

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Certiorari to Spartanburg County

Honorable R. Scott Sprouse, Circuit Court Judge

KEVIN C. CASEY,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001686

BRIEF OF PETITIONER

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

RECEIVED
JUL 30 2018
SC Court of Appeals
PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIESii

ISSUE PRESENTED.....1

STATEMENT OF THE CASE.....2

 Indictment and Guilty Plea2

 Post-Conviction Relief Proceedings2

STANDARD OF REVIEW5

ARGUMENT.....6

 The PCR court erred in failing to ensure that Petitioner’s waiver of PCR counsel was knowing and intelligent by informing him of the right to counsel and the dangers of self-representation.

 Introduction.....6

 Relevant Facts.....7

September 2014 Hearing before Judge Couch7

Order Relieving Counsel and Applicant’s Written Filings.....9

March 2015 Hearing before Judge Couch12

June 2015 Hearing before Judge Sprouse13

 Discussion.....15

CONCLUSION.....21

TABLE OF AUTHORITIES

Cases

<u>Case v. Nebraska</u> , 381 U.S. 336 (1965).....	17
<u>Hilton v. State</u> , 422 S.C. 204, 810 S.E.2d 852 (2018).....	6, 16, 18
<u>Johnson v. Zerbst</u> , 304 U.S. 458 (1938)	19
<u>Prince v. State</u> , 301 S.C. 422, 392 S.E.2d 462 (1990).....	16
<u>Richardson v. State</u> , 377 S.C. 103, 659 S.E.2d 493 (2008).....	5, 15, 16, 17
<u>State v. Cash</u> , 309 S.C. 40, 419 S.E.2d 811 (Ct. App. 1992).....	19
<u>State v. Samuel</u> , 422 S.C. 596, 813 S.E.2d 487 (2018), <i>rhr'g denied</i> (May 25, 2018)	5
<u>Whitehead v. State</u> , 310 S.C. 532, 426 S.E.2d 315 (1992).....	5, 15, 16
<u>Wroten v. State</u> , 301 S.C. 293, 391 S.E.2d 575 (1990)	6, 18

Statutes

S.C. Code Ann. § 17-27-60.....	15
--------------------------------	----

Rules

Rule 71.1, SCRCP.....	15, 19
Rule 243(i), SCACR.....	4

Constitutions

S.C. Const., art. I §3.....	17
U.S. Const., amend. XIV	17

ISSUE PRESENTED

Whether the PCR court erred in failing to ensure that Petitioner's waiver of PCR counsel was knowing and intelligent by informing him of the right to counsel and the dangers of self-representation?

STATEMENT OF THE CASE

Indictment and Guilty Plea

On November 22, 2011, the Spartanburg County Grand Jury indicted Petitioner Kevin Casey for two counts of felony driving under the influence (DUI) resulting in death, two counts of reckless homicide, and one count of felony driving under the influence (DUI) resulting in great bodily injury. App. 198.

On February 14, 2012, Casey appeared before the Honorable J. Mark Hayes, III and pled guilty to two counts of felony DUI resulting in death and one count of felony DUI resulting in great bodily injury. Casey was represented by Richard Warder, and the State was represented by Solicitor Barry Barnette. App. 7. The solicitor averred that Casey had a blood alcohol content of .211 and was driving his car at approximately ninety-one miles per hour when he ran into a motorcycle on which Jason Simmons, Steven Mills, and Megan W.¹ were riding. Steven Mills and Megan W. both died, and Jason Simmons was injured. App. 10, l. 5 – 13, l. 18.

Judge Hayes accepted Casey's guilty plea and sentenced him to concurrent terms of twenty-five years for the DUI resulting in death offenses and fifteen years for the DUI resulting in great bodily injury offenses. App. 32 – 33.

Post-Conviction Relief Proceedings

On October 18, 2012, Casey filed an application for post-conviction relief. App. 35. He filed amendments to his application on November 1, 2012 and November 9, 2012. App. 53; App. 56. The state filed its return on January 14, 2014. App. 58.

