

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case Tracking No. 2015-001097

THE STATE,

RESPONDENT,

vs.

TERRY EDWARD MCCALL,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly found section 56-5-2946 of the South Carolina Code is constitutional and the warrantless collection of Appellant's blood and urine samples was proper based on South Carolina's implied consent statute. (Appellant's Issues 1 and 2).
- II. The trial court properly denied the motion for a continuance in the middle of trial where the motion was solely for the purpose of delay.
- III. The trial court was not required to conduct a Faretta hearing and provide the full Faretta warnings because Appellant did not waive his right to counsel through a request. Instead, the trial court properly found Appellant waived his right to counsel through his conduct or otherwise forfeited his right to counsel.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

- I. **The trial court properly found section 56-5-2946 of the South Carolina Code is constitutional and the warrantless collection of Appellant's blood and urine samples was proper based on South Carolina's implied consent statute. (Appellant's Issues 1 and 2).**

Appellant contends the trial court erred in allowing the evidence from a warrantless blood draw and urine sample provided by Appellant at the hospital after his accident. The trial court properly concluded section 56-5-2946 is constitutional and that implied consent is a valid exception to a warrant. Further, Appellant did consent to both the blood draw and urine sample collection. Finally, exigent circumstances existed allowing for the warrantless blood draw and urine sample collection.

Standard of Review

In considering a challenge to the constitutionality of a statute, the Court “must presume the Acts are constitutional ‘unless [their] repugnance to the constitution is clear and beyond a reasonable doubt.’” Doe v. State, 421 S.C. 490, 501, 808 S.E.2d 807, 813 (2017) (quoting Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)). This general presumption of validity can be overcome only by a clear showing the act violates some provision of the constitution. Id. “Accordingly, our scope of review is limited in cases involving a constitutional challenge to a statute ‘because all statutes are presumed constitutional and, if possible, will be construed to render them valid.’” Doe, 421 S.C. at 502, 808 S.E.2d at 813 (quoting Hendrix v. Taylor, 353 S.C. 542, 550, 579 S.E.2d 320, 324 (2003) (internal quotation marks and citation omitted)).

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due

to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see also, State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) (“On appeal from a suppression hearing, this court is bound by the circuit court’s factual findings if any evidence supports the findings.”). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

Merits

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .” U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures. “The touchstone of the Fourth Amendment is reasonableness.” Florida v. Jimeno, 500 U.S. 248, 250 (1991).

“Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement.” State v. Brown, 401 S.C. 82, 89, 736 S.E.2d 263, 266, (2012) (internal citation and quotation marks omitted). “[W]arrantless searches are allowed when the circumstances made it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement.” Kentucky v. King, 563 U.S. 452, 462 (2011). There are several recognized exceptions to the warrant requirement. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Exceptions to the Fourth Amendment’s warrant requirement include, among other things, consent, Schneekloth v. Bustamonte, 412 U.S. 218, 222 (1973), and exigent circumstances, Mincey v. Arizona, 437 U.S. 385, 393–94 (1978). “It is well-established that ‘exigent circumstances,’ including the need to prevent the destruction of evidence, permit police

officers to conduct and otherwise permissible search without first obtaining a warrant.” King, 563 U.S. at 455.

A blood draw is a search and generally a warrant is required. See e.g., Missouri v. McNeely, 569 U.S. 141 (2013); Schmerber v. California, 384 U.S. 757 (1966). Additionally, the collection of a urine sample is a search. See Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 617 (1989). However, some exceptions that apply to the general warrant requirement under the Fourth Amendment will apply to a blood draw, including consent and exigent circumstances. See Schmerber, 384 U.S. at 770.

Implied Consent

South Carolina has implied consent statutes, which should operate to establish consent of an individual suspected of driving under the influence unless revoked. Section 56-5-2946 provides:

Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.

S.C. Code Ann. § 56-5-2946 (A) (Supp. 2015). Additionally, section 56-5-2950 provides:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs.

S.C. Code Ann. § 56-5-2950 (A) (Supp. 2015).

Appellant contends the implied consent statutes in South Carolina are unconstitutional based on the United States Supreme Court’s decision in McNeely. However, in McNeely, the

United States Supreme Court considered the very narrow question of whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that justifies, **on its own**, an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases. McNeely, 133 S.Ct. at 1558. The Court did not address the continued viability of implied consent laws, or their application to a warrantless blood draw. Importantly, the Court left open the possibility that exigent circumstances, other than the natural dissipation of alcohol, and other typical exceptions to the warrant requirement, including consent, still apply to allow a warrantless blood draw.

