ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Chester County

Honorable John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GERALDO DAMETRIUS LAND,

APPELLANT

APPELLATE CASE NO. 2018-001367

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it allowed appellant to proceed pro se, where appellant was unsure of the number of charges he faced, and where the exchange between appellant and the court consisted merely of pro forma answers to pro forma questions, since a defendant must be adequately warned of the dangers of self-representation in order to knowingly and intelligently relinquish his right to counsel?

STATEMENT OF THE CASE

On September 26, 2017, a Chester County Grand Jury indicted appellant for the offenses of first degree burglary, first degree assault and battery, possession of a weapon during the commission of a violent crime, and two counts of armed robbery. R. 438 – 447.

Appellant was tried before the Honorable John C. Hayes and a jury, from July 11 – 13, 2018. R. 1. Candice Lively represented the state. R. 1. Appellant proceeded pro se, with Geoff Dunn as standby counsel. R. 1; R. 63, ll. 15-16.

Appellant was convicted as indicted. R. 428, l. 19 – 429, l. 10. The court sentenced appellant to fifteen years for first degree burglary, ten years for first degree assault and battery, five years for possession of a weapon during the commission of a violent crime, and ten years for each count of armed robbery, with sentences to run concurrently. R. 436, ll. 4-8.

This appeal follows.

STANDARD OF REVIEW

"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*, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018). 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.* In doing so, this Court must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request." *Id.*

ARGUMENT

The trial court erred when it allowed appellant to proceed pro se, where appellant was unsure of the number of charges he faced, and where the exchange between appellant and the court consisted merely of pro forma answers to pro forma questions, since a defendant must be adequately warned of the dangers of self-representation in order to knowingly and intelligently relinquish his right to counsel.

Relevant facts

The trial began with Geoff Dunn as appellant's counsel. Dunn represented appellant during jury selection and pretrial motions and gave the defense's opening statement. However, when the parties returned from a break, Dunn told the court that appellant wished to represent himself. R. 58, ll. 19-23. The court asked appellant his age, education, and employment status. Appellant said he was thirty years old, a high school graduate, had "some college" and worked at "Foot Print Industries" where he aspired to become a personal trainer. R. 59, ll. 1-7. The following exchange took place:

> THE COURT: You have been appointed an attorney by the State and you requested that and I'm told now you wish to represent yourself.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand that you have the right to an attorney and that an attorney could be of benefit to you and that there's a danger in representing yourself since you're not an attorney. Do you understand all that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You think you could be candid with the Court and follow the rules of the Court? Even though you're not an attorney you would have to be—you would have to follow the court rules and rules of evidence and the other rules that apply. Even though you're representing yourself the Court requires that you adhere to the rules of court, do you understand that?
>
> THE DEFENDANT: Yes, sir. But I have a question about that, sir.

> THE COURT: All right.
>
> THE DEFENDANT: I have a question because I have a cell phone that I had at the time this incident happened which actually logs my testimony, it actually verifies my testimony and it's at the repair shop. I have told me lawyer prior to trial and I was wondering how would I go about admitting that into evidence? Because I've already spoken to him prior to trial about that.
>
> THE COURT: Well, let me hear from the State.

R. 59, l. 12 – 60, l. 13.

The court subsequently said it had "skimmed" *State v. Samuel*,[1] and would allow appellant to proceed pro se with Geoff Dunn as standby counsel. R. 60, l. 25 – 61, l. 3. In response to a concern voiced by the solicitor, the court further stated:

> THE COURT: Well, you clearly understand it's not the wisest decision you've ever made to represent yourself when you're facing these I think it's five charges, you understand that?
>
> THE DEFENDANT: Eight charges, yes, sir, I understand that. However—

R. 62, ll. 2-7. Although appellant seemed to believe he was being tried for eight charges, he was, in fact, being tried for five charges.

Appellant proceeded to unsuccessfully represent himself. Although Dunn made a pretrial motion to suppress the complainants' identification of appellant pursuant to *Neil v. Biggers*,[2] appellant did not contemporaneously object when the lineups were offered in evidence. R. 103, ll. 3-6. Appellant did not move for directed verdicts at the close of the state's case. R. 297, ll. 1-2. He did not object to the introduction of testimonial hearsay. R. 195, ll. 12-21. Appellant elicited damaging testimony from a state's witness that the witness knew appellant from "the jailhouse" because appellant had been "under arrest several times." R. 255, ll. 15-22. Appellant

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1 *State v. Samuel*, 422 S.C. 596, 813 S.E.2d 487 (2018).

2 *Neil v. Biggers*, 409 U.S. 188 (1972).

was surprised when the trial judge indicated his intent to charge the jury on the theory of hand of one, hand of all. R. 339, l. 10 – 340, l. 8.

Appellant entered the testimony of two alibi witnesses who each testified that appellant was with them at separate locations at the time of the offense, which allowed the solicitor to argue the "alibis conflicted" and that he could not have been in "two places at one time." R. 376, l. 25 – 377, l. 1.

