

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2017-001676

THE STATE,

Respondent,

v.

EMORY WARREN ROBERTS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court properly refused to allow Appellant to represent himself when his request was not unequivocal and where Appellant demonstrated that if he were allowed to represent himself, he would make improper or meritless arguments and not abide by rules of courtroom procedure and protocol?

STATEMENT OF THE CASE

In April 2016, the State Grand Jury indicted Appellant for one count of trafficking in heroin of twenty eight grams or more, three counts of distribution of heroin, one count of trafficking in heroin between four and fourteen grams, one count of possession with intent to distribute methamphetamine, and one count of possession of a firearm during the commission of a violent crime. Multiple co-defendants were also indicted along with Appellant. On July 24-28, 2017, Appellant and co-defendant Justin Hunter (Hunter) proceeded to trial before a jury on all counts in the Berkeley County Court of General Sessions with the Honorable Deadra L. Jefferson, presiding. Appellant was represented by Timothy L. Griffith, Esq. Respondent (the State) was represented by Assistant Attorneys General Joshua Underwood and David Fernandez of the South Carolina Attorney General's Office. Hunter was not present for trial and was tried in his absence with Theresa Johns, Esq. representing him.

At the conclusion of trial, the jury convicted Appellant of all counts. Following the verdict, the trial judge sentenced Appellant to twenty-five years' imprisonment for trafficking in heroin of twenty eight grams or more, fifteen years' imprisonment for each count of distribution of heroin, fifteen years' imprisonment for trafficking in heroin four grams to fourteen grams, five years' imprisonment for possession of a weapon during the commission of a violent crime, and fifteen years' imprisonment for possession with intent to distribute methamphetamine. All of Appellant's sentences ran concurrent to each other, resulting in an aggregate total of twenty-five years' imprisonment. Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

Appellant participated in a multistate drug conspiracy and trafficking operation with five other co-defendants. The operation involved trafficking heroin and methamphetamine from the state of New York into South Carolina. Eleanor Cleary was originally appointed as counsel for Appellant on May 18, 2016. (R. 904). Cleary, however, was relieved as counsel on November 18, 2016. (R. 905). Thereafter, Timothy Griffith was appointed as counsel on November 21, 2016 (R. 906). A pretrial hearing took place on July 19, 2017. Among the issues considered at this hearing were the admissibility of statements made by Hunter, Hunter and Appellant's motion to suppress the results of a search warrant, and Appellant's competency to stand trial.

At the beginning of this hearing, Griffith informed the trial judge that Appellant wanted a different attorney appointed. (R. 2). Griffith alleged Appellant would not communicate with him or otherwise assist him in Appellant's defense. (R. 3-4). Griffith also expressed concerns with Appellant's competence and requested the trial judge appoint a doctor to evaluate him. (R. 5). Appellant was originally scheduled to be evaluated at the Medical University of South Carolina (MUSC), but after Appellant assaulted a correctional officer, Appellant's appointment was cancelled and Dr. Maddox was appointed to evaluate him at the Berkeley County Detention Center. (R. 5). Appellant refused to be evaluated by Dr. Maddox and cited section 1308 of the Uniform Commercial Code as his reason for refusal¹. (R. 6, 63). Despite Appellant's refusal, Dr. Maddox still opined that he was competent to stand trial. (R. 12).

¹ Appellant was possibly referring to Uniform Commercial Code § 1-308 which provides the following: (a) A party that with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest," or the like are sufficient. (b) Subsection (a) does not apply to an accord and satisfaction. U.C.C. § 1-308 (2017).

As the trial judge attempted to communicate with Appellant to discern his wishes for representation, the following exchange occurred:

The Court: What is your name, sir?

Appellant: Excuse me?

The Court: What is your name?

Appellant: They call me W.

The Court: I need to know your legal name, your government name as the guys would say.

Appellant: This Court doesn't have jurisdiction over me, Your Honor. I don't give the court jurisdiction. I don't—

The Court: sir, we already have jurisdiction over you; you've been indicted. So what I need to know is your full name Emory Warren Roberts?

Appellant: That is what is located on the charging instrument.

The Court: Is that on your birth certification?

Appellant: That's a legal fiction. That's an article of commerce, Your Honor.

(R. 15-16, lines 15-6).