More recently, in Birchfield v. North Dakota, ___ U.S. ___, 136 S.Ct. 2160 (2016), the United States Supreme Court considered the constitutionality of breath tests and blood draws pursuant to the search incident to arrest exception for a warrant. After doing so, the Court also addressed the validity of implied consent statute. While the Court found the search incident to arrest exception would not allow a blood draw to test for alcohol, it did find a breath test pursuant to a search incident to arrest was constitutional.¹

The United States Supreme Court also considered the validity of the consent exception utilizing implied consent statutes. In North Dakota, unlike South Carolina, the implied consent statute imposed a criminal penalty for refusal to submit to the blood draw. It was a misdemeanor for someone to refuse. Id. at 2185-2186. The United States Supreme Court found "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." Id. at 2186.

Significantly, the United States Supreme Court spoke approvingly of implied consent statutes which did not impose criminal penalties for refusal. The Court explained:

¹ It is arguable the urine collection would also be appropriate pursuant to a search incident to arrest because it is significantly less intrusive than a blood draw and much more akin to the breath test found constitutional by the United States Supreme Court.

It is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context. **Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply.** Petitioners do not question the constitutionality of those laws, and **nothing we say here should be read to cast doubt on them.**

Id. at 2185 (emphasis added)(internal citations omitted). As long as 56-5-2946 and 56-5-2950 are construed consistent with Birchfield—allowing a revocation of consent² and not imposing criminal penalties—it is a proper implied consent law and will operate as an exception to the warrant requirement. There is no indication the statute operated to prevent voluntary consent in the way the United States Supreme Court found improper in Birchfield. Accordingly, this Court should uphold the implied consent laws of 56-5-2946 and 56-5-2950 in South Carolina, and find when an individual does not revoke consent any blood draw is constitutional without a warrant. Further, in the present case, there is no evidence Appellant sought to revoke consent or otherwise refuse either the urine collection or the blood draw. As a result, this Court should find section 56-5-2946 constitutional as applied to Appellant.

Consent

Even without relying upon implied consent under the statutes, the blood and urine collection in this case was proper because Appellant consented to the procedures. He signed the implied consent form indicating his consent and the nurse who took the samples specifically testified Appellant consented to the collection of urine and blood before she went forward with the procedures.

Trooper McAlhany arrived at the accident scene at approximately 6:12 pm and went to the hotel to arrest Appellant at approximately 8:13 pm. (T.42-43 ; R.36-37). He interviewed

² A revocation of consent to a breath test would not be valid as it can be taken without a warrant as a search incident to arrest.

Appellant at the hospital. Appellant indicated he had not been drinking. However, Appellant acknowledged taking some prescription drugs. (T.44; R.38). Trooper McAlhany explained Appellant's implied consent rights and had him sign the implied consent form. (5/12 Court's Exhibit 14; T. 47; R.41; 368). After obtaining Appellant's signature, Trooper McAlhany asked Appellant if he would provide a sample and Appellant responded: "sure, I'll give you a sample." (T.48; R.42). Appellant never indicated he wished to revoke his consent or refused to provide a sample. (T.48; R.42). While Appellant testified he did not sign the implied consent form, he **never** testified he revoked his consent. (T.77-78; R.71-72). The urine sample was ultimately taken at 8:45 pm and the blood sample at 9:05 pm. (T.86; 5/12Court's Exhibits 4-5; R.86; 350-51).

Ashley Norman, a staff nurse at Greenville Memorial emergency room was asked to obtain the samples from Appellant. (5/12Court's Exhibits 3-5; R.349-351). She indicated Appellant voluntarily provided the urine sample and was not forced to provide the sample. (T.30; R.24). She indicted she has never obtained a blood sample from someone who refused to provide the sample. Importantly, she testified she would not obtain a sample from someone who has refused. (T.30; R.24). Most significantly, on cross-examination the following colloquy occurred:

Q. So, you're only testimony then regarding whether or not he gave his permission of his consent is that he didn't actively resist you when you did what the trooper told you to do and that is go collect the samples?

A. No. In the instances that I have drawn legal samples, **I confirm that before I stick someone that they're okay with that.**

.....

A. I'll tell you how I typically do it is I go in - - a trooper asks for a legal sample, I go in and I introduce myself to the patient and let them know that I'm understanding that you're agreeing to have a legal sample drawn and then they say yes or no. **And I draw if they say yes.**

(T.32-33; R.26-27) (emphasis added). Accordingly, even if the implied consent provided by sections 56-5-2946 and 56-5-2950 are not valid, the collection of Appellant's urine and blood samples was performed with his express consent to both Trooper McAlhany and Ms. Norman.

