STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

V.

EDWARD T. CHANDLER,

APPELLANT

APPELLATE CASE NO 2016-001554

Appeal from Edgefield County

Eugene C. Griffith, Circuit Court Judge

Opinion No. 2019-UP-333

PETITION FOR REHEARING

On October 9, 2019, this Court affirmed Appellant's convictions and sentences in an unpublished opinion. State v. Chandler, 2019-UP-333 (S.C. Ct. App. filed Oct. 9, 2019). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based upon a misapprehension of the rules of issue preservation.

In affirming Appellant's convictions and sentences, this Court cited State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003) for the proposition that "[i]n order for an issue to be preserved for appellate review it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v.

Chandler, 2019-UP-333 (S.C. Ct. App. filed Oct. 9, 2019). Further, this Court cited State v. King, 416 S.C. 92, 112, 784 S.E.2d 252, 262 (Ct. App. 2016) for the proposition that "where an objection is expressly withdrawn, it cannot be raised on appeal." State v. Chandler, 2019-UP-333 (S.C. Ct. App. filed Oct. 9, 2019). Thus, this Court held Appellant's issue on appeal was not preserved for review because it was not raised to the trial judge or it was withdrawn.

Issue preservation

"Imposing ... preservation requirement[s] on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). "The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Toal, Walker, Baker, Appellate Practice in South Carolina (2016) 184. "However, [the error preservation requirement] is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012).

"There are four basic requirements to preserving issues at trial for appellate review. ... In order to preserve an issue for appellate review, the issue must have been (1) raised to and ruled upon by the lower court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the lower court with sufficient specificity." Toal, supra at 184. The issue on appeal is

whether the trial judge erred as a matter of law by requiring Appellant demonstrate a heightened level of competency in order to waive his right to counsel, and in reliance upon this legal error, the trial judge improperly forced Appellant to choose between his right of self-representation and his right to a speedy trial. The record evidence demonstrates this issue was raised timely by Appellant and ruled upon by the trial judge.

Week before Trial – Motion to Waive Right to Counsel

On July 14, 2016, Appellant appeared before Judge Griffith requesting that his public defender be relieved and that he be allowed to represent himself. R. 1. The state "anticipated" calling the case for trial the following week. R. 4, ll. 8-9. During the forty-eight hours immediately preceding the hearing on July 14, 2016, the state "received a written notice" from Appellant of his desire to relieve counsel. R. 4, ll. 9-11. Appellant wanted to "proceed pro se." R. 4, ll. 14-15.

The prosecutor explained she had "a lot of concerns about this situation at this stage" because the state was "less than a week away from his anticipated trial date." R. 4, ll. 15-18. Additionally, the prosecutor provided the court with a copy of the written report of Appellant's mental health evaluation from September 24, 2015. R. 4, ll. 18-23; R. 733-742. Defense counsel confirmed Appellant's desire for self-representation, and noted that Appellant had been found competent by the Department of Mental Health (DMH). R. 5, ll. 7-12. Defense counsel had explained the dangers of self-representation, but Appellant was "quite adamant" that he wanted to proceed *pro se*. R. 5, ll. 12-16.

Judge Griffith then engaged personally with Appellant to inquire into his desire for self-representation – to waive his right to counsel. R. 8, ll. 6-8. Appellant told the judge he was twenty-eight years old and had completed 1.5 years of college. R. 12, ll. 9-13. Additionally,

Appellant had "been through a previous general sessions trial." R. 12, ll. 15-18. Appellant was unequivocal that his request to relieve counsel was not for purposes of delay and that he would be prepared for trial on the following Monday, the date the state planned to call the case. R. 14, l. 1 – R. 15, l. 5.

Then, the state expressed its concerns about Appellant's mental health. According to the state, the mental evaluation report indicated Appellant had a history of mental health issues, including in-patient treatment. R. 15, ll. 11-19. The state complained it did not have access to those records. R. 15, ll. 19-21. According to the state "those records would need to be accessed" in order for the court to determine if Appellant could represent himself. R. 16, ll. 3-4. Finally, the state complained that the doctor who conducted the evaluation in 2015 was no longer employed by the Department of Mental Health and the state had been unable to serve her with a subpoena. R. 16, ll. 8-13. Although the state recognized that DMH "found [Appellant] competent," the state demanded "a full Blair[1]" hearing "on the record to ensure that her findings back in September of 2015 would still be her findings today, and she would also need to conduct an orientation assessment to ensure his mental status has not changed." R. 16, ll. 14-19. In the state's opinion, "this" could not be "achieved by Monday or even Tuesday." R. 16, ll. 20-21. The next term of Court in Edgefield was October 10, 2016. R. 17, ll. 13-14.[2] The state proposed setting aside a full day for "full Blair hearing" and "a full Faretta[3] hearing with the advantage of all of his mental health records and history." R. 17, ll. 17-25.