The aforementioned exchange is representative of several similar exchanges between Appellant and the trial judge during the pre-trial hearing. The trial judge also sought to obtain basic information from Appellant such as his age, work history, and educational background. (R. 20). Appellant responded to the trial judge's inquiries by asserting her questions were "immaterial" or that "The Court is lacking in jurisdiction." (R. 20, lines 11, 15, 17). Notably, Appellant never asked to represent himself at the pre-trial hearing, but rather requested that an attorney other than Griffith be appointed to represent him. At the conclusion of her colloquy with Appellant, the trial judge noted "I perceive [Appellant] is being dilatory hoping that this will in some way delay these proceedings." (R. 22, lines 4-6). The trial judge also noted:

The Court: [Appellant] has a very competent lawyer who has been appointed to represent him and The Court is not going to appoint someone else. This is the second appointment in his case and I perceive that the next person will be unsuitable as well as the next person and the next person and I'm not going to indulge in that folly.

(R. 24, lines 2-7). The trial judge further explained that Appellant could represent himself if he wished. Appellant did not indicate he wanted to represent himself but continued to tell the trial judge he didn't understand what was going on. (R. 25-29). The trial judge found Appellant's answers to her questions were "disingenuous, that they are not accurate and that they are designed to try and delay these proceedings." (R. 29, lines 6-8).

One week later at trial, Griffith informed the trial judge that Appellant wished to represent himself. (R. 116). The trial judge responded to Griffith by declaring that she would leave him "as shadow counsel." (R. 116, lines 11-12). After the trial judge instructed Griffith to act as shadow counsel, Appellant indirectly addressed the status of his representation three times. First, Appellant asked the trial judge whether Griffith was supposed to "shadow him." (R. 126, line 15). In response to Appellant's question, the trial judge recommended that Appellant keep Griffith as his attorney. (R. 126). Appellant responded to the trial judge's suggestion by denigrating Griffith and claiming that Griffith was not working in his interest. (R. 126-27). Rather than asserting that he wanted to represent himself, Appellant next questioned the jurisdiction of the court and the status of his bond. (R. 127-31). Second, when the trial judge ultimately declined to relieve Griffith as counsel, Appellant did not request to represent himself but rather complained that Griffith would incapacitate him and would "be destroying my questions to mean something else." (R. 133, 134, lines 3-4).

Finally, with Griffith acting as his appointed counsel during jury selection, Appellant attempted to speak with the jury when he was introduced to the panel. (R. 142). Appellant was

chastised by the trial judge and advised to remain silent. (R. 142). Griffith moved for a mistrial because of Appellant's outburst before the jury. Griffith's motion was denied. (R. 143-44). In denying Griffith's mistrial motion, the trial judge cautioned Appellant that any further outburst would result in Appellant and Griffith being sequestered to another room for the duration of the trial. (R. 144). After again arguing the court did not have proper jurisdiction, Appellant stated: "All right. Constitutionally, I can represent myself" but he did not ask to represent himself. (R. 145, lines 11-12). Appellant also complained that he felt threatened by Griffith. (R. 147). The trial judge denied Appellant's equivocal request to represent himself upon finding that Appellant's assertion regarding Griffith threatening him was "a dilatory attempt to delay these proceedings." (R. 147, lines, 14-15). At the conclusion of trial, the jury found Appellant guilty of all charges.

STANDARD OF REVIEW

“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, 602, 813 S.E.2d 487, 490 (2018). Appellate courts review a circuit judge’s findings of fact for clear error, but the appellate court reviews “the denial of self-representation based upon those findings of fact de novo.” Id.

ARGUMENT

I.

The trial court properly refused to allow Appellant to represent himself when his request was not unequivocal and when Appellant demonstrated that if he were allowed to represent himself he would make improper or meritless arguments and not abide by rules of courtroom procedure and protocol.