Exigent Circumstances

Additionally, exigent circumstances clearly indicate the warrantless blood draw and urine sample collection in this case was proper. This case is distinguishable from McNeely and much more similar to the factual circumstances found in Schmerber.

In McNeely, the defendant was stopped around 2:08 am by highway patrol after he was observed speeding and repeatedly crossing the center line. McNeely, 133 S.Ct. at 1556. The officer observed several signs of intoxication, and the defendant admitted he had consumed beer. Id. After the defendant performed poorly on field-sobriety tests and declined a portable breath test, the officer arrested him. Id. at 1556-57. While being transported to the police station for a breath sample, the defendant told the officer he would again refuse to provide a sample. Id. At that point, without securing a warrant, the officer decided to take the defendant to the hospital for a blood test. Id. Reading from a standard implied consent form, the officer explained to the defendant that refusal to submit to the test would lead to revocation of his driver's license and could be used against him in a future prosecution. Id. The defendant still refused, and the officer directed hospital personnel to take a blood sample. Id. The sample was secured at 2:35 am. Id.

The Court ultimately determined that a *per se* exigency did not exist under the circumstances of McNeely's case – where the only “exigency” was the natural dissipation of alcohol in the defendant's blood – and instead upheld the “totality of the circumstances” analysis as applied in Schmerber. McNeely, 133 S.Ct. at 1559-61. The Court pointed out, however, that the dissipation of alcohol remains an essential factor to be considered in the totality of the circumstances because “a significant delay in testing will negatively affect the probative value of the results.” Id. at 1560-61. In conclusion, the Court stated: “In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in Schmerber, it does not do so categorically.” Id. at 1563.

In Schmerber, the defendant, who was intoxicated, crossed the road and drove into a tree. Schmerber, 384 U.S. at 758-59 & 768-69. Both the defendant and his passenger were injured in the accident and taken to the hospital. Id. at 759 n.2. Within about two hours of the accident, and after law enforcement observed several indicators he was intoxicated, the defendant was arrested at the hospital for driving under the influence of intoxicating liquor. Id. at 768-69. Then, at the direction of a police officer, the defendant's blood was drawn by a physician at the hospital. Id. at 758-59. The defendant **expressly refused** to consent to this blood draw on the advice of his attorney. Id. at 759. The subsequent chemical analysis revealed a blood-alcohol concentration consistent with intoxication, and the results of the analysis were admitted at trial over the defendant's objection. Id.

The Supreme Court stated the Fourth Amendment question squarely presented was “whether the chemical analysis introduced in evidence in this case should have been excluded as the product of an unconstitutional search and seizure.” Id. at 766-67. After concluding the blood draw resulted from the seizure of a person and the blood test plainly constituted a search, the

Court held the issues to be determined were whether or not the police were justified in requiring the defendant to submit to the blood test and whether the means and procedures employed in taking his blood met Fourth Amendment standards of reasonableness. Id. at 768. Further, while it was clear there was probable cause for the defendant's arrest, and the blood test would likely produce relevant evidence, the question remained whether the officer was permitted to draw these inferences himself or whether he was required to procure a warrant first. Id. at 770.

The Court ultimately held the officer was not required to first obtain a warrant because he "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" Id. (citation omitted). Therefore, the exigency exception applied since there was "no time to seek out a magistrate and secure a warrant" in light of the "special facts" presented: (1) the natural dissipation of alcohol in the defendant's system; (2) the fact time had to be taken to investigate the car accident; and (3) the fact time had to be taken to bring the accused to the hospital. Id. at 770-71. The United States Supreme Court reiterated this analysis in McNeely, explaining: the totality of the circumstances in Schmerber supported an exigency because the defendant was involved in a car accident which had to be investigated; the defendant suffered injuries in the accident and had to be taken to the hospital; and, under these circumstances, the officer might reasonably have believed he was confronted with an emergency and that the delay necessary to obtain a warrant threatened the destruction of evidence due to the natural dissipation of alcohol in the defendant's blood. McNeely, 133 S.Ct. at 1559-60. Accordingly, the Court concluded "the present record shows no violation of Petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures." Id.