On June 9, 2014, Casey filed a motion to relieve his appointed PCR counsel, Leah Moody, and to appoint new counsel. App. 63. Casey complained that Moody had failed to

¹ Megan W. was seventeen years old on the date of the incident.

contact witnesses for his PCR hearing, failed to communicate with him, and failed to amend his PCR application. App. 63 – 64. On September 17, 2014, Casey appeared before the Honorable Roger L. Couch for an evidentiary hearing, which began with consideration of Casey's motion to relieve counsel. The State was represented by assistant attorney generals Suzanne White and J. Clayton Mitchell. App. 67 – 70. Following a colloquy with counsel and Casey, Judge Couch granted Casey's motion to relieve counsel, but indicated that he would not appoint another attorney for Casey. App. 70, l. 3 – 81, l. 2.

On October 23, 2014, Casey filed a letter inquiring into the status of the order relieving counsel. App. 83. On November 14, 2014, despite not having received a written order, Casey filed an objection to Judge Couch's denial of his request to appoint new PCR counsel. App. 84. On November 24, 2014, Judge Couch filed an Order of Continuance/Order Relieving Counsel, specifying that no additional attorney would be appointed to represent Casey. App. 89.

Casey sent additional letters to the court, received on December 29, 2014, January 27, 2015, and January 29, 2015, which reiterated his lack of legal background and need for help subpoenaing documents and witnesses. App. 91 – 94; Supp App. 13 – 21. On January 26, 2015, the Honorable Deadra L. Jefferson filed a form Order granting a continuance. App. 92. On February 13, 2015, Casey filed an amendment to his PCR application. App. 95. On March 16, 2015, he filed a motion for continuance with exhibits. App. 99 – 112; Supp. App. 22 – 24. On March 26, 2015, a hearing on the motion for continuance was held before Judge Couch. Casey reiterated his desire for counsel but none was appointed, and the continuance was granted. App. 115 – 123. Casey provided the names of the additional witnesses he needed subpoenaed for the evidentiary hearing to Judge Couch via letter, a copy of which was filed with the Clerk on March 30, 2015. Supp App. 25 – 26.

On April 21, 2015 and June 2, 2015, Casey filed additional motions for appointment of counsel. App. 125; App. 128. On June 12, 2015, an evidentiary hearing was held before the Honorable R. Scott Sprouse. App. 130. At the beginning of the hearing, the court heard and denied Casey's motion for continuance and noted the prior Order from Judge Couch stating that the court would not appoint another attorney. App. 132 – 139. Judge Sprouse then heard testimony from Casey and from plea counsel Richard Warder. App. 139 – 159. Judge Sprouse took the matter under advisement and instructed both parties that they had ten days to supplement the record. App. 159, l. 20 – 160, l. 2.

On June 22, 2015, Judge Sprouse filed an Order of Dismissal, denying Casey's application for post-conviction relief. App. 186. Casey mailed copies of his proposed order and the affidavit of Teresa Pickens to the court and to Respondent from the jail on June 22, 2015. Supp. 36. On July 22, 2016, Casey filed an inquiry with the court because he had not received any decision in his case. App. 197.

Casey filed a timely appeal from the Order of Dismissal, which was received by him on July 28, 2016. The appeal was perfected with the filing of the petition for writ of certiorari in the South Carolina Supreme Court on May 17, 2017. Respondent filed its return on August 31, 2017. By order filed October 30, 2017, the Supreme Court transferred this appeal to this Court pursuant to Rule 243(i), SCACR. On June 29, 2018, this Court filed an order granting the petition for writ of certiorari on question I and ordering further briefing, and denying certiorari on question II.

This brief of petitioner follows.

STANDARD OF REVIEW

Our appellate courts have not specifically articulated the standard of review for determining whether a post-conviction relief (“PCR”) court obtained a valid waiver of the applicant’s statutory right to counsel before requiring the applicant to represent himself in a PCR trial. Petitioner submits that this Court should utilize the same standard of review employed when reviewing the validity of the waiver of the constitutional right to counsel from a guilty plea or trial. See Whitehead v. State, 310 S.C. 532, 535, 426 S.E.2d 315, 316 (1992) (holding “when a PCR application is not dismissed *before* a hearing is held, the PCR judge must appoint counsel or obtain a knowing and intelligent waiver of that right by the applicant”); Richardson v. State, 377 S.C. 103, 105-06, 659 S.E.2d 493, 494-95 (2008) (discussing the two requirements for a valid waiver of counsel in a PCR proceeding).

