STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals

Honorable James R. Barber, Circuit Court Judge

Opinion No. 2017-UP-383 (Filed October 18, 2017

THE STATE,

RESPONDENT,

V.

VINCENT MISSOURI,

PETITIONER

APPELLATE CASE NO. 2018-000057

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err in finding petitioner was not denied his Sixth Amendment right to proceed *pro se*?

STANDARD OF REVIEW

The standard of review for this case is *de novo*. "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, 2018 WL 1077731, Op. No. 27768 (S.C. Ct. filed Feb. 28, 2018) (Shearouse Adv. Sh. No. 9 at 43). Appellate courts review "a circuit judge's findings of historical fact for clear error," but "review the denial of the right of self-representation based upon those findings of fact de novo." Id. When reviewing a trial judge's refusal to permit an individual to proceed pro se, the appellate 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." Id.

STATEMENT

On November 12, 2013, a Pickens County grand jury indicted petitioner for entering a bank with intent to steal, armed robbery, and failure to stop for a blue light. R. 237-45. On December 19, 2013, a hearing was held before the Honorable Letitia H. Verdin on a motion filed by petitioner's attorney to be relieved. R. 1. Doug Richardson represented the State. R. 1. Aaron Angell represented petitioner. R. 1. Judge Verdin denied petitioner's request to proceed *pro se*. R. 7, ll. 22 – 23.

On May 19, 2014, petitioner was tried before the Honorable James R. Barber, III, and a jury. R. 14. Doug Richardson again appeared for the State and Aaron Angell again represented petitioner. R. 14. The jury convicted petitioner of entering a bank with intent to steal, strong arm robbery, and failure to stop for a blue light. R. 224, ll. 16 – 25. Judge Barber sentenced petitioner to concurrent terms of twenty years' imprisonment on the bank charge, five years' imprisonment for strong arm robbery, and three years' imprisonment for failure to stop for a blue light. R. 234, ll. 6 – 20.

On appeal, petitioner was initially represented by Tiffany Butler, who filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). On June 13, 2016, the Court of Appeals denied the petition to be relieved and ordered briefing of the issue, "Was Missouri denied his Sixth Amendment right to proceed pro se?" Petitioner's current counsel began representing him before the filing of the initial reply brief. The materials submitted by petitioner pursuant to the Anders procedure were made a part of the Record on Appeal by consent of the parties. Supp. R. 1 – 42. On October 18, 2017, the Court of Appeals affirmed petitioner's convictions. App. 1. This Court granted certiorari and this brief of petitioner follows.

ARGUMENT

The Court of Appeals erred in finding petitioner was not denied his Sixth Amendment right to proceed *pro se*.

Introduction

Petitioner Vincent Missouri's case provides this Court with the opportunity to guide trial judges and criminal defendants in the proper way the issue of self-representation should be litigated. Instead of dealing with the question of representation immediately before trial—which raises the spectre of unscrupulous criminal defendants attempting to manipulate the system to either get a different lawyer or postpone an inevitable conviction—Missouri's case shows that if handled properly by an earnest defendant and the trial court, the representation question can be and *should be* decided well before trial so all parties can prepare. Properly settling the representation question as early as possible avoids the situation foisted upon Missouri in this case and helps promote an efficient trial with all parties, including the trial judge and the solicitors, knowing what to expect when the trial begins.

Missouri's Asserted His Sixth Amendment Right Two Years Before Trial

Missouri did everything we ask of a criminal defendant who legitimately and earnestly wants to represent himself at trial. Missouri's trial began May 19, 2014. R. 14. Nearly two years earlier, Missouri told the court he wanted to represent himself. Supp. R. 6. In a letter filed June 26, 2012, Missouri informed the court that he "received a letter from the Pickens County Public Defender's Office, stating they would not be able to represent me (blessings come in in all forms). **I however, will be representing myself**, and could use some assistance in getting to a 'law library' or a laptop computer with Nexis Lexis capabilities." Supp. R. 6 (emphasis added). Along with his letter informing the court he intended to represent himself, he included three

motions: (1) Motion for Change of Venue; (2) Motion for a Speedy Trial; and (3) a discovery motion. Supp. R. 1 – 5. Missouri included a certificate of service. Supp. R. 5. In response, the clerk wrote he was forwarding Missouri's motions to the solicitor's office. Supp. R. 7.

