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May 24, 2019

RECEIVED
MAY 24 2019
S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: The State v. Terry Edward McCall, Appellate Case No. 2015-001097
Oral Argument on Thursday, May 30, 2019 at 10:00 AM

Dear Mr. Shearouse:

The above referenced case is scheduled for oral argument on Thursday, May 30, 2019, at 10:00 AM. Pursuant to Rule 208(b)(7), SCACR, I would respectfully draw the Court's attention to additional authority that bears on the issues to be argued:

1. Osbey v. State, 425 S.C. 615, 825 S.E.2d 48 (2019) (holding defendant did not waive his right to counsel by conduct, and the requirement that defendant be made aware of the dangers of self-representation for waiver to be valid applied to any waiver);

2. Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002) (holding evidence was insufficient to support finding that defendant understood the dangers of self-representation and knowingly and intelligently waived his right to counsel when he pled guilty).

By copy of this letter, I am notifying opposing counsel, William M. Blitch, Jr., Esquire, of this submission of additional authority.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

Enclosures: Osbey v. State, 425 S.C. 615, 825 S.E.2d 48 (2019)
Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002)

cc: William M. Blitch, Jr., Esquire (with enclosures)

425 S.C. 615
Supreme Court of South Carolina.

Robert OSBEY, Petitioner,
v.
STATE of South Carolina, Respondent.

Appellate Case No. 2017-001038
|
Opinion No. 27866
|
Submitted November 15, 2018
|
Filed March 6, 2019

Synopsis

Background: Petitioner, who had pled guilty without counsel to two counts of trafficking in cocaine base and one count of possession with intent to distribute cocaine base, filed post-conviction relief (PCR) petition on ground that he did not waive his right to counsel. The trial court, Spartanburg County, Edward W. Miller, J., denied petition. Petitioner filed petition for writ of certiorari, which was granted.

Holdings: The Supreme Court, Few, J., held that:

[1] defendant did not waive his right to counsel by conduct, and

[2] requirement that defendant be made aware of dangers of self-representation for waiver to be valid applied to any waiver, overruling *State v. Roberson*, 382 S.C. 185, 675 S.E.2d 732.

Reversed and remanded for new trial.

James, J., filed concurring opinion in which Kittredge, J., concurred.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (11)

[1] **Criminal Law**
Right of Defendant to Counsel
Defendant in a criminal case has the right to the assistance of counsel. U.S. Const. Amend. 6.

Cases that cite this headnote

[2] **Criminal Law**
Capacity and requisites in general
Defendant may waive his right to counsel, but he must do so knowingly and intelligently. U.S. Const. Amend. 6.

Cases that cite this headnote

[3] **Criminal Law**
Waiver of right to counsel
For a knowing and intelligent waiver of defendant's right to counsel to occur, defendant must be: (1) advised of his right to counsel, and (2) adequately warned of the dangers of self-representation. U.S. Const. Amend. 6.

Cases that cite this headnote

[4] **Criminal Law**
Capacity and requisites in general
Defendant may waive his right to counsel by an affirmative, verbal request, or defendant's actions may constitute a waiver by conduct. U.S. Const. Amend. 6.

Cases that cite this headnote

[5] **Criminal Law**
Forfeiture or waiver of right by delay or misconduct
Defendant did not waive his right to counsel by conduct on basis that he failed to contact public defender's office to obtain representation in trial for trafficking in

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cocaine base and possession with intent to distribute cocaine base, since plea court did not mention the dangers of self-representation to defendant, and defendant's prior convictions and violations of probation and parole were an insufficient basis on which to find defendant actually understood the dangers of self-representation. U.S. Const. Amend. 6.

Cases that cite this headnote

[6] **Estoppel**
Nature and elements of waiver

A "waiver" is a voluntary and intentional abandonment or relinquishment of a known right.

Cases that cite this headnote

[7] **Criminal Law**
Capacity and requisites in general

Estoppel
Nature and elements of waiver

Waiver, such as a waiver of the right to counsel, requires a party to have known of a right and known that right was being abandoned. U.S. Const. Amend. 6.