The facts of this case are significantly more similar to Schmerber than they are to McNeely. This case involved a devastating automobile accident. (5/12 Court's Exhibits 6-13). Trooper McAlhany described it as a "major accident" with a "big debris field" on a busy road. (T.36; R.30). The victim in this case had to be extricated from his vehicle by the fire department because he was trapped. (T.39; R.33). Appellant was also trapped in his vehicle initially, but not as severely as the victim. (T.66; R.60). Appellant was injured in the crash and taken to the hospital. Trooper McAlhany, who as discussed above arrived around 6:12 pm, explained he had very little time on scene of the accident with either the victim or Appellant. (T.40-41; R.34-35).

Trooper McAlhany had some help with the accident and investigation. He indicated he had to conduct interviews with a couple witnesses, which took approximately an hour. (T.41-42; R.35-36). Sergeant Hiatt also went to the scene of the accident. He explained six troopers were originally called but because of how busy they were at the time they had five on scene. (T.65; R.59). He indicated most of the manpower on scene was allocated to traffic direction. (T.66; R.60). Trooper McAlhany made it to the hospital to arrest Appellant and begin the process of obtaining the blood and urine samples at 8:13 pm, with the first sample obtained at 8:45 pm, over two and a half hours after the trooper arrived at the scene of the accident.

Sergeant Bannister testified that after 5:00 pm in order to obtain a search warrant it could take two hours or more. He explained an officer would go to the jail to type up the warrant and affidavit. He testified no online or electronic system exists in South Carolina so you have to call and find a judge and then take the warrant and affidavit to them for review. (T.59; R.53). He explained "ideally" it could take an hour and a half to get a warrant and get to the hospital. He opined it could take two and a half to three hours to get the warrant and the samples. (T.61; R.55).

Another factor in the instant case was the elimination of drugs from the body. As explained by Wendy Bell with the South Carolina Forensic Services Laboratory, alcohol dissipates at a set rate from the body. Different drugs, however, dissipate at different speeds with some drugs lasting days and other very rapidly leaving the body. (T.71; R.65). She testified that some drugs eliminate “quite rapidly and . . . before they can even be taken to the hospital.” (T.72; R.66). She testified: “it’s very important that we get the blood quickly or we don’t see that parent substance” and otherwise it is only the metabolites which may or may not provide the ability to determine when the drug was last used. (T.73; R.79).

As discussed above, Appellant indicated he had not been drinking alcohol, but told Trooper McAlhany he had taken prescription drugs. As a result, a breath test would have been ineffectual at determining intoxication. Without knowing what drugs were involved, some of which have incredibly short dissipation times, it was entirely reasonable for Trooper McAlhany to obtain a urine and blood sample to determine which drugs were in Appellant’s system at the time of the crash. Accordingly, this case is very similar to Schmerber³ in terms of the exigencies involved. As a result, the collection of the blood and urine without a warrant was also appropriate based on the exigent circumstances which existed.

³ Appellant never testified he revoked his consent or refused to submit to the blood and urine collection, unlike Schmerber who expressly refused.

II. The trial court properly denied the motion for a continuance in the middle of trial where the motion was solely for the purpose of delay.

Appellant maintains the trial court erred in denying his request for a continuance after trial had already started to obtain counsel. The trial court did not err in denying the request when it was made for the purpose of delay, no actual conflict of interest existed between Appellant and his counsel, and the denial was entirely discretionary on the part of the trial court.

Standard of Review

“The trial court’s denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion.” State v. Morris, 376 S.C. 189, 208, 656 S.E.2d 359, 369 (2008) (citing State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)). “An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.” State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). “Reversals of refusal of a continuance are about as rare as the proverbial hens’ teeth.” State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002) (citing State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)).

Merits

Appellant asserts the trial court erred in denying his motion for a continuance to obtain new counsel. No actual conflict of interest existed between Appellant and his counsel, and none has been alleged. Further, Appellant’s actions in relieving counsel and seeking a continuance were merely to delay the trial and impede the administration of justice.

In the instant case, Appellant filed a motion to relieve counsel and proceed *pro se* several months before trial. The motion was never ruled on and did not assert any type of actual conflict of interest. The motion merely indicated he desired to represent himself and would accept counsel as standby counsel. (Motion to Relieve Counsel; R.494). Between March 27, when he

filed his motion, and May 12, when trial began, Appellant took no further steps to either obtain counsel of his choice or to reassert his desire to proceed *pro se*. Significantly, trial started with Appellant represented by appointed counsel without any objection from Appellant. It was only after one day and several rulings went against Appellant that he sought to relieve counsel.