“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*.” State v. Samuel, 422 S.C. 596, 813 S.E.2d 487, 490 (2018), *reh’g denied* (May 25, 2018). Appellate courts review “a circuit judge’s findings of historical fact for clear error,” but “review the denial of the right of self-representation based upon those findings of fact *de novo*.” Id. “In doing so, [the appellate] 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.” Id.

ARGUMENT

The PCR court erred in failing to ensure that Petitioner’s waiver of PCR counsel was knowing and intelligent by informing him of the right to counsel and the dangers of self-representation.

Introduction

Petitioner Casey’s motion to relieve PCR counsel explicitly requested the appointment of a new attorney. It made no mention of a desire to retain private counsel or proceed *pro se*. App. 63. While the PCR court was not under any obligation to grant Casey’s request, it should not have partially granted the motion – relieving appointed counsel Moody and leaving Casey to proceed *pro se* – without ensuring that Casey’s waiver of PCR counsel was knowing and intelligent. See Hilton v. State, 422 S.C. 204, 208, 810 S.E.2d 852, 854 (2018) (“[T]here are two requirements the PCR court must meet before allowing a PCR applicant to proceed without an attorney. First, the court should make sure the applicant is aware of his right to counsel; second, the court should ensure the applicant understands the dangers and disadvantages of self-representation.”); see also Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (“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.”). Casey appeared before Judge Couch twice prior to his evidentiary hearing before Judge Sprouse. The transcripts from the three hearings reveal no attempt to make Casey aware of his right to counsel or to seek a valid waiver of that right. There is likewise no other evidence sufficient to demonstrate that Casey made a voluntary waiver of counsel with an understanding of the risks of self-representation. As a result, his case should be remanded for the appointment of counsel and a new PCR hearing.

Relevant Facts

September 2014 Hearing before Judge Couch

The first topic at the September 17, 2014 hearing before the Honorable Roger L. Couch, was the motion to relieve PCR counsel that Casey filed on June 9, 2014. App. 70, ll. 19-20. Therein, Casey requested “that his current appointed counsel be relieved of this legal matter and [he] be appointed new counsel.” App. 63 – 64. Judge Couch told Casey:

Yes sir. Well, there needs to be -- you need to articulate some reason as to why the court should do that. **Generally people benefit from the advice of an attorney.** I -- and, of course, if your attorney was appointed, this court would like to know the reason why you think that that attorney should be replaced.

The State doesn't have an obligation just to continue to appoint attorneys for you. So if there is not a rational basis for you to dismiss the attorney, then I would not be of a mind to appoint another attorney for you. So there needs to be some rational basis or reason why you feel that that, the attorney that was appointed cannot handle your case and I haven't heard that yet.

So I'm waiting to hear from you as to why you think the court appointed attorney should be either replaced or removed.

Now, you have every right to represent yourself if you choose to do that. That would be your choice as – to whether you'd like to go forward without an attorney, and I don't know your wishes in that regard. So there's some things you and I need to discuss at this point in time as concerning your representation.

So I'll listen to you.

App. 70, l. 21 – 71, l. 19 (emphasis added).

Casey said that he filed the motion because Moody failed to obtain a toxicology report and to contact witnesses. He noted that his last conversation with Moody was at his previously continued PCR hearing on April 10, 2014. App. 71, l. 20 – 72, l. 24. Moody claimed that she was responsive to all of Casey's communications and had contacted the witnesses he requested, only one of whom was present at the hearing and willing to testify on his behalf. App. 72, l. 25 – 75, l. 15; App. 77, l. 24 – 78, l. 24. Moody said she was in trial the prior week and did not

receive any message from Casey's daughter, Cassandra. She further complained that Casey was uncooperative when her *paralegal* called to review the questions that Moody would ask him at the PCR hearing. App. 75, l. 16 – 77, l. 22. After hearing from Moody, the following exchange occurred:

THE COURT: All right. **Now, if you wish to dismiss this attorney, you have the right to do that.** I've not yet heard anything that I would say was deficient in what she has done. **so I've not of a mind to appoint another attorney for you if that is -- this attorney is dismissed at this point in time.** Now, do you -- how do you wish to proceed?