Cases that cite this headnote

[8] **Criminal Law**
Capacity and requisites in general

Estoppel
Nature and elements of waiver

Any waiver, including a waiver of the right to counsel by conduct, must be knowing and intelligent. U.S. Const. Amend. 6.

Cases that cite this headnote

[9] **Criminal Law**
Waiver of right to counsel

For a waiver of the right to counsel to be knowing and intelligent, defendant should be made aware of the dangers and disadvantages of self-representation. U.S. Const. Amend. 6.

Cases that cite this headnote

[10] **Criminal Law**
Waiver of right to counsel

Requirement under *Faretta* and *Prince v. State*, 392 S.E.2d 462, that defendant must be made aware of the dangers and disadvantages of self-representation for waiver of the right to counsel to be knowing and intelligent applies to any waiver, whether the waiver is alleged to be by affirmative, verbal request or by conduct; overruling *State v. Roberson*, 382 S.C. 185, 675 S.E.2d 732. U.S. Const. Amend. 6.

Cases that cite this headnote

[11] **Criminal Law**
Counsel

When plea court does not mention the dangers of self-representation to defendant, appellate court looks to the record to determine if it shows the factual basis for the waiver of the right to counsel to determine whether waiver was knowing and intelligent, as required for waiver to be valid. U.S. Const. Amend. 6.

Cases that cite this headnote

****49 ON WRIT OF CERTIORARI**

Appeal from Spartanburg County, J. Derham Cole, Plea Court Judge, Edward W. Miller, Post-Conviction Relief Judge

Attorneys and Law Firms

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, and Assistant Attorney General Jordan Adraine Cox, both of Columbia, for Respondent.

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Opinion

JUSTICE FEW:

***617** Robert Osbey pled guilty to criminal charges without counsel. He later applied for post-conviction relief (PCR) on the ground he did not waive his right to counsel. We reverse the denial of his PCR claim because the record does not reflect a valid waiver of Osbey's right to counsel. In particular, the plea court did not ensure Osbey was aware of the dangers of self-representation. We remand to the court of general sessions for a new trial.

I. Facts and Procedural History

The State charged Osbey with two counts of trafficking in cocaine base and one count of possession with intent to ***618** distribute cocaine base. The charges stem from two incidents in which Osbey allegedly sold crack cocaine to a confidential informant. Osbey pled guilty almost a year after his arrest, without counsel. The plea court informed him of his right to counsel, and noted Osbey had previously been informed by a court official on three separate occasions that if he wanted to have a public defender appointed he would have to contact the public defender's office and submit an application. The plea court then asked, "Did you knowingly and intelligently make the decision not to have a lawyer assist you?" Osbey responded, "No, sir. I was trying to get one." Osbey explained he went to the public defender's office the week before but was told it was too late.

The plea court ruled,

> I find ... that you have knowingly waived your right to counsel by your conduct, ****50** having known and been advised that you could have an appointed lawyer but you needed to contact the public defender's office so that they could accept your application. And in a year's time ... you failed to do that. So, you have waived your right to counsel.

Osbey pled guilty to his charges, and the plea court sentenced him to eight years in prison, followed by three years of probation. Osbey did not appeal.

Osbey filed a PCR application on the ground he "did not knowingly and voluntarily waive his right to counsel." At the PCR hearing, Osbey's PCR counsel stated, "This was a pro se plea ..., but there was nothing on the record that Mr. Osbey was warned about the dangers of self-representation .... There is no evidence he had sufficient understanding for his actions to amount to a knowing and voluntary waiver of counsel." The PCR court found "the plea judge was correct in finding [Osbey] knowingly and voluntarily waived his right to counsel." We granted Osbey's petition for a writ of certiorari.

II. Analysis

[1] [2] [3] [4] A defendant in a criminal case "has the right to the assistance of counsel." *State v. Justus*, 392 S.C. 416, 419, 709 S.E.2d 668, 670 (2011) (citing U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 340-41, 83 S.Ct. 792, 794, 9 L.Ed.2d 799, 802-03 (1963)). The defendant may waive his ***619** right to counsel, but he must do so knowingly and intelligently. *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, 581 (1975). For a knowing and intelligent waiver to occur, the defendant must be "(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation." *Prince v. State*, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) (citing *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 581-82). A defendant may waive counsel "by an affirmative, verbal request," or a defendant's actions may constitute a "waiver by conduct." *State v. Roberson*, 382 S.C. 185, 187, 675 S.E.2d 732, 733 (2009).

