STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARQUIS DELLAN EVANS,

APPELLANT

APPELLATE CASE NO. 2016-000307

FINAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589
(803) 734-1343

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STATEMENT OF ISSUE ON APPEAL

Did the court err by permitting Appellant to waive his right to counsel and proceed *pro se* without conducting the proper inquiry mandated by Faretta v. California, 422 U.S. 806 (1975)?

STATEMENT OF THE CASE

A York County Grand Jury indicted Appellant at the January 21, 2016 term of the Court of General Sessions for failure to stop for a blue light and resisting arrest. R. 167-170. His case was called to trial on February 8, 2016 before the Honorable John C. Hayes, and a jury. R. 1. Assistant Solicitors Megan Fuller and Jessica Holland represented the state, and Mindy Lipinski was standby counsel for Appellant who proceeded *pro se*. R. 1.

On February 10, 2016, the jury found Appellant guilty. R. 157, l. 24 – 158, l. 10. Judge Hayes sentenced him to eight years imprisonment for resisting arrest and three years concurrent for failure to stop for a blue light. R. 164, ll. 3-7.

This appeal follows.

STATEMENT OF FACTS

The state alleged at trial that Appellant failed to properly pull over when signaled by Officer Robert Smith of the Rock Hill Police Department on the evening of June 21, 2015. Smith claimed Appellant nearly struck his marked patrol vehicle with his car as Smith was making a three point turn in the middle of the road. After Appellant nearly struck his patrol car, Smith alleged he pulled alongside Appellant's car, rolled down his window, and observed Appellant's face. He claimed Appellant's "eyes kind of rolled a little bit" and were "very watery looking." Smith suspected Appellant was intoxicated. R. 48, l. 11 – 49, l. 13.

As Appellant drove away, Smith followed and notified dispatch he was going to make a traffic stop. Smith said he followed behind Appellant with his blue lights and siren on for "two thirds of a mile." R. 49, l. 14 – 50, l. 3. He claimed Appellant's car did not stop until it was forced to stop because of "a large block party [that was] going on" in the middle of the street. Smith said, "There was cars in the roadway, people on both sides of the street." He thought Appellant "was trying to figure out if he could get around the vehicles," but Appellant eventually stopped. R. 50, ll. 4-15.

Smith then "went to challenge the driver." R. 50, ll. 15-17. He "quickly moved up alongside his [Appellant's] vehicle" with his "weapon drawn and pointing towards the driver's door." Smith yelled, "[S]how me your hands, show me your hands." R. 51, ll. 11-14. Smith claimed Appellant immediately "stepped out of the vehicle" and "the look on his [Appellant's] face was just a we're gonna fight." Noticing Appellant did not have a weapon, Smith holstered his handgun and "moved in quickly." Smith claimed Appellant struck him "on the left side of [his] face" with his forearm. Smith grabbed Appellant in "a bear hug" and then Appellant allegedly "grabbed [Smith] and started trying to throw [Smith] on the ground." R. 51, l. 15 – 52, l. 8.

Appellant was subsequently "taze[d]" three times by Officer Dustin Ochiltree, who was training with Smith that evening. Once subdued, Appellant was arrested. R. 52, l. 11 – 53, l. 24.

The jury found Appellant guilty of both failure to stop for a blue light and resisting arrest.

ARGUMENT

The court erred by permitting Appellant to waive his right to counsel and proceed *pro se* without conducting the proper inquiry mandated by *Faretta v. California*, 422 U.S. 806 (1975).

Relevant Facts

Appellant moved pretrial to relieve his court appointed attorney, Mindy Lipinski. Lipinski informed the court that Appellant wished to relieve her as counsel because he wanted "to make a number of motions that I don't believe have as much legal merit as he does" and because he was not satisfied with the plea offer Lipinski obtained from the state. R. 7, ll. 19-25; R. 5, ll. 20-23.

When asked by Judge Hayes, Appellant stated he wanted the court to relieve Lipinski as counsel. The court informed Appellant that if Lipinski was relieved, Appellant would "be going to trial this week on [his] own without an attorney." Appellant said he understood. R. 8, ll. 1-7. The court then warned Appellant: "Well it's dangerous for you to represent yourself and there is a benefit in having an attorney because an attorney knows the things to bring to the Court's attention and knows the motions and how to try a case." R. 8, ll. 16-20.

Appellant again indicated that he understood, but still wished to relieve Lipinski as counsel. Immediately thereafter, Judge Hayes relieved Lipinski, but had her remain as standby counsel. R. 9, ll. 1-11. Appellant proceeded to trial *pro se*.

The only background information the court asked of Appellant before relieving Lipinski as counsel was his age, the extent of his education, and his employment. Appellant told the court he was thirty-eight years old and had a GED. However, according to the record, Appellant never informed the court about his employment, if any. R. 4, ll. 15-25.

