

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Kershaw County

G. Thomas Cooper, Jr., Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

GREGORY V. SMITH,

APPELLANT

APPELLATE CASE NO. 2012-213666

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ANDERS BRIEF OF APPELLANT

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JAN 17 2014

SC Court of Appeals

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### **STATEMENT OF ISSUE ON APPEAL**

Whether Appellant was denied Due Process where he distrusted and fired his first appointed counsel and barely communicated with his second appointed counsel; where, while in pretrial detention, the State seized all of his legal paperwork and notes; where he informed the court below in the middle of trial that he could not present the defense he wanted because, despite repeated attempts, he was never able to secure his case materials; where the court's remedy was to give Appellant one afternoon to obtain the materials through appointed counsel and review them; and where Appellant was still unable to present any evidence in defense and ultimately suffered a conviction.

## STATEMENT OF THE CASE

On January 23, 2012, a Kershaw County grand jury indicted Appellant Gregory Smith for murder and manufacturing methamphetamine. R. \*.<sup>1</sup> On October 22, 2012, Appellant's case proceeded to trial before the Honorable G. Thomas Cooper, Jr. and a jury. Neil Riley represented Appellant and Ron Moak and Brett Perry represented the State. Tr. 1.

The jury found Appellant guilty on both counts. Tr. 706, ll. 14-21. After a separate sentencing hearing, the trial court sentenced Appellant to thirty years for the murder charge and five years concurrent for the methamphetamine charge. Tr. Dec. 12, 2012 at 20, ll. 11-20.

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<sup>1</sup> The grand jury also indicted Appellant for manufacturing marijuana, but the State dropped the charge before trial. Tr. 14, ln. 24–Tr. 17, ln. 20.

## ARGUMENT

**APPELLANT WAS DENIED DUE PROCESS OF LAW BECAUSE HE SOUGHT TO DECIDE WHETHER TO WAIVE COUNSEL AND PREPARE HIS OWN DEFENSE BUT WAS NEVER AFFORDED THE CHANCE.**

### STATEMENT OF FACTS

The State alleged that on May 28, 2011, Appellant shot and killed Deborah Tyler in her trailer home. During the State's opening statement at trial on October 22, 2012, the solicitor explained to the jury that the State had marshalled numerous witnesses, including a pathologist and investigating police officers, and was thoroughly prepared to present a convincing case against Appellant. Tr. 160, ln. 23–Tr. 171, ln. 5. During the same opening Statement, Appellant sat thoroughly unprepared for trial: all of his legal papers, including correspondence and his handwritten notes on his case, were sealed in evidence at the Kershaw County Sheriff's Office evidence room. Tr. 567, ln. 3–Tr. 568, ln. 5.

Appellant had never given up trying to prepare his own defense. After his indictment on January 23, 2012, the State appointed William Tetterton to represent him. The two met in the Kershaw County jail a few times. Although Tetterton arranged for a fifteen-year plea deal, he observed signs from Appellant that he was not being entirely cooperative with the representation. Tr. 113, ln. 15–Tr. 126, ln. 13; SLED Report 29-30. All the while, Appellant was amassing and drafting his own legal materials in contemplation of representing himself.

On August 15, 2011, the State seized Appellant's legal materials from him while he was still in pretrial detention. Tr. 567, ln. 23–Tr. 568, ln. 1; Tr. 568, l. 15 – 570, l. 11; Tr. 576, ll. 7-20; SLED Report 12. Then-Lieutenant Christopher Phillips of the Kershaw County Sheriff's Office obtained and executed a search warrant on Appellant's cell at 12:00

p.m. Tr. 139, ln. 20–Tr. 143, ln. 1; Tr. 533, ln. 13–Tr. 534, ln. 11; Tr. 567, ln. 3–Tr. 572, ln. 21; SLED Report 9-12. In support of the warrant, Phillips alleged in a written affidavit that a confidential jail informant reported that Appellant’s girlfriend sent him mail laced with amphetamines. He also alleged that Appellant tested positive for amphetamines in a drug test administered that same day. SLED Report 11; SLED Report 17-20. In reality, the results of the test did not come back until 1:00 p.m., and the results were negative for all drugs, including amphetamines. SLED Report 341. Phillips had also ordered the test without the knowledge or consent of the detention center director.<sup>2</sup> SLED Report 252.