[5] [6] [7] [8] [9] [10] The plea court found Osbey waived his right to counsel "by [his] conduct" because Osbey did not seek counsel after being told three separate times he needed to contact the public defender's office. [1] By definition, "A waiver is a voluntary and intentional abandonment or relinquishment of a known right." *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (citing ***620** *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009)), *opinion*

clarified on other grounds, 386 S.C. 274, 688 S.E.2d 120 (2009). "Waiver requires a party to have known of a right and known that right was being abandoned." 385 S.C. at 496-97, 685 S.E.2d at 607. Any waiver, therefore, including a waiver of counsel "by conduct," must be knowing and intelligent. For a waiver to be "knowing and intelligent," the defendant "should be made aware of the dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835, 95 S.Ct. at 2541, 45 L.Ed.2d at 581-82; ****51** *Prince*, 301 S.C. at 423-24, 392 S.E.2d at 463. The *Faretta* and *Prince* requirement applies to any waiver, whether the waiver is alleged to be by "affirmative, verbal request" or "by conduct." *See* *Goldberg*, 67 F.3d at 1100, 1101 (requiring *Faretta* warnings for a valid waiver by conduct); *State v. Jones*, 772 N.W.2d 496, 505 (Minn. 2009) ("The same colloquy required for affirmative waivers must also be given before a defendant can be said to have waived his right to counsel by conduct." (citing *Goldberg*, 67 F.3d at 1100)).

In *Gardner v. State*, 351 S.C. 407, 570 S.E.2d 184 (2002), this Court held the *Faretta* and *Prince* requirement of warning the defendant of the dangers of self-representation applies to waiver by conduct. The PCR court found the petitioner's conduct amounted to a waiver of his right to counsel. 351 S.C. at 410, 570 S.E.2d at 185. We explained the petitioner knew he might lose his right to counsel if he failed to obtain counsel prior to his guilty plea. 351 S.C. at 410-11, 570 S.E.2d at 185-86. We reversed, however, finding, "Petitioner was not adequately apprised of the dangers of self-representation." 351 S.C. at 412, 570 S.E.2d at 186.

[11] In this case, the plea court did not mention to Osbey the dangers of self-representation. When this happens, we look to the record to determine if it shows the factual basis for the waiver. *See, e.g.*, *Gardner*, 351 S.C. at 412, 570 S.E.2d at 186 ("In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed pro se, with 'eyes open,' then the petitioner did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial."); *Prince*, 301 S.C. at 424, 392 S.E.2d at 463 (finding no valid waiver because the record "[did] not demonstrate petitioner was sufficiently aware of the dangers of self-representation"). Osbey has two prior convictions for possession ***621** with intent to distribute cocaine base. He also violated his probation in 2004 and violated parole in 2007. There is nothing else in the record to indicate Osbey was aware of the dangers of representing himself. We find this is an insufficient basis on which to find Osbey actually understood the dangers of self-representation.

The State argues, relying on *Roberson*, a defendant need not be warned of the dangers of self-representation in a waiver by conduct case, only when the defendant expressly asserts his right to self-representation. In *Roberson*, this Court held the defendant waived his right to counsel by his conduct even though he was not warned of the dangers of self-representation. 382 S.C. at 188, 675 S.E.2d at 734. We found "both *Prince* and *Faretta* inapplicable" because those cases "addressed defendants who elected self-representation." 382 S.C. at 188, 675 S.E.2d at 733. Today, we cannot reconcile our statement in *Roberson* that *Faretta* and *Prince* are inapplicable to a waiver by conduct case with the clear and unmistakable authority discussed above—including *Gardner*—that they are applicable. Perhaps the result of *Roberson* can be justified on the basis of forfeiture.[2] However, to the extent *Roberson* is in conflict with the requirement that the defendant's knowledge and understanding of the dangers of self-representation is a necessary predicate to any waiver of counsel, we overrule it.

III. Conclusion

Osbey did not waive his right to counsel by conduct because Osbey was not warned of the dangers of self-representation. The decision of the PCR court is **REVERSED** and the case is remanded to the court of general sessions for a new trial.

BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. JAMES, J., concurring in a separate opinion in which KITTREDGE, J., concurs.

JUSTICE JAMES:

****52** ***622** I concur with the reasoning of the majority, but I write separately to point out practical issues facing the circuit court when the unrepresented defendant appears for plea or trial.

The deeper problem facing the circuit court in any given case is that there is typically no clear way to verify whether *Faretta* warnings have ever been given to the unrepresented defendant. Perhaps the ideal time for giving *Faretta* warnings to the unrepresented defendant would be during either the defendant's first appearance or second appearance. However, first appearances are typically conducted with neither a judge nor a court reporter being present; therefore, even if the warnings were then given, there would be no record they were then given or by whom they were given. Second appearances are usually conducted in the presence of a circuit judge, but more often than not, a court reporter is not present. Therefore, there is typically no record of the warnings being given during a second appearance. Even if a court reporter was present during a first appearance, a second appearance, or during some other transcribed proceeding, there would be no occasion for a transcript to be requested or typed until the time for appeal or the commencement of a PCR application. That is of no help to the circuit judge before whom the defendant appears for an imminent trial or plea. If, immediately prior to trial or plea, the unrepresented defendant claims he was not given *Faretta* warnings or does not recall if he was given the warnings, it would likely not be appropriate for the trial or plea judge to receive testimony of the solicitor on the point.

In *Wroten v. State*, we observed, "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. ... If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied." 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) ***623** (citing *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065 (11th Cir. 1986)). Consequently, the trial judge (or plea judge) has the ultimate responsibility of warning the unrepresented defendant of the dangers of self-representation immediately before the trial or plea is to begin. That paves the way for the dilatory defendant to manipulate the process for further delay, because the trial judge or the plea judge does not become involved until the tail end of the prosecution. Perhaps the most efficient way for this problem to be avoided is for the solicitor, when it becomes apparent a plea or trial is imminent, to bring the unrepresented defendant before the circuit court for the stated purpose of curing any *Faretta* ills. Even that approach would invite further dilatory conduct by the defendant.

There are obvious practical barriers to ascertaining whether an unrepresented defendant has been warned of the dangers of self-representation. However, the law requires the defendant to be so warned, and the majority correctly concludes there is no proof Osbey was so warned. The majority also correctly concludes there is no proof of waiver by conduct. Here, we have no choice but to reward Osbey with post-conviction relief, even though he, an experienced criminal defendant, was advised he could apply for a public defender several times, beginning almost one year before he pled guilty. I reluctantly concur.

KITTREDGE, J., concurs.

All Citations

425 S.C. 615, 825 S.E.2d 48

Footnotes

1 We understand the plea court's frustration with Osbey's dilatory conduct in failing to obtain counsel. In numerous cases, we have recognized a defendant may be found to have waived his right to counsel when it is clear to the court the defendant knew his unreasonable delays could result in a waiver. In *State v. Jacobs*, 271 S.C. 126, 245 S.E.2d 606 (1978), for example, we stated the trial court "had done all it could do to urge [the defendant] to" retain counsel, but the defendant refused. 271 S.C. at 127, 245 S.E.2d at 607. After examining the defendant's actions, we "conclude[d] that, by his conduct, appellant waived his right to counsel." 271 S.C. at 127-28, 245 S.E.2d at 607-08 (citing *United*

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States v. Arlen, 252 F.2d 491, 494 (2d Cir. 1958)). Relying on *Arlen*, we found the defendant knew the consequences of his actions—that if he did not obtain counsel in a timely manner he would lose his right to counsel—and we found he chose to forego counsel. 271 S.C. at 128, 245 S.E.2d at 608 (for clarification of our finding, *see* *Arlen*, 252 F.2d at 494 (holding "where a defendant ... has been advised by the court that he must retain counsel by a certain reasonable time ... the court may treat his failure to provide for his own defense as a waiver of his right to counsel")); *see also* *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995) (discussing "waiver by conduct," and stating, "Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel."); *Com. v. Means*, 454 Mass. 81, 907 N.E.2d 646, 658 (2009) ("The key to waiver by conduct is misconduct occurring *after an express warning has been given* to the defendant about the defendant's behavior and the consequences of proceeding without counsel.").