MR. CASEY: Proceed as of --?

THE COURT: **Right now. Do you want me to dismiss the attorney?**

MR. CASEY: **Yes, sir.**

THE COURT: **And -- but I'm indicating I'm not going to appoint another attorney.**

MR. CASEY: **I understand.**

THE COURT: **Do you understand that?**

MR. CASEY: **Yes, sir.**

THE COURT: All right. I'll grant his motion. Ms. Moody, if you'll prepare an order, I'll sign it.

MS. MOODY: Thank you, Your Honor.

THE COURT: And indicate in there that the court does not find that your services have been deficient at this point in time. Therefore, the court is not appointing another attorney in the case. I'll return your letters to you, sir.

(Pause.)

THE COURT: Ms. Moody, if you could, before leaving for -- before Mr. Casey leaves, you may want to go over with him the things he'll need to do to be prepared for his hearing when it is next scheduled. So I'll ask you to advise him as to what he might need to do to subpoena witnesses and things of that nature so that he will be prepared for the hearing.

App. 79, l. 3 – 80, l. 9 (emphasis added). AAG White advised the court that Casey's case would probably be set for the next term, during the week of November 3, 2014, before the Honorable Keith Kelly. Thus, Judge Couch advised Casey:

So you have until November 3rd to get your case ready. Ms. Moody will advise you as to what you need to do yourself to get the clerk to issue subpoenas for information and/or individuals. You'll need to talk to her about getting those matters served through the sheriff's office. I'm sure she can advise you as to how you can take care of those facts, factors. Good luck to you, sir.

App. 80, l. 10 – 81, l. 2.

Order Relieving Counsel and Applicant's Written Filings

On October 23, 2014, Casey filed a letter inquiring into the status of the order relieving counsel. App. 83. On November 14, 2014, despite not having received a written order, Casey filed a document titled "Applicant's Object[ion] to the Honorable Roger L. Couch (PCR Judge) Ruling/Order to Dismiss PCR Counsel and Failure to Appoint New PCR Counsel." App. 84. In the last paragraph of the document, Casey wrote:

With Applicant having proof of the things his motion mentions, **it would seem he will be denied due process of law if he is not appointed PCR counsel to investigate such claims and assist Applicant with the presentation of those claims. It would be in the interest of justice to appoint new PCR counsel and investigate the herein allegations.**

App. 87 (emphasis added).

On November 24, 2014, Judge Couch filed an Order of Continuance/Order Relieving Counsel. App. 89. The Order stated that "[t]he Applicant requested to relieve counsel and a continuance to secure retained counsel." App. 89. It further included:

Additionally, this Court instructed Applicant that if he chose to relieve his appointed counsel in this matter, the Court **would not** appoint further counsel in the event that Applicant is unable to retain an attorney. Applicant will be required to proceed *pro se* in this matter; however, Ms. Moody is instructed to assist Applicant in securing the issuance of subpoenas from the Spartanburg County Clerk of Court's office.

App. 89 (emphasis in original). Respondent conceded in its return to the petition for writ of certiorari that the Order is inaccurate to the extent it referenced Casey requesting to retain counsel. Respondent's Return to Cert., p. 9, n. 4. Nonetheless, Judge Couch ordered: "Ms. Leah B. Moody, Esquire, is relieved from the representation of the Applicant and there will be no other appointed attorney." App. 89.

