driving

between the Upstate and Toronto as a direct result of the fact that he has an uncounseled Third Degree Domestic Violence conviction on his record. (Appx. p. 53, lines 19-25). It is unreasonable to say that, because Respondent was not actually incarcerated, he was also not entitled to be warned of the dangers of self-representation before he decided to undertake pro se representation.

Second, Respondent respectfully submits that Faretta warnings are always required in order to ensure a voluntary and intelligent waiver of the right to counsel. Faretta warnings are provided to help assist a pro se defendant in deciding whether to engage in self-representation, seek private counsel or, if applicable, apply for the service of appointed counsel. The fact that a given defendant ultimately may not qualify for appointed counsel for any number of reasons does not mean that he or she was not entitled to Faretta warnings.

Third, at the very beginning of a pro se trial, before the introduction of any of the evidence, it is completely impossible for a judge to know with certainty what sentence he or she will impose on a defendant if that person is found guilty. It does not make sense to reason backward from the sentence handed down after conviction to determine whether or not a defendant was entitled to Faretta warnings before deciding to proceed pro se.

D. Conclusion of Argument

Respondent would raise before this Honorable Court two important matters for considerations. First, the defendant in Alabama v. Shelton was “repeatedly warned [] about the problems self-representation entailed...” Shelton, 535 U.S. at 658, 122 S.Ct. at 1768, 152 L.E.2d at _____. Before the right to engage in self-representation can withstand constitutional scrutiny, each and every defendant that stands accused of a crime must be

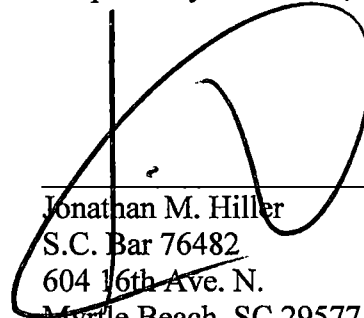
informed of the dangers inherent in self-representation. The settled rule post-Faretta is that “[t]he trial judge has the responsibility to ensure that the accused is informed of the dangers and disadvantages of self-representation, and makes a knowing and intelligent waiver of the right to counsel.” Dearyburry, 367 S.C. at 39-40, 625 S.E.2d at 215.

Second, based on a careful reading of the Talley decision, the defendant in that case only argued that he was entitled to the assistance of appointed counsel. Talley did not claim that he was never advised of his Faretta warnings. Rather his argument was premised upon the right to appointed counsel. Unlike that federal defendant’s argument, Respondent respectfully maintains that he was never afforded the chance to knowingly and intelligently waive his right to counsel because he was never advised of the dangers of engaging in self-representation.

SUMMATION

For the above stated reasons, the Respondent respectfully requests this Honorable Court to deny the Petition for a Writ of Certiorari. Respondent was entitled to be warned of the dangers of self-representation. He received no such warnings, and his decision to go forward without counsel was not knowingly and intelligently made.

Respectfully Submitted,



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June 22, 2018

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
In the Supreme Court

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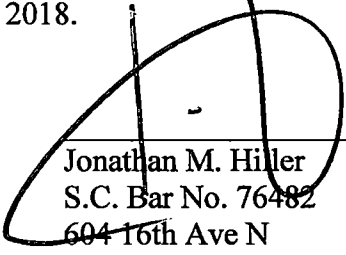
The State of South Carolina..... Petitioner.

CERTIFICATE OF SERVICE

The undersigned certifies that on June 22, 2018 he served DeShawn H. Mitchell with a Return to Petition for Writ of Certiorari by depositing the same in the U.S. Mail, postage prepaid, addressed as follows:

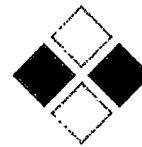
DeShawn H. Mitchell, Esq.
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The undersigned further certifies that all parties required by Rule to be served have been served this 22nd day of June, 2018.



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ATTORNEY FOR RESPONDENT



HILLER LAW FIRM, PC

June 22, 2018

The Honorable Daniel E. Shearouse
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JUN 25 2018

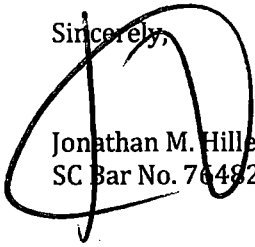
RE: Williams v. State – Appellate Case No. 2017-002580

S.C. SUPREME COURT

Dear Mr. Shearouse:

Enclosed for filing in the above-referenced matter, please find Respondent's original Return to Petition for Writ of Certiorari together with six (6) copies of the same along with my Certificate of Service.

Sincerely,



Jonathan M. Hiller
SC Bar No. 76482

cc: DeShawn H. Mitchell, Esq.