2 *See* *State v. Thompson*, 355 S.C. 255, 267, 584 S.E.2d 131, 137 (Ct. App. 2003) ("A defendant can forfeit his right to counsel irrespective of his knowledge of ... the dangers of self-representation." (citing *Goldberg*, 67 F.3d at 1100)); *but see United States v. Ductan*, 800 F.3d 642, 651 (4th Cir. 2015) ("a defendant may forfeit his right to counsel ... only in truly egregious circumstances"); *State v. Roberson*, 371 S.C. 334, 338, 638 S.E.2d 93, 95 (Ct. App. 2006) ("The record is devoid of any egregious misconduct on the part of Roberson to warrant the drastic sanction of forfeiture of the right to counsel."), *rev'd*, 382 S.C. 185, 675 S.E.2d 732.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by State v. Allen, S.C.App., April 18, 2007

351 S.C. 407
Supreme Court of South Carolina.

Charles GARDNER, Petitioner,
v.
STATE of South Carolina, Respondent.

No. 25528.
|
Submitted Feb. 21, 2002.
|
Decided Sept. 9, 2002.

Synopsis
Defendant pled guilty in the Anderson County Court, Frank Eppes, J., to trafficking twenty-eight grams or more, but less than 100 grams, of cocaine and to trafficking ten grams or more, but less than twenty-eight grams, of crack cocaine, and he sought post-conviction relief, alleging that he did not knowingly and intelligently waive his right to counsel. The Anderson County Court, H. Dean Hall, J., denied post-conviction relief, and writ of certiorari was granted. The Supreme Court, Toal, J., held that evidence was insufficient to support finding that defendant understood the dangers of self-representation and knowingly and intelligently waived his right to counsel when he plead guilty.

Reversed and remanded.

West Headnotes (3)

[1] **Criminal Law**
Guilty Plea

Evidence was insufficient to support finding that defendant understood the dangers of self-representation and knowingly and intelligently waived his right to counsel when he plead guilty to felony trafficking of cocaine and crack cocaine; although defendant had a private attorney when he was first charged, record indicated that plea judge never acknowledged that defendant did not have counsel with him at the plea hearing, and did not inquire about why defendant had relieved his counsel, or if he wished to have counsel present, nor, in the absence of counsel, did the judge advise defendant of the crucial elements of the charged offenses, of the possible penalties if the recommended sentence was not accepted by the plea judge, or ask questions to ensure defendant's understanding of the consequences of his plea. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[2] **Criminal Law**
Waiver and Pro Se Representation
Criminal Law
New Trial

In a post-conviction relief (PCR) action, if the record fails to demonstrate the petitioner made an informed choice to proceed pro se, with "eyes open," then the petitioner did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[3] **Criminal Law**
Capacity and Requisites in General
Criminal Law
Status and Competence of Accused Affecting Rights and Waiver

When determining if an accused has a sufficient background to understand the dangers of self-representation, the courts consider: (1) the accused's age, educational background, and physical and mental health; (2) whether he was previously involved in criminal trials; (3) whether he knew the nature of the charges and of possible penalties; (4) whether he was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether he was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with rules of procedure at trial;

(8) whether he knew of legal challenges he could raise in defense to the charges against him; (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and (10) whether his waiver resulted from either coercion or mistreatment. U.S.C.A. Const.Amend. 6.

9 Cases that cite this headnote

Attorneys and Law Firms

****185** ***409** Deputy Chief Attorney Joseph L. Savitz, III, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., and Assistant Attorney General Elizabeth R. McMahon, all of Columbia, for respondent.

Opinion

CHIEF JUSTICE TOAL:

This Court granted Charles Gardner's ("Petitioner") petition for a writ of certiorari to review the denial, after a hearing, of his application for Post-Conviction Relief ("PCR"). Petitioner argues the PCR court erred in finding he knowingly and intelligently waived his right to counsel. We agree.