On December 29, 2014, Casey filed a letter to the Spartanburg County Clerk of Court. App. 91. In the letter, Casey explained that without the appointment of another attorney, he was *pro se* and scheduled for the upcoming PCR docket. App. 91. He wrote: "**With 'eyes wide open,' I'm requesting to be appointed counsel. I have no legal background and this case is very complicated...**" App. 91. He went on to describe the documents and witnesses that he needed subpoenaed for the hearing. App. 91. Casey also filed a letter addressed to the Honorable Deadra Jefferson and enclosing copies of his prior filings. Supp. App. 13 – 21. He explained:

I'm saying that I never wanted to file pro se. Being a layman, I had no success with obtaining any of my documents that I needed to establish my claims. The Judge also stated; for my counsel whom was relieved to help get everything I needed to present my claims. I have tried and she (Leah B. Moody) has been no help at all. I really need someone who will do the proper investigation and get my subpoenas for witnesses and documentation to substantiate my claim. With "eyes wide open" can you please help me with this matter.

Supp. App. 13 (emphasis added). Judge Jefferson filed a form order granting a continuance on January 26, 2015. App. 92.

On January 27, 2015,² Casey filed another letter with the Clerk. App. 93. Amongst his requests, Casey asked for assistance filing subpoenas in his case and inquired when a hearing would be set on his motion for appointment of counsel, referencing his November 14, 2014 filing. App. 93. By letter filed January 29, 2015, Casey again requested the Clerk's assistance with the subpoena process. App. 94.

On February 13, 2015, Casey filed an amendment to his PCR application. App. 95. On March 16, 2015, he filed a motion for continuance with exhibits. App. 99 – 122; Supp. App. 22-24. Casey explained that, contrary to the written order relieving counsel, he never sought to retain private counsel and needed the assistance of a lawyer in his PCR action. App. 99 – 100. Included in the exhibits attached to Casey's motion was a letter from Moody "explaining" to him the subpoena process. It advised Casey that he would have to provide the Spartanburg County Sheriff's Office with a letter detailing who to serve, a check or money order for ten dollars per subpoena, and stamped, self-addressed envelope for return of the signed affidavits of service. App. 112. Another exhibit was Casey's December 2014 letter to the Attorney General's Office, in which he requested to be appointed counsel. Supp. App. 22. He wrote:

I have not been able to retrieve the toxicology report that I have been inquiring about. Ms. Leah B. Moody has not help me in the things I was needing. I am scheduled on the PCR court docket for January 16, 2015. "With eyes wide open" I'm requesting to be appointed counsel. I have no legal background to be doing this pro se and this case is very complicated. So far I haven't [any] means to subpoena my witnesses or the documents that I need. Any help on my behalf would greatly be appreciated.

Supp. App. 22.

² The letter contains a scrivener's error in the date at the top, listed as "January 23, 2014." The letter was filed with the Clerk on January 27, 2015, and its content suggests that it was written on January 23, 2015. App. 93.

March 2015 Hearing before Judge Couch

On March 26, 2015, Casey appeared again before Judge Couch, who noted that Casey had a pending motion for continuance. App. 114- 116. The following exchange occurred:

THE COURT: Mr. Casey, I have received this motion. Do you wish to proceed on your motion today?

MR. CASEY: Yes, sir.

THE COURT: **All right. Now, Mr. Casey, you're appearing in front of me without lawyer. Is it your desire to proceed without counsel in this matter?**

MR. CASEY: **No, sir, I wanted to ask for counsel.**

THE COURT: Is that what you're -- is that the reason for your motion?

MR. CASEY: Yes, sir.

THE COURT: [A]right. Then I will hear from you.

MR. CASEY: Okay. On September 17, 2014 --

THE COURT: Yes, sir.

MR. CASEY: -- I was here for my PCR hearing.

THE COURT: Uh-huh. (Affirmative).

MR. CASEY: My actual PCR hearing began on addressing a motion to relieve counsel.... The motion was from 7/17/14 to relieve counsel and due to she never did subpoena my witnesses or my toxicology report, and she failed to amend the issues as I'm gonna address, and she failed to communicate, and you relieved her.

After you relieved her, I received an order several months later, and in that order it said I'm gonna retain counsel but there must have been a mistake as I never stated I was gonna retain counsel nor did I state I wanted to do pro se.

App. 116, l. 16 – 117, l. 18 (emphasis added). After hearing from AAG White, Judge Couch explained:

In cases, it's not unusual... when a person is wishing to relieve appointed counsel, if I find that, that I don't believe you have sufficient cause shown for relieving appointed counsel, **I'll allow them -- you to have them be relieved and there's no problem with you doing that but I don't see the need to appoint additional counsel when you've already had adequate counsel appointed for you.**

So, **it's not usual for me, in that circumstance, not to appoint another attorney but give you the right to act as your own attorney,** which is what I did.