Also significant, it was only in the middle of trial and during his request to relieve counsel, that Appellant first expressed any desire to obtain his own counsel. As stated, his motion was not a motion to relieve counsel to obtain his own. He did not move before trial or even at the beginning of trial to obtain counsel. It was only after the trial court ruled against him on several grounds that he expressed any dissatisfaction with his appointed counsel and sought to obtain counsel of his own. His motion came after pretrial motions, after opening statement by both parties, after hearing the testimony of several State's witnesses, and after the admission of twenty-five State's exhibits. (See e.g., T.2-3; R.2-3).

Additionally, the trial court, who was present to consider the demeanor of the parties and the nature of the request for a continuance, concluded "specifically that the motion was ill-timed and that the ultimate end of a motion to continue and a motion for relief of counsel is to delay and hinder the administration of justice." (T.176; R.131). The trial court did not abuse its wise discretion in denying a motion for a continuance when its sole purpose was a dilatory tactic by Appellant after receiving several unfavorable rulings.

Finally, as the trial court concluded any continuance in the middle of trial would have had a significant prejudicial effect on the State. (T.176; R.131). The State's witnesses were present and ready to testify and the delay to obtain counsel would not have been merely for a day, but would have required new counsel to obtain the file and become prepared to go forward. Further, Appellant was privy to opening statements, pretrial motions, and several witnesses before

seeking the continuance which would have allowed additional time to prepare his response to the State's case. The Appellant should not be able to hamstring a trial by waiting until the middle of trial and seeking to relieve counsel and force a continuance by not being willing to either cooperate with current appointed counsel or going forward pro se. If this Court sanctions the behavior of Appellant and finds a continuance was required, every criminal trial in South Carolina can be halted by a defendant's behavior and refusal to accept any outcome other than a continuance. Accordingly, this Court should find this case does not present the situation of the proverbial hens' teeth and conclude the trial court did not abuse its discretion in denying the mid-trial motion for a continuance by Appellant.

III. The trial court was not required to conduct a Faretta hearing and provide the full Faretta warnings because Appellant did not waive his right to counsel through a request. Instead, the trial court properly found Appellant waived his right to counsel through his conduct or otherwise forfeited his right to counsel.

Appellant contends the trial court erred in failing to conduct a proper hearing in accordance with Faretta v. California, 422 U.S. 806 (1975). The trial court properly considered Appellant's request to relieve counsel; warned him that he could only proceed with Mr. Chambers or go forward *pro se*; warned him of the dangers of proceeding *pro se*; and, when Appellant continued to attempt to delay and hinder the trial, found he should go forward *pro se* with standby counsel.

Standard of Review

The South Carolina Supreme Court recently articulated the standard of review to use when considering whether a proper Faretta hearing took place:

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. Specifically, we review a circuit judge's findings of historical fact for clear error; however, we review the denial of the right of self-representation based upon those findings of fact de novo. In doing so, this 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.

State v. Samuel, 422 S.C. 596, 813 S.E.2d 487, 490 (2018) (internal citations omitted).

Additionally, this Court has explained: "A motion to relieve counsel is addressed to the discretion of the [circuit court] and will not be disturbed absent an abuse of discretion." State v. Childers, 373 S.C. 367, 372, 645 S.E.2d 233, 235 (2007).

Merits

The Sixth Amendment mandates that in all criminal proceedings, the accused shall have the right to the assistance of counsel for his defense. U.S. Const. amend. VI. Furthermore, an indigent defendant is entitled to have an attorney appointed by the court to represent him. Gideon v. Wainwright, 372 U.S. 335, 344 (1963). “The right of an accused to effective assistance of counsel, however, does not extend to the appointment of counsel of choice, or to special rapport or even a meaningful relationship with appointed counsel.” State v. Boykin, 324 S.C. 552, 555, 478 S.E.2d 689, 690 (Ct. App. 1996) (citing Morris v. Slappy, 461 U.S. 1, 13-14 (1983)).

“The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” Faretta v. California, 422 U.S. 806, 807 (1975). “Courts have recognized three ways in which a defendant may relinquish his right to counsel: (1) waiver by an affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture.” State v. Roberson, 382 S.C. 185, 187, 675 S.E.2d 732, 733 (2009) (citing Boykin, 324 S.C. at 556, 478 S.E.2d at 690).