FACTUAL/PROCEDURAL BACKGROUND

In February 1995, Petitioner was indicted on two counts: (1) for trafficking over 400 grams of cocaine; and (2) for trafficking over eighty grams of crack cocaine. Pursuant to a plea agreement, Petitioner plead guilty to trafficking twenty-eight grams or more, but less than 100 grams, of cocaine and to trafficking ten grams or more, but less than twenty-eight grams, of crack cocaine. Petitioner was not represented by counsel at the plea hearing. Pursuant to the State's recommendation, Petitioner received concurrent 10 year sentences.

In September 1995, Petitioner filed an application for PCR. After a hearing, the PCR judge denied Petitioner relief. Petitioner then petitioned this Court for a writ of certiorari. This Court granted certiorari, and the sole issue before this Court is:

> Did the PCR Court err in holding Petitioner knowingly and intelligently waived his right to counsel?

*410 LAW/ANALYSIS

Petitioner argues the record does not support the PCR court's finding that he understood the dangers of self-representation and knowingly and intelligently waived his right to counsel. We agree.

At the PCR hearing, Petitioner testified he retained an attorney after he was arrested. However, because he was unable to afford the legal fees, the private attorney stopped representing Petitioner.[1] A public defender was never appointed.

Petitioner testified he spoke with Assistant Solicitor Jon Ozmint ("Ozmint") about his plea.[2] Petitioner stated Ozmint informed him that his bond would be revoked if he refused to plead guilty. According to Petitioner, Ozmint told him he would recommend a seven year sentence, of which he would only have to serve three years, if Petitioner would plead guilty and turn in three other drug dealers. Ozmint admits he discussed a plea with Petitioner, but denied he ever told Petitioner that his bond would be revoked or that he would only have to serve three years.

Petitioner's brother, Rick Gardner, also testified at the PCR hearing. He stated Ozmint offered Petitioner a seven year deal and promised him he would only have to spend four years in prison. He later testified Ozmint offered Petitioner a ten year deal and promised he would only spend three years in prison.

On cross-examination, Petitioner admitted Magistrate David Crenshaw[3] informed him at his arraignment that he had a ***411** right to a ****186** public defender.

Furthermore, he stated he was aware public defenders were available to represent people who could not afford to hire private counsel. In fact, Petitioner testified he had been represented by a public defender in 1993 on a charge of possession of cocaine.

The PCR court found Petitioner failed to prove that he did not knowingly and voluntarily waive his right to counsel. In its order, the PCR court stated Petitioner was of above average intelligence. [4] The court further stated the record indicated Petitioner was advised at his arraignment that he had a right to a public defender. In addition, the court found Petitioner was completely familiar with the court system.

According to the United States Supreme Court, in order to waive the right to counsel, the accused must be (1) advised of his right to counsel *and* (2) adequately warned of the dangers of self-representation. *Prince v. State,* 301 S.C. 422, 392 S.E.2d 462 (1990) (citing *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)) (emphasis added). The trial judge must determine whether there is a knowing and intelligent waiver by the defendant. *State v. Dixon,* 269 S.C. 107, 236 S.E.2d 419 (1977) (citing *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). If the trial judge fails to address the disadvantages of appearing *pro se,* as required by the second prong of *Faretta,* "this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." *Prince,* 301 S.C. at 424, 392 S.E.2d at 463 (citing *Wroten v. State,* 301 S.C. 293, 391 S.E.2d 575 (1990)).

> 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. If the *record demonstrates* ***412** the defendant's decision to represent himself was made with an understanding of the *risks of self-representation,* the requirements of a voluntary waiver will be satisfied.

Wroten, 301 S.C. at 294, 391 S.E.2d at 576 (citing *Fitzpatrick v. Wainwright,* 800 F.2d 1057, 1065 (11th Cir.1986)) (emphasis added).

[1] [2] In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed *pro se,* with "eyes open," then the petitioner did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial. *See Watts v. State,* 347 S.C. 399, 556 S.E.2d 368 (2001); *Wroten; Prince; Bridwell v. State,* 306 S.C. 518, 413 S.E.2d 30 (1992). We find Petitioner was not adequately apprised of the dangers of self-representation. The plea judge never even acknowledged that Petitioner did not have counsel with him at the plea hearing. The judge did not inquire about why Petitioner had relieved his counsel, or if he wished to have counsel present. There is absolutely no mention by the judge of anything relating to the right to an attorney, the dangers of self-representation, or the like in the guilty plea transcript. Furthermore, Petitioner did not say anything about counsel. He never stated that he did not want an attorney, that he wished to waive this right, or that he wanted to represent himself.