Appellant contends the trial judge violated his Sixth Amendment right to self-representation by refusing to allow him to proceed *pro se*. Specifically, Appellant contends his invocation of his right to self-representation was (1) unequivocal, (2) knowing, intelligent, and voluntary, and (3) timely. Appellant's argument is without merit. Appellant never expressed any desire to represent himself until after jury selection had taken place and even then his request was not unequivocal. (R. 145). Prior to that, Appellant had only requested that alternate counsel be appointed. (R. 2). Because Appellant did not invoke his right to self-representation until after the trial began, his request was not timely. Finally, Appellant's request was not knowing, intelligent, and voluntary because by refusing to engage with the trial judge regarding his background and his understanding of courtroom proceedings, Appellant was unable to make this showing. Assuming for the sake of argument that Appellant appropriately invoked his right of self-representation, the trial judge nevertheless properly refused to allow Appellant to represent himself because Appellant attempted to delay the proceedings, made frivolous arguments, and would not comply with the rules of the courtroom. Appellant acted in a classic dilatory manner. Appellant's convictions and sentences should be affirmed.

A criminal defendant has a fundamental right to self-representation under the Sixth Amendment of the United States Constitution. Faretta v. California, 422 U.S. 806, 819-21 (1975). However the right of self-representation is not absolute. United States v. Frazier-El, 204 F.3d 553, 559 (4th Cir. 2000). "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." Martinez v. Court of Appeal of California, 528 U.S. 152, 162 (2000).

The right to counsel is mutually exclusive of the right to self-representation. United States v. Bush, 404 F.3d 263, 270 (4th Cir. 2005). "The right to counsel is preeminent and hence, the default position." United States v. Ductan, 800 F.3d 642, 649 (4th Cir. 2015) (quoting United States v. Singleton, 107 F.3d 1091, 1096 (4th Cir. 1997)). The right to counsel is so important that courts should "indulge in every reasonable presumption against [its] waiver." Brewer v. Williams, 430 U.S. 387, 404 (1977).

To properly assert the right of self-representation, an assertion must be "(1) clear and unequivocal, (2) knowing, intelligent, and voluntary, and (3) timely." Frazier-El 204 F.3d at 558. (internal citations omitted). The right of self-representation must "be asserted at some time before meaningful trial proceedings have commenced and thereafter its exercise rests within the sound discretion of the trial court." United States v. Lawrence, 605 F.2d 1321, 1325 (4th Cir. 1979). "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." Faretta 422 U.S. at 834. "The right of self-representation does not exist to be used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process." City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 790 (2017). "A trial court may refuse to permit a criminal defendant to represent himself when he or she is not able and willing to abide by rules of procedure and courtroom protocol." Unites States v. Lopez-Osuna, 242 F.3d 1191, 1200 (9th Cir. 2000). "A trial court must be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel." Assa'ad-Faltas, 420 S.C. at 45, 800 S.E.2d at 791.

Equivocal

Appellant did not unequivocally invoke his right to self-representation. In Appellant's pre-trial hearing, Griffith informed the trial judge that Appellant did not want Griffith to represent him. (R. 2). Specifically, Griffith stated that Appellant wanted another attorney appointed, but in the alternative, Appellant's family may be able to hire private counsel. (R. 2). For the duration of the pre-trial hearing, Appellant continued to object to Griffith acting as his lawyer but Appellant never asserted that he wanted to represent himself.

At trial, Griffith informed the trial judge that Appellant wanted to represent himself, and though he later spoke directly to the court, Appellant himself never made this request. (R. 116). The trial judge initially told Griffith and Appellant that Griffith would remain as a shadow counsel. (R. 116). Appellant later asked for clarification on the status of his counsel. (R. 126). The trial judge clarified that she recommended Appellant keep Griffith as his attorney. (R. 126). At this point, Appellant did not request to represent himself, but rather he complained that Griffith was hostile to him and not working in his interest. (R. 126-27). Appellant then raised other frivolous arguments regarding his bond and the jurisdiction of the court before the trial judge informed Appellant that Griffith was not being relieved as counsel. (R. 127-33).

To the extent Griffith's comments to the Court at the start of trial can be construed as a request for self-representation, Appellant effectively walked back that request in his own exchange with the court. After challenging the jurisdiction of the court an additional time, Appellant made the following statement: "All right. Constitutionally, I can represent myself." (R. 145, lines 11-12). Appellant's statement is somewhat ambiguous as it is not so much a request as it is a declaration of Appellant's rights. Appellant correctly states that he has a constitutional right to represent himself, but he does not unequivocally request to do so. Even assuming that

Appellant's statement was a request to represent himself, the trial judge properly treated Appellant's request with skepticism. Considering that Appellant frequently complained about his lawyer and wanted new counsel appointed throughout the pre-trial hearing and the early part of trial, the trial judge rightfully did not accept Appellant's request as being unequivocal. Appellant only half-heartedly invoked his right to counsel after it was clear the trial judge would not appoint him a new attorney. The trial judge appropriately exercised her discretion by keeping appointed counsel in place for Appellant. See City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 800 S.E.2d 782 (2017). Appellant's convictions and sentences should be affirmed.