Missouri's letter and motions indicate an advanced knowledge of criminal procedure for a layman. Supp. R. 1 – 6. His motions are well-written, concise, and free of the gibberish and conspiracy theories frequently seen in *pro se* filings. Supp. R. 1 – 6. The motions have captions, case numbers, and cite the correct authorities, including Article I, section 10 of the South Carolina Constitution for his right to a speedy trial and Brady v. Maryland, 373 U.S. 83 (1963) in his discovery motion. Supp. R. 3 – 4. Missouri's filings indicate knowledge of practice and procedure sufficient to represent himself, although such a capability is not required. State v. Samuel, 2018 WL 1077731 at *3, Op. No. 27768 (S.C. Ct. filed Feb. 28, 2018) (Shearouse Adv. Sh. No. 9 at 43) ("In other words, whether a defendant is capable of effectively representing himself has no bearing upon his ability to elect self-representation.") citing Godinez v. Moran, 509 U.S. 389, 400 (1993).

Almost exactly a year later, on July 29, 2013, Missouri wrote Chief Justice Toal in frustration with the clerk's adherence to the prohibition on hybrid representation. Supp. R. 9. In his letter to the Chief Justice, he cites the Sixth Amendment, Faretta v. California, 422 U.S. 806 (1976), and McKaskle v. Wiggins, 465 U.S. 168 (1984). Supp. R. 9 – 13. By this point, Missouri was represented by Aaron Angell. Supp. R. 8. On August 20, 2013, the Pickens clerk wrote Missouri that no right to hybrid representation exists. Supp. R. 14.

On September 2, 2013, Missouri submitted a Motion to Relieve Counsel. Supp. R. 15. Missouri cited concerns about Mr. Angell's caseload, the failure to file requested motions, and the time spent in pre-trial detention without bond. Supp. R. 15-16. The clerk responded on

September 4, 2013, that he was returning Missouri's motion and would not file it. Supp. R. 18. Missouri wrote again on September 8, 2013, demanding that the clerk file his motion. Supp. R. 19-21. The clerk replied on September 11, 2013, telling Missouri that he did "not understand that I am trying to help you by telling you to contact your attorney." Supp. R. 22. Missouri again responded on October 8, 2013, telling the clerk that he was acting on his own behalf, that communication with Mr. Angell had ceased, and requesting the court's "immediate attention" to his motions. Supp. R. 23.

Missouri included two more motions with his October 8 letter. Supp. R. 24 – 34. The clerk wrote Missouri three days later again telling him that he would not file his motions and that Mr. Angell "will remain your attorney until the time a Circuit Court Judge signs an order relieving him as your attorney." Supp. R. 35. On October 16, 2013, Mr. Angell filed a Motion to Withdraw as Counsel telling the court that Missouri needed "new counsel appointed or in the alternative continue with the defense of his case Pro Se." Supp. R. 36. The court set a hearing, which was held two months later. R. 1.

Judge Verdin's Denial of Missouri's Right to Represent Himself

At the hearing five months before Missouri's trial, Judge Verdin, without following any of the requirements of Faretta, refused to allow Missouri to represent himself. R. 7, ll. 22 – 23. The judge failed to recognize that "[s]o long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014). When the defendant makes an unequivocal invocation of his right to represent himself, a trial court must honor that right after warning the defendant of the dangers of self-representation and ensuring the waiver of the right to counsel is knowing and intelligent. Id. at 35-36, 753 S.E.2d at 550. See also State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170

(1999) (The Sixth Amendment's right of self-representation "must be preserved even if the court believes that the defendant will benefit from the advice of counsel.")

The only factor Judge Verdin considered was an improper one: the seriousness of the charges faced by Missouri. The Sixth Amendment's guarantee of the right to represent yourself exists in cases both large and small. See Barnes at 29-30, 753 S.E.2d at 546-47 (reversing death sentence because of denial of right of self-representation); Fuller at 239, 523 S.E.2d at 169 (reversing murder conviction and LWOP sentence because of denial of self-representation); City of Columbia v. Assa'ad-Faltas, 420 S.C. 28, 31-32, 800 S.E.2d 782, 783 (2017) (affirming denial of right because defendant in simple assault case in municipal court equivocated and repeatedly abused the judicial system).