[3] Because of the absolute failure of the plea judge to ask Petitioner for a waiver and to apprise him of the dangers of appearing *pro se,* as is required by *Faretta,* this Court must look into the record to determine if Petitioner had sufficient background or was apprised of his rights by some other source. *Prince; Wroten* (absent a specific inquiry by the trial court into the hazards of proceeding *pro se,* this Court will examine the record to determine whether the accused was advised of his rights from some other source or had sufficient background to intelligently waive his right to counsel). When determining if an accused has a sufficient background to understand the dangers of self-representation, the courts consider many factors including: (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of ***413** the possible penalties; (4) whether the accused ****187** was represented by counsel before trial and

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whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew of legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment. *State v. Cash,* 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct.App.1992) (citations omitted).

While there is evidence in the record to indicate Petitioner was aware of his right to counsel, there is insufficient evidence to indicate he was aware of the dangers of self-representation. After weighing the factors above, we find the PCR court erred in finding Petitioner knowingly and intelligently waived his right to counsel.

First, the plea judge did not give Petitioner any warning about the dangers of proceeding *pro se.* He did not inform him of the nature of the charges or of the possible penalties. Petitioner did have a 12th grade education, and he had been represented by counsel on a previous charge to which he pled guilty. He also had a private attorney when he was first charged. However, the record gives no indication this attorney explained to him the dangers of self-representation. *See Wroten* (fact that petitioner had spoken with an attorney and fact that he had plead guilty to another charge in 1979 did not sufficiently demonstrate that he was aware of the dangers of self-representation).

Second, although the guilty plea proceeding did not consist merely of *pro forma* questions and answers, the transcript on its face poses several other problems which would indicate the plea itself was not knowing and voluntary. This Court and the United States Supreme Court have held that before a court can accept a guilty plea, a defendant must be advised of the federal and state constitutional rights he or she is waiving. ***414** *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *Pittman v. State,* 337 S.C. 597, 524 S.E.2d 623 (1999). Specifically, a defendant must be aware of the privilege against self incrimination, the right to a jury trial, the right to confront one's accusers, the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived. *Id.*

In this case, the plea judge did not even ask Petitioner for an admission of guilt. The transcript also indicates the trial judge did not advise Petitioner of the crucial elements of the charged offenses, or of the possible penalties if the recommended sentence was not accepted by the plea judge. In addition, the trial judge did not ask questions to ensure Petitioner's understanding of the consequences of his plea. Furthermore, any defect in the court's questioning was not cured by the accused conversation with another source, since Petitioner had no attorney. *See State v. Ray,* 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993) (a knowing and voluntary waiver of the constitutional rights which accompany a guilty plea "may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.")

CONCLUSION

Based on the foregoing, we **REVERSE** the PCR court's order of dismissal and **REMAND** for a new trial.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

All Citations

351 S.C. 407, 570 S.E.2d 184

Footnotes

1 The record is not clear at what point Petitioner's private attorney stopped his representation.

2 Following the initial dismissal of Petitioner's PCR application, he filed a petition for a writ of certiorari. This Court issued an order remanding the case back to the PCR judge for a reconstruction of the record from the PCR hearing. The PCR judge then issued a second order finding an additional hearing to reconstruct was unnecessary because the first order was so detailed. Petitioner has not voiced an objection to this order. Accordingly, the testimony discussed comes from the Order of Dismissal.

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3 Judge Crenshaw also testified at the PCR hearing. He stated it was his usual practice to explain to those who appear before him that they have a right to a public defender. He further testified that he makes sure the accused understands his right to an attorney before he allows him to sign a "statement of rights" form. However, Judge Crenshaw did not testify that he explained to Petitioner the dangers of self-representation.

4 The record is unclear whether Petitioner actually graduated from high school. In his application for PCR, he stated he did not have a high school diploma. At his guilty plea hearing, when asked how far he went in school, Petitioner responded, "12th Grade."

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