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[1] State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

[2] The judge noted, and the state agreed, that the same judge would be presiding over both terms of court; therefore, it was clear that Appellant was "not judge-shopping." R. 17, ll. 15-17.

[3] Faretta v. California, 422 U.S. 806, 819 (1975).

The judge then turned to Appellant, asking what he thought of the state's suggestion to move the case to the next term of court.

> [W]hat do you think about that? You see what she's saying? She's not telling you no, but let's get all of the pieces up, have you - - the examiner who provided this come back and talk to you again, make certain you're still in good shape. You appear to be today to me, just by looking at you, but since it was over a year ago, kind of updating that, giving you a chance to fully appreciate what you're asking the Court to do.

R. 18, ll. 1-10. This requirement that Appellant exhibit a heightened level of competency runs counter to clearly established South Carolina law. See State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014) (holding South Carolina would not "impose a higher competency standard upon an individual who wishes to waive his right to an attorney and represent himself at trial than that required for the waiver of other fundamental constitutional rights afforded a criminal defendant"). Despite this precedent, the judge refused to permit Appellant to waive counsel unless he could show he possessed a higher level of competency than the one required to proceed to trial.

In response to the judge's questioning, Appellant explained he had been in pre-trial detention for seventeen months with no bond set. R. 18, ll. 11-12. Appellant asked "to not be sitting." R. 19, l. 3. He had "been sitting a very long time" and he wanted to go to trial. R. 19, ll. 6-7.

The judge explained he was considering the "parameters of the Faretta case," which outlined when a person "is competent enough to represent themselves. Because if somebody were not competent, not educated, couldn't appreciate all of the dangers of the trial, then the Court has to make an independent decision and evaluation of whether or not that would be appropriate." R. 20, ll. 1-8. The judge stated he was "kind of inclined to get all of these pieces lined up for October." Based upon his incorrect view that Appellant was required to possess a

heightened level of competency, the judge then presented Appellant with a choice: "You can let [defense counsel] go forward and we'll start Monday" or "[i]f you want to represent yourself, that's your request. If you want to do that, I would be much more comfortable in protecting your rights that we get these things done and start this trial in October." R. 20, ll. 12-25. He then put it very succinctly – if Appellant wanted to go trial the next week in July, he had "to withdraw" his motion for self-representation and allow defense counsel to represent him. R. 20, ll. 3-5.

Appellant explained that if he withdrew his motion for self-representation, then he would "need to be certain" that defense counsel employed his strategy. R. 21, ll. 7-13. Appellant was clear that if defense counsel refused to use his strategy, then Appellant could not "let him represent" Appellant. R. 21, ll. 15-16.

The judge ordered a break in the proceedings to allow Appellant and trial counsel to discuss the matter to determine if "some understanding" could be reached. R. 22, ll. 6-7; Pre-trial 23, ll. 2-20. After a thirty-minute break, the parties reconvened. R. 24, l. 2. Defense counsel announced that Appellant wanted to go to trial on Monday with defense counsel representing him. R. 24, ll. 12-13. The state requested Appellant "formally withdraw[]" his motion to relieve counsel and proceed *pro se*. R. 24, ll. 15-17. Appellant then withdrew his motion. R. 24, ll. 18-21.

Trial – Motions for Self-Representation

The trial started on July 18, 2016, with trial counsel representing Appellant. R. 26. After the testimony of the state's twelfth witness, Appellant moved to relieve counsel again. R. 393, ll. 11-17. Appellant explained his lawyers would "not do anything" he asked. R. 393, ll. 11-17. Further, Appellant told the judge that there were witnesses he wanted called and evidence he wanted introduced, but that counsel had told him they were "not going to use it." R. 393, ll. 19-

21; see also, R. 394, ll. 13-22. Specifically, Appellant wanted the lead investigator called as a witness in the case because "of all the contradictions," but defense counsel informed Appellant they would not call him to testify. R. 393, ll. 21-23. Also, Appellant informed the judge that he and defense counsel had planned for Appellant to testify "for months," but during the trial defense counsel stated he did not "want" Appellant "to testify." R. 394, ll. 5-7.

