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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2017-002632

TRAVIS HINES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF THE ISSUES

I. Did the Post-Conviction Relief ("PCR") court properly find Petitioner was adequately informed of the dangers of self-representation and the advantages of having an attorney represent him at the time of the plea hearing?

II. Did the PCR Court properly deny Petitioner's assertions that the State committed prosecutorial misconduct by offering the Petitioner a plea contingent on Petitioner not viewing the video and further did not obtain a waiver of his right to view the video during his guilty plea?

STATEMENT OF THE CASE

Petitioner is presently in the South Carolina Department of Corrections pursuant to orders of commitment from the York County Clerk of Court. During the December 2015 term, the York County Grand Jury indicted Petitioner for distribution of heroin (2015-GS-46-3685). Assistant Public Defender Mike McKinnon originally represented Petitioner and was later replaced by Christopher Wellborn, Esquire later represented Petitioner once Mr. McKinnon was relieved. Assistant Solicitor of the Sixteenth Circuit Solicitor's Office Ryan Newkirk represented the State.

On December 15, 2015, Petitioner appeared before the Honorable Daniel Hall and moved to have Mr. Wellborn relieved as counsel. Prior to the court relieving Petitioner's counsel, Petitioner was informed by the State that they intended to call the case for trial on January 11, 2016. Petitioner told the court he understood his case would be called for trial the week of January 11, 2016 and intended to hire that day. The court granted Petitioner's request and relieved Mr. Wellborn as his counsel. The court informed Petitioner that it would not appoint Petitioner any more lawyers. The court further indicated that he needed to hire an attorney prior to January 4, 2016, and if he had not, the court would need to make sure he understood his right to represent himself because the State would be proceeding to trial on January 11, 2016.

On December 17, 2015, Petitioner appeared *pro se* before the Honorable John C. Hayes, III, and pled guilty as indicted. Pursuant to a negotiations between Petitioner and the State, Judge Hayes sentenced Petitioner to imprisonment for fourteen years.[1] Petitioner signed a Plea Waiver Form, which indicates Petitioner understood and waived his rights. Petitioner did not appeal his guilty plea or sentence.

Petitioner filed his application for post-conviction relief on December 9, 2016. Respondent

[1] Petitioner's corresponding proximity charge (warrant 2014A4610200842) was dismissed.

made its Return on May 22, 2017. On July 31, 2017, an evidentiary hearing was held at the Moss Justice Center in York, South Carolina before the Honorable R. Lawton McIntosh. Petitioner was represented by Leah Moody, Esquire. Respondent was represented by Assistant Attorney General Justin Hunter. At the evidentiary hearing, Petitioner testified on his own behalf. Christopher Wellborn, Esquire and the prosecuting solicitor, Ryan Newkirk, Esquire, testified for the State. By order filed August 8, 2017, Judge McIntosh denied Petitioner's application in its entirety.

Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his Petition for Writ of Certiorari.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The Post-Conviction Relief Court properly found Petitioner was adequately informed of the dangers of self-representation and the advantages of having an attorney represent him at the time of the plea.

Petitioner asserts he was not properly informed of the dangers of self-representation prior to proceeding *pro se* in his guilty plea. However, the post-conviction relief court properly denied Petitioner post-conviction relief, as Petitioner was adequately informed by two separate judges of the dangers of proceeding *pro se* and Petitioner knowingly and intelligently waived his right to counsel. This Court should deny certiorari.

To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of the right to counsel; and (2) adequately warned of the dangers of self- representation. Bridwell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992) (citing Faretta v. California, 422 U.S. 806; Prince v. State, 301 S.C.2d 575, 576 (1990) ("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.'") (citation omitted).

In evaluating the voluntariness of a defendant's waiver of counsel, the only standard is whether 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." Gardner v. State, 351 S.C. at 411-412, 570 S.E.2d at 186 (2002) (internal citations omitted).

In the absence of a valid waiver of counsel, the appellate court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source. Bridwell, 306 S.C. at 519, 413 S.E.2d at 31; Prince, 301 S.C. at 424, 392 S.E.2d

at 463. In State v. Cash, the court listed ten factors in determining whether a defendant had sufficient background to make a valid waiver of counsel. Specifically, the court listed:

> (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.

State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct.App.1992).