Faretta and Voluntary Waiver

A defendant may waive the right to counsel. “It is the trial court’s responsibility to determine whether there was a knowing and intelligent waiver by the accused.” State v. Bryant, 383 S.C. 410, 414, 680 S.E.2d 11, 13 (Ct. App. 2009); see also, State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) (“It is beyond question that an accused person may waive counsel and represent himself. However, it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver.”). “To effectuate a valid waiver, the accused must (1) be advised of the right to counsel and (2) be adequately warned of the dangers of self

representation.” Bryant, 383 S.C. at 414, 680 S.E.2d at 13 (citing State v. McLauren, 349 S.C. 488, 493 94, 563 S.E.2d 346, 348 49 (Ct. App. 2002)); see also, Faretta, 422 U.S. at 835.

Faretta requires 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.” 422 U.S. at 835. “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.” Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). Additionally, if a defendant relinquishes his right to counsel by either waiver by conduct or forfeiture, the underlying necessity of the warnings encapsulated in Faretta are not required. See Roberson, 382 S.C. at 188, 675 S.E.2d at 733.

Appellant contends the trial court erred in failing to conduct a proper hearing pursuant to Faretta or advising Appellant of the dangers and disadvantages of self-representation. The colloquy in this case presents a highly unusual set of circumstances and not the normal request of a defendant to proceed *pro se*. The defendant in this case exclusively sought to force a continuance of his trial, which had already begun the day before, instead of being willing to either proceed with appointed counsel, Mr. Chambers, or proceed *pro se*. His colloquy with the trial court does not indicate Appellant’s desire to waive his right to counsel by an affirmative, verbal request. While he initially indicated he would rather proceed *pro se* than be represented by counsel, he later indicates repeatedly his desire not to proceed without counsel. (T.167-178). Throughout the entire colloquy he is insistent that he not be represented by Mr. Chambers, but refuses to allow for any alternative except for a continuance seeking to delay trial. (See e.g., T.169, 173; R.124, 128).

As a result, the trial court's decision to have Appellant proceed *pro se* was not based on his voluntary request, but instead based on either his forfeiture of his right to counsel or his waiver of that right by his conduct. The trial court specifically noted: "the ultimate end of a motion to continue and a motion for relief of counsel is to delay and hinder the administration of justice." (T.176; R.131). The trial court later found: "You are in an uncomfortable position as a consequence of your own conduct. . . . As the sole and exclusive consequence of your own conduct." (T.177-178; R.132-33).

Faretta, however, is inapposite to the facts of the instant case when there was no unequivocal request to proceed *pro se*. See, e.g., Robards v. Rees, 789 F.2d 379, 383 (6th Cir.1986) (noting exception to application of Faretta where "prosecution makes an affirmative showing that the defendant's request for self-representation is merely a tactic to secure a delay in the proceeding"); State v. Jones, 546 P.2d 45, 51 (Ariz.Ct.App.1976) (finding Faretta was not controlling where defendant did not request that he be permitted to represent himself but, instead, requested on the day of trial that his present attorney be fired and that a new one be appointed); State v. Shumaker, 914 So.2d 1156, 1162 (La.Ct.App. 2005) (holding defendant's reliance on Faretta, was misplaced and stating "defendant never expressly asked that he be allowed self-representation. He simply indicated that he wanted to fire his counsel. That statement certainly does not reach a clear and unequivocal expression requesting the right to represent oneself as required by Faretta.").

Accordingly, Faretta and its prophylactic warnings were not required. The trial court had no reason to fully explore whether the defendant knew the dangers of self-representation because the defendant was attempting to force the trial court's hand by refusing to cooperate with appointed counsel, thereby creating a conflict, and at the same time refusing to proceed *pro se*.

The trial court should not have been required to participate in Appellant's clear scheme to obtain a delay in the remainder of trial, obtain a mistrial, or obtain a reversal of his conviction based solely on his own choices and behavior. Therefore, the trial court did not err in failing to conduct a proper Faretta hearing or give the appropriate advisements because they were not required under the unique circumstances of this case.

Further, to the extent they were required, the trial court made Appellant well aware of the dangers of self-representation. The trial court indicated: "I will consider relieving Mr. Chambers as your attorney of record, if you want, but you will be required to proceed *pro se* for the remainder of this trial, sir." (T.168; R.123). Appellant responded: "If that's what I got to do, that's what I got to do." (T.169; R.124). The following colloquy then occurs:

THE COURT: You understand that you have a right to have an attorney represent you?

DEFENDANT MCCALL: Yes, sir.

THE COURT: And you understand that if you decide and determine - - -

DEFENDANT MCCALL: I don't want him to represent me, though.

THE COURT: You understand that if you decide to represent yourself you assume certain risks in doing so, do you understand?