App. 118, l. 20 – 119, l. 5 (emphasis added). Casey reiterated that Moody was not prepared for his hearing, but Judge Couch found that there was “no showing that she was not capable of doing that or that she wouldn't have done that.” App. 119, ll. 7-12. Judge Couch told Casey “the subpoena power is available to you” and said that he would sign any subpoenas that were presented to him. App. 119, l. 15 – 120, l. 3. Judge Couch instructed Casey to provide the names and addresses to AAG White as soon as possible, after which the subpoenas would be issued and delivered by the Sheriff's Office. App. 120, l. 5 – 123, l. 18. AAG White said that Casey's case would be put on the roster for the next term. App. 123, ll. 11-14. Casey sent a letter with the information regarding the witnesses and documents he needed on March 30, 2015. Supp. App. 25 – 26.

June 2015 Hearing before Judge Sprouse

On April 21, 2015, Casey filed another motion for appointment of counsel, stating simply: “Now comes Applicant (Kevin C. Casey) requesting appointment of counsel in the above case **pursuant to the South Carolina Post Conviction Act.**” App. 125 – 126 (emphasis added). In a subsequent filing on June 2, 2015, Casey explained that he still needed assistance in obtaining the subpoenas discussed with Judge Couch at the prior hearing and requested the appointment of counsel. App. 127 – 129.

On June 12, 2015, an evidentiary hearing was held before the Honorable R. Scott Sprouse. App. 130. At the beginning of the hearing, the court heard Casey's motion for continuance and reviewed the prior order relieving counsel. Casey explained that at his prior hearing before Judge Couch, he understood that he would help with the issuance of subpoenas for his witnesses and toxicology report, but had not received that assistance. App. 132, l. 18 – 133, l. 17. Regarding the order relieving counsel, Casey said: "I still need some help because I don't understand how to do a lot of the stuff *pro se*. I never requested to do that or even state[d] that I was going to retain a counsel because I don't have the funds to do that either." App. 133, l. 18 - 134, l. 11. The following exchange then occurred:

THE COURT: Judge Couch ruled in this order dated November 24, 2014, that there would be no further counsel appointed if she was relieved. So did you get a copy of Judge Couch's order?

MR. CASEY: After the fact, yes, sir, but I didn't really understand that I was going to be *pro se* either.

THE COURT: The order states explicitly, "Applicant will be required to proceed *pro se* in this matter." So you were put on notice back in November that you either were going to have to hire your attorney or proceed *pro se*. The court wasn't going to appoint you an attorney. Do you understand that?

MR. CASEY: I understand now.

THE COURT: Okay.

App. 134, l. 12 - 135, l. 1.

AAG White agreed that Judge Couch told Casey "that if he needed something subpoenaed, let us know the names and he would make sure he got subpoenas" but was not aware of the issuance of any subpoenas. App. 135, l. 2 – 137, l. 15. Casey said that the witnesses he wanted to be present were Teresa Pickens and Donald Moore, and that he also wanted the toxicology report for the alleged victim. App. 137, ll. 16-25. The State said that the

only affidavit it had seen was from Teresa Pickens, though she noted an objection to its authenticity. App. 138, ll. 1-20. Judge Sprouse denied the request for a continuance but allowed Casey to submit the affidavit from Pickens.³ After hearing testimony from Casey and plea counsel Warder, Judge Sprouse took the matter under advisement and instructed both parties that they had ten days to supplement the record with any additional exhibits. App. 138, l. 16 - 139, l. 2; App. 139, l. 6- 159, l. 17; App. 159, l. 20 - 160, l. 2. An order denying and dismissing his application for post-conviction relief was filed on July 22, 2015. App. 186 - 196.