The warrant described the items to be seized as “all papers and effects belonging to inmate Greg Smith. To Include but not limited to pictures, letters, envelopes and memo’s.” SLED Report 10 (emphasis added). Although the underlying allegation implicated only materials from Appellant’s girlfriend, Phillips said he seized all of Appellant’s papers because “I could not pinpoint a specific item . . . that could have potentially been laced with some type of material, it had to be all collected up at one time.” Tr. 574, l. 19 – Tr. 575, l. 3.

Phillips seized Appellant’s Brady and Rule 5 materials. The materials were clearly organized into stacks of related documents. SLED Report 55-184. They included witness statements from Horace Lee, Appellant’s girlfriend Samantha Steeprock, and Virginia Grady. In front of each were one to three pages of Appellant’s handwritten notes on the content of the statements for purposes of his defense. SLED Report 86-100. The materials also included a SLED forensic report with a page of Appellant’s handwritten notes; the initial search warrant for Appellant’s residence with two pages of handwritten notes; the Kershaw County Sheriff’s Office incident from the original incident with three to four pages

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<sup>2</sup> Officer Phillips was later promoted to Captain and then demoted to Corporal. Tr. 572, l.

of handwritten notes; and Appellant's criminal history report with handwritten notes. SLED Report 106-184. Finally, the seized materials included Appellant's request to Tetterton for information regarding motions and trial procedures, SLED Report 43, notes on Appellant's suspicion that Phillips "used Mr. Tetterton and coer[c]ion to gain a confession," SLED Report 59, and a two and one-half page draft of an opening statement for trial, SLED Report 102-104; Tr. 599; ll. 5-12.

Tetterton was not aware of the warrant and was not present when Phillips executed it. Sometime after the seizure, Appellant fired Tetterton as his lawyer, claiming Tetterton had conspired with the solicitor and the sheriff's office to obtain a confession. The State then appointed Riley as Appellant's trial counsel. SLED Report 30; Tr. 113, ln. 15-Tr. 126, ln. 13.

Over the following months, Appellant made continuous efforts to reacquire his notes and other legal paperwork. On October 7, 2011, Appellant filed a grievance report seeking the return of his paperwork. SLED Report 259-261. On September 9, 2011, Appellant sent a letter to the Kershaw County Sheriff's Office seeking the paperwork. SLED Report 263. On September 12, 2011, Appellant filled out an "Inmate to Staff Request Form" complaining about his seized paperwork. SLED Report 273-275. On September 24, Appellant filed another grievance form. SLED Report 264-272. Later in 2011, Appellant sent multiple letters to Mark Keel, Chief of SLED, informing him of the seizure of his papers. SLED Report 248-250. On or about January 4, 2012, Appellant filed a complaint in South Carolina federal court against the Kershaw County jail director and Phillips, claiming they had wrongfully seized and kept the materials. SLED Report 199.

All of Appellant's pretrial efforts to secure the materials necessary to prepare his defense were fruitless. His only relief finally came after the commencement of trial when he was permitted to directly address the trial court regarding his decision whether to testify in presenting his defense. Appellant initially attempted to take the stand and introduce on his own various documents into evidence. Based on Riley's lack of knowledge as to the contents of the documents in conversing with the trial judge, he and Appellant had apparently not discussed the materials at length, if at all. Tr. 592, ln. 11—Tr. 594, ln. 3. The trial judge admonished Appellant he needed to converse with Riley. Tr. 593, ll. 5-17. Appellant then informed the judge about the broader problem undermining his defense:

I got – all my family is in Maine. The only way to get a proper defense is through the manual system. I have Mr. Riley, and the evidence that I'm bringing in is from – under penalties of perjury in a civil suit in which my evidence from August 15<sup>th</sup> of last year to May 28<sup>th</sup> back is missing. Law enforcement took it. So therefore I'm at a disadvantage, where I don't have anybody. I don't have anybody on the outside but Mr. Riley.