DEFENDANT MCCALL: I do, but I'm not going to stand here and not have an attorney present when I have a constitutional right to have a lawyer.

(T.169; R.124). Later, the trial court again asks: "You understand that you would be proceeding on your own and assume certain risks because you may not have the knowledge and experience that an attorney can afford you in the trial of a case." Appellant responded: "I understand that." (T.172-173; R.127-128). Appellant then again indicated he wanted new counsel and a

continuance to hire new counsel instead of either allowing Mr. Chambers to proceed as counsel or proceeding *pro se*. However, the trial court made certain Appellant was warned of the dangers of proceeding *pro se* and Appellant even acknowledged those risks. Accordingly, to the extent Faretta warnings were even required, the trial court explained the dangers and risks to Appellant, he just refused to cooperate with the trial court and continued making it clear the only option he was willing to accept was a continuance in the middle of trial to get a new attorney.

Waiver by Conduct and Forfeiture

First, it should be noted Appellant has not challenged the trial court's determination his conduct—either by waiver or forfeiture—lead to the removal of appointed counsel and his being required to proceed *pro se*. The trial court specifically noted Appellant's sole purpose in making the motion to relieve counsel and for a continuance was "to delay and hinder the administration of justice." (T.176; R.131). The trial court found and explained Appellant was being required to proceed *pro se* because of his conduct: "You are in an uncomfortable position as a consequence of your own conduct. . . . As the sole and exclusive consequence of your own conduct." (T.177-178; R.133). These rulings have not been challenged by Appellant. As a result, the propriety of the trial court's decision to require Appellant to proceed *pro se* with standby counsel is not properly before the Court. See Dreher v. S.C. Dep't of Health & Envtl. Control, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) ("[S]hould the appealing party fail to raise all of the grounds upon which a court's decision was based, those unappealed findings—whether correct or not—become the law of the case."); Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will

become the law of the case.”); State v. Branham, 392 S.C. 225, 231, 708 S.E.2d 806, 809 (Ct. App. 2011) (finding unappealed alternate ruling the law of the case).

On the merits, the trial court properly relieved counsel and appointed standby counsel to assist with Appellant’s defense. Courts have recognized three ways in which a defendant may relinquish his right to counsel: (1) waiver by an affirmative, verbal request; (2) waiver by conduct; and (3) forfeiture. State v. Roberson, 382 S.C. 185, 187, 675 S.E.2d 732, 733 (2009).

A defendant may waive his right to counsel through his conduct. See United States v. Goldberg, 67 F.3d 1092, 1100 (3d Cir.1995). In State v. Cain, this Court held a waiver of the right to counsel may be inferred from a defendant’s actions. State v. Cain, 277 S.C. 210, 284 S.E.2d 779 (1981). “Most courts have held that the defendant must first be warned that his misconduct will thereafter be treated as a waiver.” State v. Thompson, 355 S.C. 255, 263, 584 S.E.2d 131, 135 (Ct. App. 2003) (citing Boykin, 324 S.C. at 556, 478 S.E.2d at 691).

A defendant can forfeit his right to counsel irrespective of his knowledge of either the consequences of his actions or the dangers of self-representation. See Goldberg, 67 F.3d at 1100. “[B]ecause of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct.” Id. at 1101. In United States v. McLeod, 53 F.3d 322 (11th Cir. 1995), the Eleventh Circuit Court of Appeals explained some of the grounds and analogous situations resulting in a defendant forfeiting his right to counsel, including: 1) a defendant’s failure to retain counsel within a reasonable time; 2) a defendant who misbehaves in the courtroom; 3) defendant who causes a witness to be unavailable for trial; 4) defendant who escapes from custody during his trial; and 5) a defendant who is abusive toward his attorney may forfeit his right to counsel. Id. at 325.

The trial court in this case was placed between a rock and a hard place by Appellant's decisions and conduct. Throughout the colloquy, Appellant made it abundantly clear to the trial court he was seeking to delay trial and not to proceed. Further, he sought to undermine Mr. Chambers and ultimately attempt to force any conviction to be overturned based on the situation into which he placed his counsel. Mr. Chambers explained to the trial court: "I'll let him state what his reasons more but he made statements that led me to believe that my continuance as an attorney basically **would put me in jeopardy** as far as allegations he planned to make against me. So I think he has **created a conflict** between us." (T.167; R.122) (emphasis added). Appellant told the trial court he had previously filed to relieve Mr. Chambers and then explained to the court: "**I have a conflict from the past with him** and I didn't get to be heard in relation to it and he came in yesterday and started the trial without hearing my motion." (T.170; R.125) (emphasis added). Mr. Chambers agreed with Appellant's motion to relieve him as Appellant's counsel and stated:

Your Honor, I would join him in the motion to relieve me from this trial and allow him to proceed pro se because based on everything he has just said, **I question whether I can effectively represent him anymore**. I'm certainly prepared and I thought I was doing a pretty good job. I didn't know anything about a motion, the motion that he's talking about now.