Appellant did not object to the solicitor's remarks to the jury in closing that appellant was "a dangerous person" and had been "incarcerated before." R. 353, ll. 17-20. The solicitor repeated that appellant was "a dangerous person," "violent," and "controlling." R. 353, ll. 22-23. The solicitor added that appellant was "a manipulator. He's trying to manipulate the system." R. 354, l. 8. The solicitor carried on in her closing argument that appellant was "controlling" and "has no boundaries." R. 355, ll. 9-10; R. 355, ll. 23-24. The solicitor exhorted the jury, without objection: "We need to keep dangerous people who are willing to break into people's houses with guns off the streets." R. 356, ll. 19-21.

Discussion

"When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938)).

"To establish a valid waiver of counsel, *Faretta* requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation. In the absence of a specific inquiry by the trial judge addressing the disadvantages of a *pro se* defense

as required by the second *Faretta* prong, 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 v. State*, 301 S.C. 422, 423–24, 392 S.E.2d 462, 463 (1990).

"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." *State v. Barnes*, 407 S.C. 27, 36, 753 S.E.2d 545, 550 (2014).

In *Barnes,* the defendant was questioned by the judge about "a specific rule of evidence, his understanding of the prohibition of hybrid representation, his current mental health status, and his familiarity with courtroom procedure and prior experience as a criminal defendant." *Id.* at 31, 753 S.E.2d at 547-48 (footnote omitted). The defendant there demonstrated an understanding of "*voir dire,* stated his intention to pursue a third-party guilt defense at trial and discussed the relevant case law, the burden of proof, and his right to testify." Barnes also demonstrated his familiarity with "the niceties of error preservation," such as "the need to place objections and the court's rulings on the record." *Id.* at 31-32, 753 S.E.2d 545, 547-48. Our Supreme Court found the trial judge's refusal to allow Barnes to proceed pro se was error under these circumstances. *Id.* at 37, 753 S.E.2d at 550.

In *Barnes*, the trial court's thorough questioning demonstrated the knowing and intelligent nature of his waiver: the trial judge questioned the defendant on some of the technical matters that he would face, giving him notice of the very real dangers he would face. Here, there was no colloquy that gave appellant a hint of the technical difficulties he might face. Instead, the court just told him he would have to comply with the rules of court, without explaining or giving a concrete example.

In *State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998), the defendant's waiver of his right to counsel was found to be knowing and intelligent. In *Reed*, the "trial judge held several hearings to determine whether [Reed] understood what it meant to represent himself and to waive the appointment of experienced counsel." *Id.* at 41, 503 S.E.2d at 750. "The trial judge questioned [Reed] in camera about his knowledge of the proceedings and what it would mean to represent himself rather than have representation . . . . The trial judge warned [Reed] of the dangers and disadvantages of self-representation." *Id.* In *Reed*, the multiple in camera hearings about the defendant's knowledge of the proceedings demonstrated a knowing and intelligent waiver of his right to counsel. Here, there was not the extensive inquiry undertaken by the trial judge in *Reed*: appellant was not questioned about his knowledge of the proceedings and what it would mean to represent himself.

In *State v. Starnes*, 388 S.C. 590, 601, 698 S.E.2d 604, 610 (2010), our Supreme Court similarly found the defendant knowingly and voluntarily waived his right to counsel. There, "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. 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." The trial judge in Starnes engaged in a "thorough *Faretta* colloquy" and "sternly warned [Starnes] of the dangers of self-representation." *Id.* Here, unlike in Starnes, there was no methodical and careful explanation of the dangers of self-representation by the trial court. The trial court did not ensure appellant understood the various issues that would arise at trial.

In *State v. Samuel*, 422 S.C. 596, 599, 813 S.E.2d 487, 489 (2018), our Supreme Court "clarif[ied] the proper scope" of a *Faretta* inquiry and began by observing that a proper *Faretta*

inquiry is made ex parte. The defendant in *Samuel* was held to have made a knowing, voluntary, and intelligent waiver of counsel where he "clearly expressed his understanding of the nature of the charge against him and the potential penalties he faced were he to be found guilty. He indicated he was making the request of his own volition and continuously asked to represent himself despite the circuit judge's persistent attempts to dissuade him." *Id.* at 596, 604, 813 S.E.2d at 491.

Troublingly, the *Faretta* inquiry by the trial court here was not made ex parte. Also unlike *Samuel*, it is unclear that appellant knew the charges against him: he was unaware of their number. Although appellant was being tried for five charges, his confusion regarding his charges is apparent from his expressed belief that he was facing eight charges. Moreover, appellant was never queried on the potential penalties he faced.

The appellate courts of this state have explained that factors to be considered in determining if an accused had sufficient background to understand the disadvantages of self-representation include:

> (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether he knew of the nature of the charge and of the possible penalties; (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case; (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 the 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 the accused's waiver resulted from either coercion or mistreatment.

State v. McLauren, 349 S.C. 488, 494-95, 563 S.E.2d 346, 349 (Ct. App. 2002). *Accord Gardner v. State*, 351 S.C. 407, 411, 570 S.E.2d 184, 186 (2002); *In re Christopher H.*, 359 S.C. 161, 168, 596 S.E.2d 500, 504 (Ct. App. 2004).