Appellant reminded the judge that when he moved to relieve trial counsel the week prior to trial, he was convinced to permit trial counsel to represent him based on (1) the judge's insistence that the trial be moved to October if trial counsel were relieved and (2) Appellant's reliance on trial counsel's assurances that he would follow Appellant's strategy. R. 395, ll. 9-13; R. 399, ll. 8-15; R. 405, ll. 5-8. Appellant told the judge that he would represent himself and that he could not let his life "go down the drain like that." R. 395, ll. 19-21.

The judge proposed moving forward "with the state's witness this afternoon" and see "where" the parties got during the afternoon. R. 397, ll. 6-13. Appellant explained the parties were "not going to get anywhere" because trial counsel was "not going to do what" Appellant requested. R. 397, ll. 14-16. The judge insisted on moving forward that afternoon, but told Appellant he would address his request the following day. R. 398, l. 20 – R. 399, l. 1.

Everyone then convened in chambers. R. 399, ll. 16-24. Trial counsel informed the judge that Appellant wanted medical personnel cross-examined regarding prior inconsistent statements made by the alleged victim. R. 400, ll. 9-16. The judge then told Appellant that such questions risked opening the door to testimony that trial counsel successfully excluded. R. 400, l. 16 – R. 401, l. 19. The judge then told Appellant that it was his understanding from "the case law" that he could *not* permit Appellant to represent himself "midstream." R. 401, ll. 19-21; R. 402, ll. 5-9; R. 407, ll. 7-11. According to the judge, "once a jury is sworn, you got to stick with

what you got." R. 402, ll. 2-4. Contrary to settled law, the judge then denied Appellant's request for self-representation. R. 404, ll. 5-11. He further instructed Appellant and his lawyers to meet after the day's proceedings to resolve the conflict among them. R. 404, ll. 17-20; R. 405, ll. 9-14.[4]

Appellant went through various items of discovery and his notes from the trial testimony, explaining what questions he believed trial counsel should have asked, but failed to do so. R. 413, l. 25 – R. 417, l. 11. Judge Griffith told Appellant that one of the problems for his team was that the alleged victim seemed "to be a likable lady," "honest," and "a responsible citizen." R. 417, ll. 22-25. It was "hard to make her out to be a liar by saying she changed her story a little bit in the middle of the morning when something happened to her that was traumatic." R. 417, l. 25 – R. 418, l. 3. He noted that the change in her story was justifiable due to adrenaline: "when your adrenaline gets going and you playing ball or something and you get popped good, you don't feel it. You just all juiced up." R. 418, ll. 4-7.

The judge instructed Appellant to talk to his lawyers overnight, and that if counsel still refused to "delve into" cross examination or call a witness, then the judge would hold another hearing. R. 411, ll. 1-7; R. 418, l. 24 – R. 419, l. 8. The judge said the parties could reconvene after the state rested regarding Appellant's desire to call witnesses. R. 419, ll. 12-15; R. 421, ll. 4-13.

The next day Appellant moved to relieve counsel and proceed *pro se*. R. 480, ll. 14-15. He explained he met with defense counsel as the judge instructed, and that counsel refused to ask the questions he requested or call the witnesses he wanted. R. 480, ll. 20 – R. 481, l. 2; R. 481, ll. 5-16. Again, Appellant explained that he only agreed to withdraw his initial motion for self-

[4] The judge explained the direct appeal process and the post-conviction relief procedures during the in-chambers meeting with Appellant. R. 406, l. 20-25; R. 409, l. 6 – R. 410, l. 11.

representation because trial counsel promised he would follow Appellant's instructions. R. 481, ll. 2-5. Appellant told the judge he wanted to call several witnesses, including members of his family and law enforcement to testify. R. 481, l. 22 – R. 482, l. 24.

The judge then engaged in a colloquy with Appellant, explaining the dangers and disadvantages of self-representation, including the need to preserve issues for appeal, the inability to file an application for post-conviction relief for ineffective assistance of counsel regarding any matters missed by Appellant, and the difficulties of testifying in a *pro se* scenario. R. 483, l. 9 – R. 484, l. 17. During the colloquy, Appellant expressed his unequivocal desire for self-representation. R. 484, ll. 18-19.

