

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Charleston County
Hon. Deadra L. Jefferson, Circuit Court Judge
Appellate Case Tracking No. 2017-000728

RECEIVED

JAN 16 2018

S.C. SUPREME COURT

The State,

Respondent,

v.

Wayne Gary Polite,

Petitioner.

Opinion No. 2017-UP-021 (S.C. Ct. App. filed January 11, 2017)

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

- I. The trial court properly refused to allow Petitioner to represent himself when his request was not unequivocal, he admitted he was unable to do so, and agreed proceeding *pro se* was not in his best interest.

STATEMENT OF THE CASE

Procedural History

The Charleston County Grand Jury indicted Petitioner for obtaining property in excess of \$10,000 by false pretenses. (R. 265-266). The State called the case for trial before the Honorable Deadra L. Jefferson and a jury on August 12, 2015. (R. 1-2). On August 14, 2015, the jury found Petitioner guilty as charged. (R. 250). Judge Jefferson sentenced Petitioner to seven years' imprisonment. (R. 257). She also found Petitioner violated the terms and conditions of his probation as a result of his conviction. She revoked his probation in full and ordered him to serve the revoked sentence concurrently with the sentence imposed for the instant matter. (R. 257).

Petitioner filed a timely Notice of Appeal. The Court of Appeals affirmed Petitioner's conviction and sentence by unpublished opinion dated January 11, 2017. See State v. Polite, Op. No. 2017-UP-021 (S.C. Ct. App. Filed January 11, 2017). By Order filed February 23, 2017, the Court of Appeals denied Petitioner's Petition for Rehearing.

Petitioner filed a timely Petition for Writ of Certiorari in which he raised two questions. The State filed a timely Return. This Court granted the Petition for Writ of Certiorari as to Petitioner's Question I. Petitioner filed a Brief of Petitioner and this Brief of Respondent follows.

ARGUMENT

- I. The trial court properly refused to allow Petitioner to represent himself when his request was not unequivocal, he admitted he was unable to do so, and agreed proceeding *pro se* was not in his best interest.**

The trial court properly did not abuse its discretion by denying Petitioner's request to represent himself. Petitioner clearly indicated he did not desire to represent himself at trial, and as a result, the trial court did not err in denying his motion to recuse counsel or refusing to allow Petitioner to proceed *pro se*.

The United States Supreme Court has stated it is clear that the right to the aid of counsel is fundamental. Powell v. State of Ala., 287 U.S. 45, 68 (1932). Further, the Court has found a defendant has a constitutional right to self-representation under the Sixth and Fourteenth Amendments. Faretta v. California, 422 U.S. 806, 807 (1975). "However, the right of self-representation is not absolute." State v. Samuel, 414 S.C. 206, 211, 777 S.E.2d 398, 401 (Ct. App. 2015) (citing United States v. Frazier-El, 204 F.3d 553, 559 (4th Cir. 2000)). "A defendant's assertion of his right to self-representation must be: '(1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely.'" Id. at 212, 777 S.E.2d at 401 (quoting Frazier-El, 204 F.3d at 558). The United States Supreme Court has long held that with all fundamental rights, "every reasonable presumption should be indulged against its waiver." Hodges v. Easton, 106 U.S. 408, 412 (1882). So important is the right to counsel that the Supreme Court has instructed courts to "indulge in every reasonable presumption against [its] waiver." Brewer v. Williams, 430 U.S. 387, 404 (1977). Further, the United States Supreme Court has stated: "we do not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Significantly, a request to proceed *pro se* must be clearly articulated and unequivocal. See State v. Winkler, 388 S.C. 574, 586, 698 S.E.2d 596, 602 (2010) (stating “[t]he request to proceed pro se must be clearly asserted”); see also Raulerson v. Wainwright, 469 U.S. 966, 970–71 (1984) (Marshall, J., dissenting from denial of cert.) (“If a request [for self-representation] is ambiguous, the trial judge need not respond, because there has been no clear indication of a desire to waive a right to counsel.”). Because of the importance of the right to counsel, “[a]n assertion of the right of self-representation therefore must be (1) clear and unequivocal.” United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000) (citing Faretta, 422 U.S. at 835, 95 S.Ct. 2525; United States v. Lorick, 753 F.2d 1295, 1298 (4th Cir.1985)).

“The question of whether court appointed counsel should be discharged is a matter addressed to the discretion of the trial judge. Only in a case of abuse of discretion will this Court interfere.” State v. Sims, 304 S.C. 409, 414, 405 S.E.2d 377, 380 (1991); see also, Samuel, 414 S.C. at 211, 777 S.E.2d at 401. “An abuse of discretion occurs when the decision of the trial [court] is based upon an error of law or upon factual findings that are without evidentiary support.” Id.

This Court recently explained the requirement of an unequivocal request in City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 800 S.E.2d 782 (2017):

In evaluating Appellant’s claim that the municipal court infringed upon her constitutional right of self-representation, we must first determine whether Appellant **effectively** invoked this right during proceedings before the municipal court. To be effective, “[a]n assertion of the right of self-representation therefore must be (1) **clear and unequivocal**; (2) knowing, intelligent and voluntary; and (3) timely.” “The particular requirement that a request for self-representation be clear and unequivocal is necessary to protect against an inadvertent waiver of the right to counsel by a defendant’s **occasional musings** on the benefits of self-representation.”

Id. at 45–46, 800 S.E.2d at 791 (internal citations omitted and emphasis added).