In applying the factors set forth in Cash, the court found that Cash had sufficient background to understand the disadvantages of self-representation. Specifically, the court noted Cash was forty-six years old, had six years of college, and had been previously involved in criminal proceedings. Id. at 44. The court noted that Cash understood the nature of the charges against him and the possible penalty. Id. The court noted that there was no indication that Cash was represented by counsel before trial or that an attorney advised him of the difficulty of self-representation, the record showed that Cash appreciated the difficulty of his particular case. Id. The court cited to Cash's statement that he could do a better job of preparing his defense than a public defender. Id. The court cited that there was no indication Cash was attempting to delay or manipulate the proceeding in declining the assistance of counsel. Id. at 45. The trial judge appointed stand by counsel for Cash. Id. The court noted that Cash was aware that he would be required to comply with the procedural rules. Id. The court noted that Cash was aware prior to trial of possible legal challenges he could raise in defense to the charge against him. Id. The court noted during the

pretrial hearing in which Cash declined the assistance of counsel, the exchange between the judge and Cash did not consist of merely pro forma questions.

In State v. McLauren, the South Carolina Court of Appeals applied the Cash factors to determine whether defendant had a sufficient background to make a valid waiver of the right to counsel. State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (2002) (citing Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct.App.1992). The court noted McLauren was a mature man with both formal and informal education. There was no evidence in the record of any physical or mental impairment. Id. at 495. McLauren was involved in prior criminal proceedings and knew of the nature of the charges. Id. McLauren addressed questions by the court and made motions. Id. Although McLauren was not assigned an attorney before trial and appeared *pro se* at his arraignment, the court appointed him stand by counsel during trial. Id. There was no indication that McLauren was attempting to delay or manipulate the proceedings. Id. The court noted that the record indicated that McLauren knew to comply with the procedural rules and had at least some familiarity with the rules. Id. Specifically, the court cited the fact that McLauren made motions, called several witnesses, and objected at times to the prosecutor's questions. Id. McLauren knew of the legal challenges he could raise in defense to the charges against him. Id. The court noted that the exchange between McLauren and the court did not consist merely of pro forma questions. Id. The court noted McLauren language and actions at trial indicated he had an understanding of the legal system. Id. Finally, the court noted that there was no evidence that McLauren's waiver resulted from coercion or mistreatment. Id.

In the case at bar, the record reveals that Petitioner was warned by Judge Hall and Judge Hayes in separate appearances regarding the dangers of proceeding *pro se*. Although Petitioner did express an intention to Judge Hall regarding his desire to hire an attorney prior to his trial,

Petitioner voluntarily pursued the Solicitor in his case to negotiate a plea agreement. App. p. 101. On December 17, 2016, Petitioner appeared *pro se* in front of Judge Hayes where the judge inquired about Petitioners age, education, and employment and warned Petitioner of the dangers of proceeding without an attorney. App. p. 101-102. At the conclusion of Judge Hayes' examination of Petitioner, he found Petitioner "freely voluntarily knowingly and intelligently [understands] the benefits of counsel and the danger of self-representation exercises his right to proceed *pro se*." App. p. 102.

Petitioner also signed a Plea Waiver Form, which states in writing the various rights Petitioner has and is choosing to waive with the guilty plea. Among the rights listed is Petitioner's right "to be represented by a lawyer at all stages of the proceedings. ...I understand an attorney would be of benefit to me, and since I am not an attorney, there is a danger in my representing myself. Understanding this, I give up this right." App. p. 87. Petitioner initialed next to each of the enumerated rights he chose to waive and signed the document. App. p. 86-89.

Petitioner further alleges that the sentencing judge, Judge Hayes, did not inquire as to why Petitioner dismissed his former attorney, whether that attorney had discussed the dangers of proceeding *pro se*, or if he had the opportunity to review his discovery. There is no script during Faretta hearings a judge must undertake with a defendant in order for their wavier to be valid. The record clearly shows Petitioner was warned on the record during two hearings regarding the dangers of proceeding *pro se* and that Judge Hayes, the sentencing judge, found Petitioner "freely voluntarily knowingly and intelligently" invoked his right to proceed *pro se*.

Although the record clearly establishes Petitioner received his Faretta warnings, Petitioner also had a sufficient background to make a valid waiver of counsel. The record reveals Petitioner

had a sufficient background to make a knowingly and intelligent waiver of counsel, even if the trial judge's inquiry of the Petitioner fell short of addressing the disadvantages of a *pro se* defense.