The following day, before jury selection, Appellant told the court he wanted "to have a different attorney if possible" and "I believe I don't know what I'm doing." R. 14, ll. 14-23. The court responded:

> **Well, I know you don't**. That's why I told you yesterday it was dangerous for you to fire your attorney but you insisted on doing it. I didn't think it was very wise but whether I think it was wise or not in my eyes now its up to you to determine whether you're doing something wise. Ms. Lipinski's here. I'll allow her to continue to represent you if she doesn't have any objection to that as she was prepared yesterday. But you've indicated you do not want her to represent you so we're sort of in the land of – Well, we're sort of in a situation where you put yourself in a situation that's going to require you to either use Ms. Lipinski but you don't want to do, or represent yourself, which I told you doesn't really make sense to me, but that's your choice.

R. 14, l. 24 – 15, l. 12 (emphasis added).

Counsel Lipinski never stated on the record whether she was prepared and willing to continue to represent Appellant. However, as the court noted, Lipinski was prepared to try to case the previous day. Cf. State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998).

Appellant later told the court, "I'm not prepared enough" and "I don't know what kind of motions. I don't know what kind of motions to file. I ask for a continuance or something so I [can] get prepared." R. 16, ll. 2-3; R. 18, ll. 1-3. The court never addressed Appellant's request for a continuance. Appellant also told the court, "Like I said *this is my first time really doing this* so I'm just gonna follow your lead." R. 19, ll. 2-3 (emphasis added).

Appellant ultimately proceeded to trial *pro se* and was convicted by a jury as indicted. R. 157, l. 24 – 158, l. 10. Judge Hayes sentenced him to eight years imprisonment for resisting arrest and three years concurrent for failure to stop for a blue light. R. 164, ll. 3-7.

Discussion

The court erred by permitting Appellant to waive his right to counsel and proceed *pro se* without conducting the proper inquiry mandated by Faretta v. California, 422 U.S. 806 (1975). The trial judge failed to sufficiently inquire into Appellant's background, learning only minimal information about him, and wholly failed to inquire into Appellant's knowledge of the various aspects of a trial, including the procedural rules, the elements of the charges against him, and his available defenses. Because the record fails to show Appellant knowingly and voluntarily waived his right to counsel, this Court should hold the trial court erred by allowing Appellant to proceed *pro se* and remand for a new trial.

"A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) (citing State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010)). "So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta." Id. (citing State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010)).

"Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel." Id. (citing Reed, 332 S.C. at 41, 503 S.E.2d at 750). "Recognizing that it may be to the defendant's detriment to be allowed to proceed *pro se*, his knowing, intelligent and voluntary decision 'must be honored out of that respect for the individual which is the lifeblood of the law.'" Id. (citing Faretta, 422 U.S. at 834).

In State v. Barnes, 407 S.C. 27, 31, 753 S.E.2d 545, 548 (2014), our Supreme Court held Barnes should have been allowed to represent himself where he "demonstrated an understanding of the process of capital *voir dire*, stated his intention to pursue a third-party guilt defense at trial, and

discussed relevant case law, the burden of proof, and his right to testify." Barnes also answered the judge's detailed inquiries about the problems with his defense attorneys and the "trust issues" about why he felt betrayed. Id. at 32, 753 S.E.2d at 548. Barnes demonstrated he had read relevant case law and showed some understanding of the rules of evidence when questioned by the trial judge. Id. at 33, 753 S.E.2d at 548.

In State v. Starnes, 388 S.C. 590, 601, 698 S.E.2d 604, 610 (2010), our Supreme court held Starnes knowingly and voluntarily waived his right to counsel after "the trial court methodically and carefully explained the dangers of self-representation and ensured that [Starnes] understood the various issues that would arise at trial." In so holding, the Court noted, "The trial judge inquired into [Starnes'] mental state and his knowledge of numerous aspects of a trial, including procedural rules, elements of the charges against him, and available defenses." Id.

None of the factors in Barnes or Starnes, which evidenced an intelligent waiver of the right to counsel and that the defendant was proceeding with the full understanding of the dangers and disadvantages of self-representation, exist in the record before this Court.

Here, the trial judge failed to sufficiently inquire into Appellant's background and knowledge of the various aspects of a trial. The judge merely learned Appellant's age, thirty-eight years old, and his education level: Appellant never completed high school and had only obtained a GED. R. 4, ll. 15-20. The court failed to discover Appellant's employment history, if any.

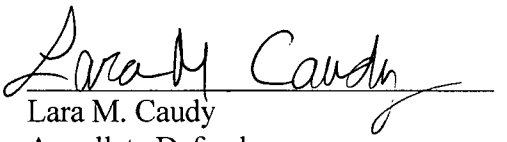
Moreover, the trial court failed to ask Appellant about his prior experience with the criminal justice system and whether he had ever proceeded to trial before a jury in the past. Significantly, Appellant never demonstrated an understanding of the procedural rules, his available defenses, or the elements of the charges against him.

Because the record fails to show Appellant knowingly and voluntarily waived his right to counsel, this Court should hold the trial court erred by allowing Appellant to proceed *pro se* and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of February, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

February 3, 2017

Lara M. Caudy
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589