Not Knowing, Intelligent, and Voluntary

Assuming for the sake of argument that Appellant's invocation of his right to self-representation was unequivocal, Appellant's behavior made it so the trial judge was unable to determine if his decision was knowing, intelligent, and voluntary. The trial judge could not determine whether Appellant's request to represent himself was knowing, intelligent, and voluntary because Appellant refused to engage with the trial judge as she inquired about his age, educational background, and work history. A party cannot complain of an error which his own conduct induced. See State v. Babb, 299 S.C. 451, 455, 385 S.E.2d 827, 829 (1989).

At the beginning of Appellant's pre-trial hearing, Griffith expressed concerns about Appellant's competence and Appellant's unwillingness to speak with him. (R. 3-5). The court heard testimony from Dr. Maddox that Appellant refused to be evaluated. (R. 6). Appellant stated that his reason for refusing evaluation was section 1308 of the Uniform Commercial Code. (R. 6). After hearing testimony from Dr. Maddox, the trial judge attempted to obtain basic information from Appellant such as his name, work history, and educational background. (R. 15-

20). Appellant refused to answer the trial judge's questions. The following exchange between Appellant and the trial judge is instructive:

The Court: Sir, how old are you?

Appellant: That's immaterial, Your Honor.

The Court: How old are you? It is material. It goes to your competency and whether you understand what is going on and whether your age and discretion to understand where you are and what you are doing (sic). How old are you?

Appellant: The court is lacking jurisdiction, Your Honor. It's immaterial—

(R. 20, lines 4-12).

The preceding exchange exemplifies the difficulty the trial judge faced in determining whether Appellant's decision was knowing, intelligent, and voluntary. The trial judge explained to Appellant the purpose of her questions and yet Appellant did not provide any meaningful answers. Appellant continued to challenge the jurisdiction of the court and insisted the proceedings were governed by the uniform commercial code. When faced with Appellant's intransigence and lack of cooperation with Dr. Maddox or herself, the trial judge was unable to determine whether Appellant knowingly, intelligently, and voluntarily invoked his right to self-representation. Appellant's convictions and sentences should be affirmed.

Untimely

Assuming that Appellant's invocation of his right to self-representation was unequivocal and knowing, intelligent, and voluntary, Appellant still failed to properly invoke his right of self-representation, because his invocation was not timely. Appellant never asserted his desire to proceed *pro se* during his pre-trial hearing despite being told that he had a right to do so. (R. 25-26). Griffith did say that Appellant wished to represent himself at the beginning of his trial and Griffith was told to remain with Appellant as shadow counsel. However, the trial judge

ultimately changed her mind after Appellant continued to present frivolous arguments to the court. After the trial judge informed Appellant that Griffith would remain as his counsel, Appellant complained about Griffith being his attorney but otherwise did not request that he be allowed to represent himself. Appellant did not talk about his constitutional right to represent himself until after the trial had already begun and jury selection had taken place. (R. 145). The trial judge appropriately exercised her discretion in denying Appellant's request to proceed *pro se* because his request was not timely. Appellant's convictions and sentences should be affirmed.

Appellant's Dilatory Motive

Even if Appellant had properly invoked his right to self-representation, the trial judge still properly refused to allow Appellant to proceed *pro-se* because of his lack of cooperation with the court and the likelihood that Appellant would fail to comply with court rules and would present improper arguments. Before Appellant's trial even began, Appellant demonstrated that he would present frivolous arguments to the court by refusing a formal evaluation from Dr. Maddox based on the Uniform Commercial Code. (R. 6, 63). At the pre-trial hearing Appellant continued to advance the same frivolous argument that the court did not have jurisdiction over him. (R. 15). After the trial judge explained to Appellant that the Uniform Commercial Code had no relevance in criminal court, Appellant asserted "That's not my name. That's an article—that's a straw man, a legal fiction and he can't represent me unless it's for a whole settlement and closure in a transaction." (R. 16, 19-20, lines 25-1). Thus, Appellant demonstrated that he would continue to advance this improper argument if he were allowed to represent himself. The trial judge recognized this when she noted:

The Court: [Appellant] is no different than anyone else who has convinced themselves that the uniform commercial code is applicable in a criminal situation when it is not, hoping that that will somehow salvage or delay the proceedings and prevent the court from proceeding.