Applying the factors laid out by this Court in *McLauren*, the colloquy fails on several counts. As to factor number three (whether he knew of the nature of the charge and of the possible penalties): appellant was aware of the incident for which he was he was being tried. But he was unaware of how many charges he faced (and presumably against which alleged victims), and there was no showing that he knew the penalties he faced. Factor three thereby weighs in favor of finding appellant's waiver was not knowing and intelligent.

Instead, the exchange between appellant and the trial court simply consisted of pro forma answers to pro forma questions, as evidenced by the court's generalized comments that there was "a danger" in representing himself and that appellant would have to "adhere to the rules of court" without any explanation or example of what one of those dangers was or what one of the court rules was.

Absent a single example or explanation, the judge's brief admonition that appellant would have to comply with "the court rules and rules of evidence and the other rules" was insufficient to establish appellant understood what it meant to comply with the rules of criminal procedure. Here, appellant's immediate response to the judge's question in this regard was to express that he was unaware how to admit an item of evidence he wished to admit. *See* R. 59, l. 12 – 60, l. 13. Therefore, the seventh and ninth factors laid out in *McLauren* (whether the accused knew he would be required to comply with the rules of procedure at trial; and whether the exchange between the accused and the court consisted merely of pro forma answers to pro

forma questions) weigh heavily in favor of a finding appellant's waiver was not knowing and intelligent.

As to the fifth factor enumerated in *McLauren*, there was no evidence appellant was attempting to delay or manipulate the proceedings. And as to the fourth factor, there was no showing appellant's prior counsel discussed with him the difficulty of self-representation in this case. These factors too, weigh in favor of finding the waiver of counsel was not knowing and voluntary.

"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." *Watts v. State*, 347 S.C. 399, 402, 556 S.E.2d 368, 370 (2001) (emphasis added). Appellant submits the warnings here were inadequate. "[I]n the absence of proper *Faretta* warnings, the reviewing court may look to the record to determine whether [a defendant's] background indicated he could make an intelligent waiver without such advice." *Id.* at 403, 556 at 371. "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." *Wroten v. State*, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (internal citations omitted).

Here, the record fails to show appellant had sufficient background to make an intelligent waiver of counsel absent sufficient *Faretta* warnings. While appellant said he had attended "some college," there was no further inquiry into what that meant. Nor did the court inquire into the nature of appellant's work history, but only heard he aspired to be a personal trainer at Foot

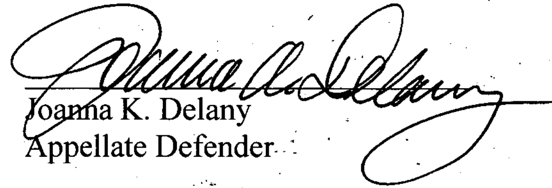
Print Industries. R. 59, ll. 2-7. While appellant had a prior criminal record, it appeared to consist entirely of guilty pleas. R. 7, ll. 11-23; R. 59, ll. 8-11.

Appellant was tried for this incident previously (a trial that ended in a mistrial), but he was represented by Geoff Dunn at that trial. R. 44, ll. 8-11; R. 46, ll. 8-11; R. 58, ll.1-3. Nothing in the record indicates appellant was at all aware of the risks of self-representation, or that his education or work history would have given him an understanding of the rights he was waiving absent proper *Faretta* warnings. Looking at the record, these facts demonstrate that appellant did not have a sufficient background to make an intelligent waiver without adequate *Faretta* warnings. These facts also, pursuant to *McLauren*'s first and second factors, (the accused's age, educational background, and physical and mental health; and whether he was previously involved in criminal trials) weigh in favor of finding his waiver of counsel as not knowing and intelligent.

"The Sixth Amendment mandates that in all criminal proceedings, the accused shall have the right to the assistance of counsel for his defense." *State v. Boykin*, 324 S.C. 552, 555, 478 S.E.2d 689, 690 (Ct. App. 1996); U.S. CONST. amend. VI. "The trial judge has the responsibility to ensure that the accused is informed of the dangers and disadvantages of self-representation, and makes a knowing and intelligent waiver of the right to counsel." *State v. Brewer*, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). Appellant's waiver of the right to counsel was not knowingly and intelligently made. The pro forma nature of the inquiry and his confusion regarding the charges he faced illustrate his lack of understanding of the risks involved.

CONCLUSION

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



Joanna K. Delany
Appellate Defender

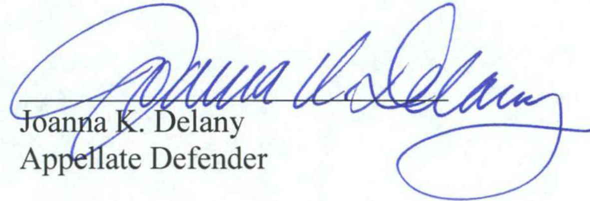
ATTORNEY FOR APPELLANT

This 22nd day of August, 2019.

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."

August 22, 2019.



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