It's clear to me at this point that rather than allowing me to effectively represent him through the remainder of this trial, he's trying to build some kind of a record so he can either on appeal or a PCR or something down the road and **try to get any conviction overturned** which will result basically in throwing me under the bus and saying that somehow I didn't do the job I was supposed to do.

(T.170-171; R.125-126) (emphasis added). Appellant responded by again asking the court to relieve Mr. Chambers. (T.171; R.126).

Throughout the colloquy Appellant maintained his desire to relieve Mr. Chambers as counsel. However, in the discussion with the trial court he attempted to present the trial court with no option other than relieve Mr. Chambers and grant a continuance. Even after the trial court noted its decision not to grant a continuance, Appellant continued to insist on the removal of Mr. Chambers and a continuance. The trial court warned Appellant that his only options were to continue with Mr. Chambers or to proceed *pro se*. He stated: "I will consider relieving Mr. Chambers as your attorney of record, if you want, but you will be required to proceed *pro se* for the remainder of this trial, sir." (T.168; R.123). After Appellant again asked to relieve Mr. Chambers, the trial court warned: "Again, I'm going to ask you this as a consequence of relieving Mr. Chambers that you will be required to proceed *pro se*." (T.171; R.126). The trial court attempted to make it clear that the only two options for Appellant were to proceed *pro se* or continue with Mr. Chambers as counsel. Appellant made it abundantly clear he did not intend to cooperate with Mr. Chambers or allow him to effectively represent him. As a result, he forced the trial court's hand through his behavior to requiring him to proceed *pro se* with standby counsel from the public defender's office.⁴

The "adjudicative power of the court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." Williams v. Bordon's, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). Further, "a trial judge has the inherent power to maintain order and decorum in his courtroom." State v. Beckham, 334 S.C. 302, 314, 513 S.E.2d 606, 612 (1999). "A trial judge has the inherent power to preserve order in his court and to see that **justice is not obstructed by any person or persons.**" State v. Shelton, 270 S.C. 577, 580, 243 S.E.2d 455, 457 (1978) (emphasis added). "It is the right and duty of the trial judge to see that the trial is

⁴ The State notes that the public defender appointed as standby counsel significantly participated in the trial of the case including cross-examining multiple witnesses and conducting closing argument.

conducted in an orderly dignified manner and that proper decorum is maintained in the court room while the trial is under way.” State v. Tuckness, 257 S.C. 295, 303, 185 S.E.2d 607, 610 (1971).

Additionally, this Court has stated: “The right to counsel is not so absolute that it requires a trial judge to preside over a trial, exhausting the time of attorneys, jurors, and judicial staff despite an admission by a defendant’s attorney that the integrity of the verdict is in doubt due to conduct falling below the accepted standards of the legal profession.” State v. Cottrell, 421 S.C. 622, 636, 809 S.E.2d 423, 431 (2017). In the instant case, Mr. Chambers emphasized the fact Appellant was not cooperating with him, he could no longer effectively represent Appellant, and Appellant was seeking to create issues for PCR to result in the overturning of his conviction. As a result, the trial court was not required to sanction Appellant’s tactics by either giving into his strong-arming of the court seeking a continuance or requiring Mr. Chambers to continue representation when the final conviction could be in doubt because of Appellant’s attempt to create issues.

Accordingly, this Court should find Appellant either waived his right to counsel by his behavior or forfeited his right to counsel. This Court should not sanction Appellant’s behavior placing the trial court between a rock and a hard place. The trial court provided the two alternatives to Appellant and he refused to accept either. The trial court found his behavior was hindering the administration of justice and, as the person charged with maintaining the sanctity of the judicial proceeding, the trial judge in this case properly determined Appellant’s conduct placed him in the position of having to proceed *pro se*. Therefore, this Court should affirm Appellant’s conviction and sentence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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September 27, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case Tracking No. 2015-001097

RECEIVED
SEP 27 2018
SC Court of Appeals

The State,

Respondent,

vs.

Terry Edward McCall,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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