Tr. 592, ln. 11—Tr. 596, ln. 23. Appellant further explained to the court that he had lost “anything that I had started to build my case,” Tr. 600, ll. 15-16, and he had documentary evidence of “several attempts to get my legal documents back from the Kershaw County sheriff's office. They will not give me my paperwork back. I got a huge hole in my defense.” Tr. 600, ll. 4-8. Appellant notified the court of the case he filed in federal district court. Tr. 593, ll. 20-25; Tr. 601, ln. 2 –Tr. 602, ln. 4

Appellant argued that the seizure of his papers amounted to a denial of his Fourteenth Amendment right to a fair trial. Tr. 602, ll. 17-22. To provide Appellant time to review other materials he did have in his possession at the time, the trial court continued the case at approximately 11:00 a.m. to reconvene at 9:00 the following morning. Appellant

asked the court to help him obtain the seized paperwork. The court instructed him to seek help from his counsel. Tr. 604, ln. 9–Tr. 606, ln. 25.

The following day, Appellant told the court he had decided not to testify. The solicitor told the court that after adjournment the previous day, he had Appellants papers, still in custody at the Kershaw County Sheriff's Office, copied and provided to Appellant and his counsel. Tr. 612, ln. 13–Tr. 614, ln. 1.

Appellant subsequently offered no evidence in his defense. Tr. 617, ln. 1–Tr. 619, ln. 14. After the jury found him guilty of both charges, the court delayed sentencing and allowed Appellant to state for the record any claims of error with respect to his prosecution. Appellant claimed that while he was in pretrial detention in Kershaw County, the State obtained his legal materials in violation of his constitutional rights. Appellant also informed the court he had correspondence to and from SLED regarding the matter. The trial judge instructed trial counsel to follow up with SLED to determine the status of any investigation into a violation of Appellant's rights. Tr. 713, l. 15 – Tr. 724, l. 3.

At his sentencing hearing on December 12, 2012, Appellant repeated his allegation of denial of a fair trial, stating had he not been deprived of his paperwork, he would have had identifiable witnesses and documents to present at trial. Tr. Dec. 12, 2012 at 1; Tr. Dec. 12, 2012 at 15, ll. 11-22. "They had the right to inspect the letters. That's true, but to remove my defense from my possession at that time and return it to me the day before the jury goes into deliberation had a serious effect on my trial . . . ." Tr. Dec. 12, 2012 at 16, ll. 14-18.

At the end of the hearing, trial counsel noted that the trial judge had previously requested a SLED investigation into the seizure of Appellant's papers and that such a report

had been made. Upon asking for a copy of the report, the trial court stated it had yet to review the report and might release it later if the circumstances called for it. Tr. Dec. 12, 2012 at 19, ln. 11–Tr. Dec. 12, 2012 at 20, ln. 2.

### DISCUSSION

Appellant was denied Due Process of law because he sought to decide whether to waive counsel and prepare his own defense, but he was never afforded the chance to intelligently make the decision. A pretrial detainee is presumed innocent and has his rights curtailed only to the extent justified by considerations underlying the operation of the detention facilities. *See State v. Ellefson*, 266 S.C. 494, 500, 224 S.E.2d 666, 669 (1976). “Pursuant to the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness.” *State v. Hutton*, 358 S.C. 622, 631, 595 S.E.2d 876, 882 (Ct. App. 2004) (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984)). “This standard requires criminal defendants be afforded a meaningful opportunity to present a complete defense.” *Id.*

“The right to defend is given directly to the accused,” *Faretta v. California*, 422 U.S. 806, 819-20 (1975), and “forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.” *Id.* at 817. Thus, a criminal defendant has the Due Process right to self-representation under both the federal and state constitutions. *State v. Starnes*, 388 S.C. 590, 698 S.E.2d 604 (2010); *Faretta*, 422 U.S. at 818. “Unless the accused has acquiesced in [appointed] representation, the [presentation of such a defense] is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.” *Faretta* at 821.