(R. 23, lines 19-23).

At trial, Appellant continued his effort to present frivolous arguments by claiming he had a letter indicating he had no outstanding charges with the State Grand Jury. (R. 122). In actuality, Appellant presented the trial judge with a letter from the Department of Public Safety which said Appellant did not have outstanding charges with that agency. (R. 122-25). Appellant then attempted to prove the State Grand Jury never met to true bill the indictments charging him with the crimes for which he stood trial, despite the fact the trial judge presented Appellant with his certified indictments. (R. 123). After Appellant's initial arguments failed, Appellant argued that the Attorney General's Office was corrupt. (R. 148). To prove his theory, Appellant asked the trial judge if he could call the Assistant Attorney General prosecuting the case as a witness. (R. 148).

In addition to consistently presenting frivolous arguments, Appellant also displayed a lack of respect for courtroom rules and procedure. Appellant interrupted the trial judge while she was speaking, interrupted the direct examination of a State's witness, and attempted to speak directly to the jury during jury selection. (R. 22, 40-41, 142). The trial judge also appropriately recognized Appellant's attempts to delay the proceedings. Appellant not only refused evaluation by Dr. Maddox, but was unable to even be transported to MUSC because he assaulted a prison guard who was attempting to transport him. (R. 5-6, 63, 894). Appellant was working with his second appointed attorney after Appellant's first counsel was relieved of representing Appellant at Appellant's request. (R. 905). At trial, Appellant claimed to have not received discovery, despite Griffith telling the court that he had received and shared all discovery with Appellant. (R. 118).

The current case is very similar to the factual scenario considered by the Fourth Circuit Court of Appeals in United States v. Frazier-El, 204 F.3d 553 (4th Cir. 2000). In Frazier-El, the Fourth Circuit considered whether the trial court properly required Frazier-El to proceed with appointed counsel rather allowing Frazier-El to represent himself. Frazier-El's attorney moved for a psychiatric evaluation to determine Frazier-El's competence. Frazier-El 204 F3d at 556. After being found competent to stand trial, Frazier-El moved to have his attorney relieved because his attorney was not working in his interest and refused to file motions on his behalf asserting the court did not have jurisdiction over Frazier-El because he was "an officer in the Moorish Science Temple." Frazier-El, 204 F.3d at 557. Frazier-El admitted that he would continue to argue that the court did not have jurisdiction over him if he were allowed to represent himself. Frazier-El also admitted he would continue to request a different attorney if replacement counsel did not make the same argument. Frazier-El, 204 F.3d at 557-58. The Fourth Circuit held that Frazier-El's request to represent himself was an attempt to manipulate the court system rather than a genuine desire to represent himself. Frazier-El, 204 F.3d at 560.

Here, like Frazier-El, Griffith had concerns about Appellant's competence and moved for an evaluation. Like Frazier-El, Appellant was deemed competent to stand trial. (R. 12). Frazier-El and Appellant both said that their attorney was working against their interest and both men sought to present frivolous arguments challenging the jurisdiction of the court. This Court should reach the same conclusion the Fourth Circuit did in Frazier-El. The trial judge appropriately recognized that Appellant's request for self-representation was intended to delay his trial. In the alternative to the trial being delayed, Appellant intended to present frivolous arguments and otherwise refuse to abide by courtroom rules and protocol. The trial judge's refusal to allow Appellant to proceed *pro se*, and Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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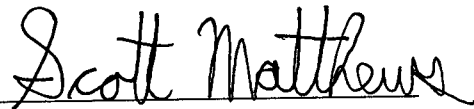
CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule
211(b), SCACR.

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant 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 twentieth day of September, 2018.



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