Missouri then told the court he was ready to represent himself rather than proceed with his attorney, but the court refused to consider his request. R. 5, l. 12 –7, l. 23. The trial judge asked Missouri's attorney what charges he faced and after the lawyer's reply, the trial judge ruled, **"Pro se is not in the realm of possibility right now."** R. 7, ll. 22 – 23 (emphasis added). The trial judge further told Missouri that he did not need to "change horses in midstream" even though the trial was five months away. R. 9, l. 22 – 10, l. 15. Judge Verdin ordered Missouri to "make everything go through your lawyer." R. 11, l. 6 – 12, l. 2. Missouri responded, "So in other words, I have to keep him." R. 12, ll. 3 – 4. The court said, "Bottom line, you got to keep him. You're going to be happy with him." R. 12, ll. 5 – 6. Missouri responded, "Oh, boy." R. 12, l. 7.

The Court of Appeals agreed that Judge Verdin's ruling was erroneous. App. 3. The Court wrote, "We find Missouri was initially denied the right to represent himself at a hearing five months prior to trial; however, Missouri abandoned or waived the right via his subsequent

conduct on the day his trial began." App. 3. The court correctly recognized that Judge Verdin's failure to conduct any inquiry under Faretta and brushing aside Missouri's request was error. The court's conclusion that later events undid this structural error is incorrect and is the issue before this Court.

The Judge's Inquiry into Missouri's Representation on the Day of Trial

Five months after Judge Verdin denied Missouri the right to represent himself, his case was set for trial before Judge Barber. R. 14. Mr. Angell appeared on Missouri's behalf. R. 14. When Judge Barber learned that Judge Verdin had earlier denied Missouri's motion to represent himself, he stated, "Well, that motion's been taken care of." R. 24, ll. 14 – 20. Judge Barber told Missouri that he lacked the ability undo Judge Verdin's ruling. R. 25, ll. 2 – 8. Judge Barber stated, "And if there's an error in that regard, then you will have to deal with it in the future." R. 25, ll. 2 – 12.

After taking up other matters, Judge Barber then reconsidered his earlier decision and told Missouri he could move to represent himself. R. 45, ll. 4 – 23. However, the court was clear that the trial was going forward that day, regardless of whether Missouri represented himself or not. R. 45, l. 4 – 50, l. 6. Missouri protested about "the twenty-three months that I was trying to do this. . . " when the court interrupted him and demanded that he decide immediately whether to move to represent himself. R. 45, l. 20 – 46, l. 15. The trial judge told appellant "If you make the motion. If you don't want to make the motion, that's fine. We're ready to go. What is it you want to do?" R. 46, ll. 12 – 15. When Missouri protested that he was being put "in an awkward position" the trial judge again interrupted him. R. 46, ll. 16 – 22.

Missouri asked whether he would be allowed to litigate the *pro se* motions he filed and whether Judge Barber would "please grant me the right to go over my material as opposed to

what Mr. Angell did a poor job of doing this morning. Please give me that right." R. 48, ll. 8 – 13. Judge Barber replied, "No, sir." R. 48, l. 14. Missouri then told the Court, "I need to represent myself completely or not at all." R. 48, ll. 15 – 16. Missouri attempted to bring up the motions he wanted to make, but the trial court rebuffed him. R. 48, l. 17 – 49, l. 24. Judge Barber then stated, "It appears that Mr. Missouri is not prepared to make a motion in the matter, so we will go forward with [the trial]." R. 49, l. 25 – 50, l. 6. The Court of Appeals affirmed Missouri's conviction, holding, "Missouri chose to equivocate rather than commit to his own representation." App. 3.