Such a “knowing, intelligent, and voluntary decision ‘must be honored out of that respect for the individual which is the lifeblood of the law.’” *State v. Barnes*, Op. No. 27322 (Jan. 15, 2014) (quoting *Faretta* at 834) (providing defendant could intelligently waive counsel and proceed pro se based on “trust issues”). It cannot be doubted that denial of the opportunity to make the decision when sought is a deprivation of the right itself. *See, e.g., U.S. v. Portillo*, 633 F.3d 1313, 1324-25 (9th Cir. 1980) (“Appellant's contention that his right to self-representation was denied him due to the district court's unreasonable restrictions on research is without merit. Appellant had sufficient time to conduct his research prior to trial if he truly wanted to proceed in pro per.”).

The record in this case repeatedly shows Appellant sought before the trial court the opportunity to decide intelligently whether to waive counsel and prepare his own defense. Appellant was consistently disinterested in appointed representation. He fired Tetterton early in the case, in doing so even rejecting a plea deal Tetterton had secured as discussed in the SLED report. Also appearing in the report, Appellant's worries about Tetterton conspiring with authorities against him indicated trust issues with appointed representation in general. At trial, when they discussed his defense with the trial judge, neither Appellant Riley made reference to any substantial communications between the two about examining the State's evidence or possible defenses. Indeed, Appellant never stated that he had actually relied on or asked anything of Riley. The trial judge plainly recognized the disassociation when he called out their lack of communication and instructed Appellant to defer to Riley.

The record also shows Appellant consistently pursued representing himself. At trial Appellant attempted to offer into evidence on his own various documents with which Riley

was woefully unfamiliar. He expressly explained to the court he had been working to develop a defense himself and alluded to the claim he was pursuing pro se in federal court that was necessary to “build his case” and correct the “hole in [his] defense.” He then asked the trial judge directly to compel the return of his papers rather seeking help from Riley. In addition, the SLED report revealed that Appellant had organized and studied his legal paperwork while also creating substantial notes on the State’s evidence, requests for information on court procedures, and drafts of statements to a jury for trial. Further, his efforts to reacquire the papers were commensurate with a serious contemplation of self-representation. The SLED report disclosed that he pleaded for the materials through four written communications to local authorities, letters to SLED, and the ultimate filing of a lawsuit in federal district court.

The communications at trial, the information in the SLED report, and Appellant’s arguments post-trial all reasonably indicated to the trial court Appellant’s good faith desire to further consider representing himself. No meaningful sign of his acquiescence in representation by appointed counsel appeared before the court below until the middle of trial, when the case was too far gone Appellant had no realistic options once and for all. He was precluded from making that decision by the seizure of his legal paperwork and the resulting dearth of understanding of his case. The right to defend should have been afforded the greatest honor and been given directly to him first.

**CONCLUSION**

For the foregoing reasons, Appellant Gregory Smith respectfully requests reversal of his convictions and remand for a new trial.

Respectfully submitted,

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of January, 2014.

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APPELLATE CASE NO: 2012-213666

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PETITION TO BE RELIEVED AS COUNSEL

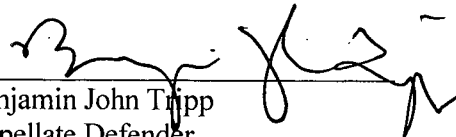
SC Court of Appeals

Counsel for Gregory V. Smith states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge G. Thomas Cooper, Jr., which was held on October 22-26, 2012, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Gregory V. Smith.

Respectfully submitted,

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of January, 2014.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:


- (1) True-billed indictment(s);
- (2) Entire Trial Transcript October 22 – 25, 2012
- (3) Entire Trial Transcript December 12, 2012
- (4) SLED Investigative Report

I certify that this designation contains no matter which is irrelevant to this appeal.

January 16th, 2014

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JAN 17 2014

  
Benjamin John Tripp  
Appellate Defender

**SC Court of Appeals**

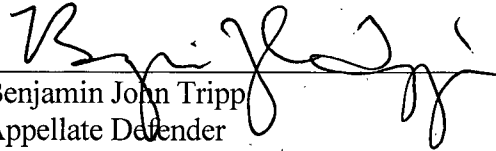
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 16, 2014

  
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter has been served on Gregory V. Smith, #00353524 at Lieber Correctional Institution, this 16th day of January, 2014.

  
Benjamin John Tripp  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 16th day of January, 2014.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.

**RECEIVED**

JAN 17 2014

**SC Court of Appeals**