Here, as in Cash and McLauren, Petitioner had sufficient background to make a valid waiver of counsel and proceed *pro se*. During Judge Hayes' colloquy with Petitioner, he established that Petitioner was twenty-nine years old at the time of trial and was currently enrolled in college. There was no evidence in the record of any physical or mental impairment. Additionally, Petitioner had been previously involved in criminal proceedings. The record indicates that he had two previous drug convictions, which had the case proceed to trial, would have led to the State seeking life without parole. App. p. 118. Petitioner was also well aware of the nature of the charge. Notably, prior to the court accepting Petitioner's guilty plea, Judge Hayes went over the nature of the charge, the seriousness of the offense, and penalties associated with the offenses. Further, Judge Hayes also explained that a conviction of three serious offenses could subject Petitioner to being incarcerated for life without parole. App. p. 102-103. Finally, Petitioner had two previous attorneys that he alleviated from representation, and the record makes it clear that his most recent attorney, Chris Wellborn, had discussed the seriousness of the offense and the potential sentence Petitioner faced if he chose to proceed to a trial. App. p. 40-41. Based on the record, it is apparent that Petitioner was well aware of the serious nature of the charges he faced and had a sufficient background to knowingly and intelligently waive his right to counsel and proceed *pro se* in his guilty plea.

Ultimately, Petitioner knowingly and intelligently waived his right to counsel and proceeded *pro se* in his guilty plea. Petitioner's waiver was obtained after thorough warning and examination by two judges. Petitioner was provided a Plea Waiver Form where his rights were clearly listed and Petitioner chose to initial and signed the form effectively waiving his rights. Petitioner has

failed to establish that he received inadequate warnings regarding self-representation and did not know the disadvantages of proceeding *pro se* in his plea. The post-conviction relief court properly denied relief. Certiorari should be denied.

II. The Post-Conviction Relief Court properly denied Petitioner's assertions that the State committed prosecutorial misconduct by making his plea contingent on Petitioner not viewing the video and by not obtaining a specific waiver of his right to view the video during his guilty plea.

Petitioner argues, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), that the State committed prosecutorial misconduct and his plea was not voluntarily entered because the State did not disclose the video of the drug transcription to him personally. This Court already rejected that such a requirement exists in Hyman v. State, 397 S.C. 35, 45–47, 723 S.E.2d 375, 380–81 (2012), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). The post-conviction relief court properly denied this allegation and this Court should deny certiorari.

The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006) (internal citation omitted). Brady evidence is either favorable exculpatory evidence or favorable impeachment evidence. Porter, 368 S.C. at 384, 629 S.E.2d at 356 (citing United States v. Bagley, 473 U.S. 667, 676 (1985)). "Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense." Id. (citing State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998)). A "reasonable probability" is demonstrated when the suppression "undermines confidence in the outcome of the trial." Id. (quoting United States v. Bagley, 473 U.S.667, 678). The State must disclose Brady evidence even when a criminal defendant does not specifically request the evidence. Id. (citing United States v. Agurs, 427 U.S. 97, 107 (1976)).

In Gibson, the South Carolina Supreme Court set forth "framework" to evaluate Brady violation claims. The Court held:

> [An applicant] may challenge the voluntary nature of his guilty plea in a PCR action by asserting an alleged Brady violation. ...Consequently, we utilize the following framework to evaluate the success of a PCR applicant's claim: (1) whether the evidence in question was favorable to the applicant; (2) whether the prosecution knew or had the evidence in its possession; (3) whether the prosecution suppressed the evidence; and (4) whether the evidence was material to Petitioner's guilt or punishment. We held that these factors applied in the guilty plea context to both exculpatory evidence and evidence to be used for impeachment purposes.

Gibson v. State, 334 S.C. 515, 514 S.E.2d 320, 324 (1999), (internal citations omitted).

Further, Gibson found that disclosure to Petitioner personally was not required in order for the solicitor to satisfy Brady. The court also stated that Brady would not apply to the disclosure of inculpatory evidence.

> Under the present facts, it is undisputed that the solicitor disclosed the videotape to defense counsel. Therefore, in order to find that this action amounts to impermissible suppression under Brady, we must first assume that the Constitution requires disclosure of Brady evidence to a criminal defendant *personally*. We are unwilling to make that sweeping assumption, and find that disclosure to defense counsel was satisfactory under the present circumstances. Further, because we deem the manner of disclosure appropriate, Petitioner cannot satisfy the materiality prong of Brady. ...Finally, Petitioner has not proven that the videotape was favorable to him. By all accounts, including defense counsel's testimony, the videotape depicted Petitioner engaged in a drug transaction with a confidential informant. Because the evidence is *inculpatory,* Brady is inapplicable.