The Court of Appeals' Ruling Punishes Missouri for Exercising his Sixth Amendment Right in Advance of Trial

Had Missouri's first effort to assert his Sixth Amendment right been on the day of trial, the Court of Appeals' ruling would likely be correct. The court's error lies in finding that Missouri's reluctance to proceed *pro se* on the day of trial when he was unprepared and had assumed Mr. Angell would handle his defense can be used to strip Missouri of this Sixth Amendment right and somehow undoes Judge Verdin's structural error. Missouri was unprepared to handle his defense because of the earlier wrongful denial of his request five months earlier. The court's ruling punishes Missouri for attempting to litigate the issue of his representation early instead of on the day of trial.

Timeliness is one of the three factors considered when conducting a Faretta inquiry. United States v. Bernard, 708 F.3d 583, 588 (4th Cir. 2013). While a defendant may certainly make a valid request to represent himself on the day of trial, the preferred method is to settle the question well in advance. The benchbook for federal district judges advises that representation issues, including a Faretta colloquy if necessary, should be decided at the defendant's first

appearance. Jona Goldschmidt, Has He "Made His Bed, and Now Must Lie in It?" Toward Recognition of the Pro Se Defendant's Sixth Amendment Right to Post-Trial Readmonishment of the Right to Counsel, 8 DePaul J. for Soc. Just. 287, 312-13 (2015). In his dissent from a denial of certiorari in Raulerson v. Wainwright, 469 U.S. 966 (1984), Justice Marshall wrote that a trial judge should immediately conduct a Faretta colloquy upon a defendant's request to represent himself. In Raulerson, the defendant sent the trial judge a letter unequivocally demanding to represent himself. Id. at 967. The trial judge "provided a copy of the letter to counsel and did nothing more." Id. Justice Marshall wrote that "once a defendant affirmatively states his desire to proceed *pro se*, a court should cease other business and make the required inquiry." Id. at 970. Justice Marshall continued:

> [I]f a trial court judge holds a *Faretta* hearing when the accused clearly asserts his desire to proceed *pro se*, the result will not do harm to the right to counsel. At the same time, the *failure* to hold a *Faretta* inquiry at this time *will* do injury to the right recognized in *Faretta*. Delay in holding a hearing after the right is unequivocally asserted undermines that right by forcing the accused to proceed with counsel in whom he has no confidence and whom he may distrust.

Id. at 970 (emphasis in original).

Faretta does not explicitly say when the court must decide whether a defendant will represent himself, but Faretta asked to represent himself "[w]ell before the date of trial." Faretta, 422 U.S. at 807. The trial judge held two hearings on whether Faretta could represent himself before conducting any substantive proceedings. Id. at 807-11. At the second hearing, the court held that Faretta had no constitutional right to represent himself and forced the public defender upon him. Id. at 809-10. The United States Supreme Court reversed. In reviewing lower court decisions, the Court stated, "We confront here a nearly universal conviction, on the part of our people as well as

our courts, that 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.

The majority opinion in Faretta hints at when a decision must be made about representation. The majority recognized that decisions on matters of trial strategy are allocated to counsel. Id. at 820. The Court stated this allocation was justified only "by the defendant's consent, **at the outset**, to accept counsel as his representative." Id. at 820-21 (emphasis added). Justice Blackmun's dissent noted "the procedural problems that . . . today's decision will visit upon trial courts in the future." Id. at 852. Among the dissent's list of procedural problems were whether a defendant must be given notice of his right to proceed *pro se* and "when must that notice be given?" Id. Justice Blackmun also asked, "How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*?" Id. The justices in Faretta expressed a clear preference that the question of the defendant's representation be decided early in the case.

Missouri's actions in this case eliminate all of the problems asked by Justice Blackmun because he sought to exercise his Sixth Amendment right well before trial. Missouri followed the intent of Faretta and should not be punished for bringing his desire to represent himself to the court's attention at his earliest opportunity. See Gardner v. State, 351 S.C. 407, 413, 570 S.E.2d 184, 187 (2002) (holding that one of ten relevant concerns under the Faretta inquiry is "whether the accused was attempting to delay or manipulate the proceedings"). He did not lie to the court and was respectful. See Samuel at *10 ("No one has the *right* to lie to the court and manipulate the proceeding.") (Kittredge, J., dissenting). The Court of Appeals' reasoning mangles the incentives courts should be creating for *pro se* defendants.