This Court also recognized the right of self-representation was not absolute, and under certain circumstances the trial court can insist the defendant proceed with counsel. This Court stated:

At bottom, the Faretta right to self-representation is not absolute, and the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.” Where the circumstances surrounding an accused’s purported assertion of the right to proceed without counsel suggest “a manipulation of the system [rather] than an unequivocal desire to invoke [the] right of self-representation” and “dispense with the benefits of counsel,” a court is justified in insisting that the accused proceed with the assistance of counsel.

Assa'ad-Faltas, 420 S.C. at 46, 800 S.E.2d at 791 (internal citations omitted).

The Tenth Circuit Court of Appeals explained the reasoning for requiring a clear and unequivocal request from a defendant before allowing the defendant to waive his right to counsel:

A defendant’s waiver of his right to representation and his concomitant election to represent himself must be “clearly and unequivocally” asserted. United States v. Bennett, 539 F.2d 45, 50 (10th Cir.), *cert. denied*, 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293 (1976). The reason that a defendant must make an “unequivocal” demand for self-representation is that otherwise “convicted criminals would be given a ready tool with which to upset adverse verdicts after trials at which they had been represented by counsel.” Meeks v. Craven, 482 F.2d 465, 467 (9th Cir.1973), cited with approval by this court in United States v. Bennett, at 51.

It follows that if a defendant in a criminal proceeding makes an equivocal demand on the question of self-representation, he has a potential ground for appellate reversal no matter how the district court rules. If the district court denies defendant’s equivocal demand to represent himself, the defendant, on appeal, will argue that his constitutional right to self-representation has been denied. And if the district court grants defendant’s demand for self-representation, the defendant, on appeal, will argue that his waiver

of his right to counsel was not intelligent, knowing and unequivocal. All of which is a form of the “cat and mouse” game mentioned in United States v. Padilla, 819 F.2d 952, 959 (10th Cir.1987) and in United States v. Gipson, 693 F.2d 109, 112 (10th Cir.1982), *cert. denied*, 459 U.S. 1216, 103 S.Ct. 1218, 75 L.Ed.2d 455 (1983).

United States v. Treff, 924 F.2d 975, 978-79 (10th Cir. 1991). The Fourth Circuit Court of Appeals has also explained:

This requirement that a defendant invoke his self-representation right clearly and unequivocally also serves an additional purpose. A trial court evaluating a defendant’s request to represent himself must “traverse ... a thin line” between improperly allowing the defendant to proceed *pro se*, thereby violating his right to counsel, and improperly having the defendant proceed with counsel, thereby violating his right to self-representation. A skillful defendant could manipulate this dilemma to create reversible error. The requirement that a defendant invoke his self-representation right clearly and unequivocally greatly aids the trial court in resolving this dilemma by allowing the court safely to presume that the defendant should proceed with counsel absent an unmistakable expression by the defendant that so to proceed is contrary to his wishes.

Fields v. Murray, 49 F.3d 1024, 1029 (4th Cir. 1995) (internal citation omitted); see also, United States v. Ductan, 800 F.3d 642, 650 (4th Cir. 2015) (“Since our *en banc* decision in Fields, we have consistently held that as between counsel and self-representation, counsel is the ‘default position’ unless and until a defendant explicitly asserts his desire to proceed *pro se*.”).

In the present case, Petitioner never clearly, explicitly, or unequivocally asked to proceed *pro se*. Instead, he acknowledged his inability to represent himself and proceed without counsel.

The following portion of the colloquy between Petitioner and the trial court is instructive:

The Defendant: I don’t want him as my lawyer.

The Court: Then here are your options, either Mr. Malloy represents you or you represent yourself.

The Defendant: I'll represent myself.

The Court: I don't think that's such a good idea.

The Defendant: **At the moment - - I think you're right** because I don't have a law library. I don't have case law in front of me.

(T.11; R. 11) (emphasis added).

Recognizing the defendant was not really seeking to represent himself but continued to insist he did not want trial counsel to represent him, the trial court explained Petitioner's only recourse was to hire someone. (T.11-12; R. 11-12). Contrary to asserting his right to proceed *pro se*, Petitioner responded by indicating: "Well, I have someone working on it, but the person hasn't come to see me. One of them is Smiley, and a few other people that I inquired of. They're supposed to come visit me this week, but they haven't come to see me yet." (T.12; R.12). The remainder of the discussion regarding relieving trial counsel focused on substituting counsel with someone hired by Petitioner, and he **never again** mentioned proceeding *pro se*. Petitioner never clearly, explicitly, and unequivocally sought to represent himself, and instead immediately withdrew the possibility at the mere hint of difficulty by the trial court.

Petitioner also seems to indicate the trial court failed to properly warn him of the dangers pursuant to Faretta. However, because he never made an unequivocal request, no warning was necessary. Further, the trial court did not have to give a full warning because as soon as she indicated it would not be a good idea for Petitioner, he withdrew his request to proceed *pro se*. Therefore, the requirement of a warning to allow a defendant to proceed with his eyes open appears to have opened Petitioner's eyes to the folly of proceeding *pro se*. Accordingly, this Court should affirm the decision of the Court of Appeals and affirm Petitioner's conviction and sentence.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed and Petitioner's conviction and sentence should be affirmed.

Respectfully submitted,

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January 16, 2018

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PROOF OF SERVICE

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

Susan B. Hackett, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 16th day of January, 2016.



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