Discussion

In Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992), our Supreme Court recognized that Rule 71.1(d) of the South Carolina Rules of Civil Procedure “mandates the appointment of counsel for indigent PCR applicants whenever a PCR hearing is held to determine questions of law or fact.” 310 S.C. at 535, 426 S.E.2d at 316; Richardson v. State, 377 S.C. 103, 105-06, 659 S.E.2d 493, 494-95 (2008) (same). Rule 71.1(d) provides:

If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent.... Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.

Rule 71.1(d), SCRCPP; see also S.C. Code Ann. § 17-27-60 (“If the applicant is unable to pay court costs and expenses of representation ... these costs and expenses shall be made available to the applicant....”). Though the right to counsel in a PCR hearing is statutory rather than

³ The applicant’s exhibits admitted at the PCR hearing did not include an affidavit from Pickens, and no such affidavit was referenced in the Order of Dismissal. See App. 162 - 182; App. 187 - 197. However, Respondent’s supplemental appendix included a copy of Casey’s proposed order, which was mailed to the PCR court on June 22, 2015, and included Pickens’ affidavit. Supp. App. 27 - 36. Pickens wrote that she was present in the hallway outside of the courtroom with her niece, Cassandra Casey, on the day that Casey pled guilty. Pickens asked plea counsel Warder how much time Casey was going to receive and Warder responded “a ten year sentence.” Supp. App. 35.

constitutional, the Whitehead Court held that “when a PCR application is not dismissed *before* a hearing is held, the PCR judge must appoint counsel or obtain a knowing and intelligent waiver of that right by the applicant.” 310 S.C. at 535, 426 S.E.2d at 316 (emphasis in original). “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.” Id., 426 S.E.2d at 316-17 (citing Prince v. State, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) (holding that petitioner did not make a valid waiver of his right to counsel at his guilty plea hearing)).

Recently, in Hilton v. State, 422 S.C. 204, 208, 810 S.E.2d 852, 854 (2018), our Supreme Court confirmed that Whitehead established that the Prince structure also applies in a PCR proceeding. “Thus, there are two requirements the PCR court must meet before allowing a PCR applicant to proceed without an attorney.” Hilton, 422 S.C. at 208, 810 S.E.2d at 854. “First, the court should make sure the applicant is aware of his right to counsel; second, the court should ensure the applicant understands the dangers and disadvantages of self-representation.” Id. “However, the nature of a PCR proceeding is such that a court’s explanation of the dangers and disadvantages of self-representation is necessarily abbreviated when compared to such an explanation in a criminal case.” Id. at 209, 810 S.E.2d at 855.

As to the first requirement for a valid waiver of the right to PCR counsel, neither Judge Couch nor Judge Sprouse advised Casey of his right to counsel. Judge Couch told Casey that if his originally appointed attorney was relieved, there was no obligation that he be provided another attorney and that the court was not going to appoint him another attorney. App. 70, l. 21 – 71, l. 19; App. 79, l. 3 – 80, l. 9; see also App. 118, l. 20 – 119, l. 5. Judge Couch was referring to the following principle set forth in Richardson v. State, 377 S.C. 103, 659 S.E.2d 493 (2008):

[A] PCR applicant is not entitled to appointed counsel of choice. While an applicant *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.

377 S.C. at 106, 659 S.E.2d at 495. Notably, however, the remedy approved in Richardson was denial of the motion to relieve counsel. Here, Judge Couch granted the motion to relieve counsel, leaving Casey without representation. Judge Couch did mention to Casey that he had “every right to represent [himself]” and “go forward without an attorney,” but, as will be discussed further *infra*, he never completed any discussion of the dangers and disadvantages of self-representation. App. 71, ll. 13-15.

There is no evidence that Casey was otherwise aware of his right to counsel. In Casey’s initial response to Judge Couch’s ruling relieving counsel but failing to appointment new counsel, filed November 14, 2014, he referenced “the South Carolina Post Conviction Relief Act, The South Carolina Constitution, Article I §3 (Due Process of Law), The United States Constitution Fourteenth Amendment (Due Process Clause), and Case v. Nebraska, 381 U.S. 3[3]6 (1965) and it’s progeny.” App. 87; see also App. 99 – 100 (referring to “due process,” “equal protection,” and “the interest of justice”). On April 21, 2015, he filed an additional request for the appointment of counsel, citing generally the South Carolina Post Conviction Relief Act. App. 125. In the remainder of his filings requesting the appointment of counsel, Casey cited his lack of education and difficulty obtaining documents and witnesses, as if the right to counsel were situational. App. 91; App. 93; App. 99 – 100; App. 128; Supp. App. 13; Supp. App. 22.