The waiver of the right to counsel must be knowing and voluntary and the waiver of the right to represent yourself must be the same. See United States v. Singleton, 107 F.3d 1091, 1095-96 (4th Cir. 1997). The Singleton court recognized that though no United States Supreme Court case "discussed in any detail the requirements for a waiver of the right to self-representation," the twin guarantees of counsel or a *pro se* defense "are essentially inverse aspects of the Sixth Amendment. . . ." Id. The defendant in Singleton did not make a timely assertion of his right to proceed *pro se*, firing his attorney mid-trial Id. at 1094-95. The trial judge denied the defendant a recess to examine the fired attorney's files. Id. The defendant challenged the trial judge's refusal to grant a recess. Id. at 1099.

The Fourth Circuit held that "because Singleton clearly did not make a timely assertion of his Faretta right, the district court had discretion to limit it." Id. The court held the trial judge did not err in denying the defendant's requests because of the mid-trial, unexpected request. Id. But the court's opinion is instructive on the effect and importance of a timely Faretta invocation. Id. The court stated it "would not condone unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." Id. (internal quotations and citations omitted). Importantly for Missouri's case, the Singleton court wrote, "**Had Singleton asserted his Faretta right before trial, he would have had no disadvantage in preparation time.** Furthermore, if that time were insufficient, the existing case law governing the granting of continuances might have afforded him yet more leisure to prepare his case." Id. (emphasis added).

Missouri tried to make this point to Judge Barber. R. 45, l. 4 – 50, l. 6. When he began talking about "the twenty-three months" he tried to represent himself, the court interrupted him. R. 45, l. 20 – 46, l. 15. He told the Court he needed to represent himself "completely or not at

all." R. 48, ll. 15 – 16. The time to represent himself completely would have been during the months of preparation leading up to the trial, not faced with a split-second decision to abandon either a constitutional right or a prepared, albeit unwanted, lawyer.

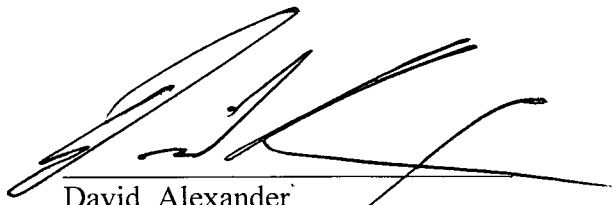
The trial court's insistence that Missouri must switch horses in mid-stream and now represent himself left him with no real choice. He could, as an incarcerated layman, unexpectedly and without preparation represent himself. Or, he could proceed with an attorney he did not want but who was prepared to try the case. This harsh choice was no choice at all. Missouri's purported waiver of the right to represent himself could not be voluntary. Judge Barber made it clear that Missouri's case would proceed to trial and would not be continued, despite the fact that Missouri assumed he would be represented by counsel because of Judge Verdin's ruling. Missouri could not meaningfully abandon or waive his right to represent himself given these circumstances.

The rule adopted by the Court of Appeals punishes defendants who truly want to represent themselves and do it the right way. The court's rule would require a defendant who suffered an erroneous ruling that his attorney would represent him to nevertheless attempt to prepare to try his case in the event he was offered the opportunity before trial. Most lawyers could not prepare to try a case in thirty minutes—much less an incarcerated layman. Furthermore, the right to represent yourself includes the right to prepare—to subpoena witnesses, hire experts, file pretrial motions, and research and select legal strategies. It cannot be disputed that Judge Verdin's ruling deprived Missouri of this right, and this deprivation is a structural error. Barnes at 35, 753 S.E.2d 549-50 (stating that the "erroneous denial of Faretta request is a structural error requiring automatic reversal"). Judge Barber's *pro forma* Sixth Amendment

inquiry on the day of trial did not somehow cure the structural error of Judge Verdin's earlier denial of Missouri's right to represent himself. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse petitioner's convictions and grant him a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

MAY 21 2018

S.C. SUPREME COURT

Appeal from Pickens County

Honorable James R. Barber, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VINCENT MISSOURI,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Vincent Missouri, #197996, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 21st day of May, 2018.

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of May, 2018.

Hank Seinsch (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023