Gibson, 334 S.C. 515, 514 S.E.2d 320, 324 (1999), (emphasis in original quote).

In Hyman, the South Carolina Supreme Court made it clear that making the video available for defense counsel to view and providing still photographs from the video to the Petitioner was an "appropriate balance."

> ...the State not only disclosed the existence of the videotape, but also made the evidence available for inspection by defense counsel. The State even took the extra step of generating still photographs to assuage Petitioner's concerns about the contents of the videotape.

> ...Here, the State struck the appropriate balance by allowing defense counsel to view the videotape and providing Petitioner with stills during negotiations. Therefore, under these circumstances, the manner and extent of disclosure to defense counsel was satisfactory under Rule 5 of the South Carolina Rules of Criminal Procedure.

Hyman, 397 S.C. 35, 47-48, 723 S.E.2d 375, 381 (2012).

The South Carolina Supreme Court further stated, "Petitioner was fully aware of the inculpatory nature of the videotape throughout the negotiations and the guilty plea proceedings. Consequently, Petitioner has failed to prove how the outcome would have been different had he chosen not to plead guilty after he watched the videotape for himself." Id.

As the record establishes, Petitioner was initially offered a ten year plea agreement based on the condition that Petitioner not view the undercover video of his actions during the incident that led to his charges. The State indicated the condition was based on protecting their confidential informant from being known to Petitioner since Petitioner had a history of witness intimidation and homicide. App. p. 56-57. However, as in Hyman, the State provided stills from the video to opposing counsel and Petitioner for review and, after signing a "protective order" allowed Mr. Wellborn to view the video. App. p. 39-40. During the hearing, Mr. Wellborn testified he did not advise the Petitioner to take the ten year plea offer in the beginning since he felt viewing the video would be material in evaluating the charges against his client. App. p. 38. The ten year plea offer expired and the State's plea offer changed several times throughout negotiations with Mr. Wellborn and later with the *pro se* Petitioner.

After viewing the video, Mr. Wellborn advised Petitioner that "it was kind of from my standpoint if I were prosecuting the case it would not be an extraordinary circumstantial leap to connect the dots and suggest [Petitioner] had given the informant the drugs." App. p. 40. By the time the assessment of the video had been made by Mr. Wellborn, the ten year plea offer had

expired and thereafter Petitioner sought to relieve Mr. Wellborn from his representation. The court granted the removal of counsel and Petitioner undertook negotiating his plea offer with the State *pro se*.

Petitioner asserts that the State withholding the video from Petitioner's view is tantamount to misconduct in this case. However, the State made Petitioner aware of the existence of the video and provided still photographs from the video early in the process, which, as Hyman establishes, "struck an appropriate balance." Additionally, after signing a protective order, Mr. Wellborn, counsel for the Petitioner at the time, was allowed to view the video and provided Petitioner with information that the video was not favorable to their case. App p. 40.

Petitioner's assertion that his guilty plea was not freely and voluntarily given because he was not able to view the video is without merit. As in Hyman, the Petitioner here cannot satisfy any of the factors set forth in Gibson. The record shows that Mr. Wellborn was able to view the video and believed the video to be persuasive evidence that Petitioner was involved in a drug transaction, which would make the evidence inculpatory and immune from a Brady challenge. Therefore, Petitioner is unable to meet the criteria necessary to challenge the voluntariness of his guilty plea.

Petitioner is unable to show actual prosecutorial misconduct. The State providing stills from the video and allowing Petitioner's defense counsel to view the video was "an appropriate balance" in order to preserve the identity of the confidential informant. Petitioner showed no effort on behalf of the State to hide or suppress the video from Petitioner's knowledge. Further, the video contained evidence that was not favorable to the Petitioner, which would make it inculpatory evidence, and therefore, immune from a Brady challenge. The post-conviction relief court properly denied relief. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Should this Court grant the Petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

JANELL H. GREGORY
Assistant Attorney General
SC Bar No. 103176

By: Janell H. Gregory
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7/16, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
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The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2017-002632

TRAVIS HINES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

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

C. Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

This 16th day of July, 2018

CAROLINE COLLINS
Administrative Coordinator

ALAN WILSON
ATTORNEY GENERAL

July 16, 2018

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Travis Hines v. State of South Carolina**
Appellate Case No. 2017-002632
Lower Court Case No. 2015-CP-46-3602

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Janell H. Gregory
Assistant Attorney General
SC Bar No. 103176

JHG/cc
Enclosures

cc: C. Rauch Wise, Esquire (2 copies)