Assuming *arguendo* that Casey’s filings are sufficient evidence of his knowledge of the right to counsel, the PCR court still failed to satisfy the second requirement before allowing

Casey to proceed *pro se*. Neither Judge Couch nor Judge Sprouse made any effort to ensure that Casey understood the dangers and disadvantages of self-representation. Judge Couch made one passive remark at the first hearing that “[g]enerally people benefit from the advice of an attorney.” App. 70, l. 23-24. There was no mention of the benefits of counsel or risks of proceeding of *pro se* at the subsequent hearings. Rather, Judge Couch made it sound as though Casey would have the assistance of the PCR court and the Attorney General’s office in gathering evidence and witnesses to be prepared for the hearing. App. 116, l. 16 – 123, l. 10. Judge Sprouse did not conduct any independent colloquy, instead deferring to Judge Couch’s order and permitting the submission of affidavits within ten days of the hearing. App. 132, l. 18 – 139, l. 2.

In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense, 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. See Hilton, 422 S.C. at 210-11, 810 S.E.2d at 855-56; Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (holding, even in the context of a criminal case, “If 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.”). “While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test [for determining a valid waiver] is not the trial judge’s advice but rather the defendant’s understanding.” Wroten, 301 S.C. at 294, 391 S.E.2d at 576.

In the context of the waiver of the right to trial counsel, relevant factors for assessing 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.

State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992). "Courts indulge every reasonable presumption against waiver of fundamental rights, and do not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

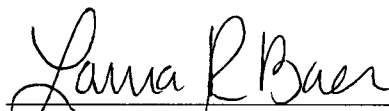
Here, Casey was forty-three years old at the time of the first hearing on the motion to relieve counsel before Judge Couch. He completed the eleventh grade and earned a G.E.D. App. 6, ll. 16-20. Though Casey had prior convictions, there is no evidence in the record that he had ever participated in a post-conviction relief proceeding. Thus, Casey was likely unaware of the fact that in a PCR proceeding, the applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence. Rule 71.1, SCRCF. Rather than a nefarious attempt to manipulate proceedings, Casey was an undereducated applicant, who naively believed that he would have some assistance from his former PCR attorney, the court, and the Attorney General's office. Casey's former PCR attorney no help in assisting him with the subpoena process and his letter to Judge Couch did not result in the issuance of any subpoenas. App. 112; App. 137, ll. 2-15; Supp. App. 25 – 26. Casey's subsequent filings with the court illustrate that he realized after the hearing before Judge Couch that he needed the assistance of an attorney to properly investigate and present his claims. App. 91 – 94; App. 99 – 100; Supp. App. 13; Supp. App. 22. Further, while Casey's performance at his PCR hearing is not relevant to whether his waiver of

counsel was valid, it is also notable that Casey did not secure the presence of any witnesses at his PCR hearing. The record in this case cannot support a finding that Casey understood the dangers and disadvantages of self-representation.

In short, Casey did not make a knowing and intelligent waiver of PCR counsel. He is accordingly entitled to a new PCR hearing and the assistance of PCR counsel.

CONCLUSION

Based on the foregoing, Petitioner Kevin C. Casey respectfully requests that this Court reverse the denial of post-conviction relief and remand his case for a new post-conviction relief hearing.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of July, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Spartanburg County

Honorable R. Scott Sprouse, Circuit Court Judge

KEVIN C. CASEY,

PETITIONER


V.

STATE OF SOUTH CAROLINA,

RESPONDENT

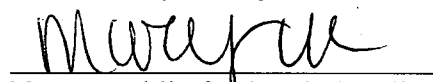
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Jordan Cox, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Kevin C. Casey, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 30th day of July, 2018.



Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of July, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: May 12, 2027

RECEIVED
JUL 30 2018
SC Court of Appeals