At this point, the state reiterated its concern regarding Appellant's mental health. R. 486, ll. 4-10. The state noted Appellant was found competent by DMH. R. 486, ll. 4-10. The judge explained he found Appellant "to be respectful and calm and ... well-spoken." R. 486, ll. 11-14. He also noted Appellant had asserted his right previously, but the court had discouraged him from self-representation and encouraged him to work with counsel. R. 486, ll. 14-16. The judge then allowed Appellant to represent himself. R. 487, ll. 15-24. He found Appellant had "sufficient education" and had been involved with a trial previously. R. 487, ll. 15-24. Additionally, the judge noted Appellant was aware "of the nature of the charges" and the penalties. R. 488, ll. 1-5. Both the judge and trial counsel had explained "the dangers of self-representation" and cautioned Appellant he would have to follow the rules of procedure. R. 488, ll. 5-9. Importantly, the judge was convinced Appellant's request was not for purposes of delay. R. 488, ll. 9-12. Therefore, the judge relieved defense counsel and permitted Appellant to represent himself for the remainder of the trial. R. 488, ll. 20-21.

Based on this review of the record, it is clear Appellant's issue on appeal – whether the trial judge erred as a matter of law by requiring Appellant demonstrate a heightened level of competency in order to waive his right to counsel, and in reliance upon this legal error, the trial judge improperly forced Appellant to choose between his right of self-representation and his right to a speedy trial – was preserved for appellate review. The week before his case was called for trial, Appellant moved to exercise his right to self-representation. The judge refused to permit Appellant to exercise his constitutional right because the judge erred as a matter of law in requiring that Appellant prove a higher level of competency. Due to this mistake of law, the judge gave Appellant what amounted to a Hobson's choice – exercise his constitutional right to self-representation or exercise his right to a speedy trial. It was only due to the trial judge's error of law that Appellant withdrew his motion for self-representation. During the trial, Appellant renewed his motion for self-representation. Only then did the trial judge agree that Appellant could represent himself. Appellant did all that was necessary to preserve his issue for appellate review – he moved to exercise his right to self-representation. Appellant's desire for self-representation was presented with the issue in a timely fashion and ruled upon the issue. The judge erred in construing the law as requiring a heightened level of competency in order to waive one's right to counsel. See State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174-175 (1993) (stating that "judges are presumed to know the law"). Relying upon this erroneous legal construct, the judge forced Appellant to chose between his constitutional rights to a speedy trial and self-representation. It was this forced choice, which was premised upon the judge's mistake of law, that resulted in Appellant's withdrawal of his motion for self-representation. This Court must not punish Appellant for the trial judge's failure to understand the clear mandates of South Carolina law regarding the level competency necessary to support a motion for self-representation.

To the extent there is any argument that Appellant's issue on appeal is not preserved for review, Appellant respectfully requests this Court review the issue under an exception to the error preservation requirements. South Carolina does not require a defendant to object to the failure of the trial judge to secure a knowing and intelligent waiver of the right to counsel. State v. Rocheville, 310 S.C. 20, 24 n.4, 425 S.E.2d 32, 35 n.4 (1993) (explaining "[a] notable exception to this general rule requiring a contemporaneous objection is found when the record does not reveal a knowing and intelligent waiver of the right to counsel"). This is so because "[t]he pro se defendant cannot be expected to raise this issue without the aid of counsel." Id. Here, Appellant requested to represent himself and the entire colloquy regarding whether Appellant would represent himself was conducted between the judge and Appellant only. The lawyers appointed to represent Appellant did not interject themselves into the process; instead, the lawyers permitted Appellant to make his request to proceed pro se on his own and without any assistance from them, which was reasonable in light of Appellant's expressions of displeasure with his lawyers. Appellant, who was acting in a pro se capacity during the colloquy, cannot be expected to raise the issue presented on appeal – whether the trial judge erred as a matter of law by requiring Appellant demonstrate a heightened level of competency in order to waive his right to counsel, and in reliance upon this legal error, the trial judge improperly forced Appellant to choose between his right of self-representation and his right to a speedy trial – with any greater specificity than he did.

Appellant respectfully requests this Court rehear his appeal based upon this Court's misapprehension of the applicable rules governing error preservation. Appellant's request to proceed pro se preserved this issue for appeal. In any event, the error preservation requirements

are lessened when the matters relate to self-representation, and therefore, the merits of Appellant's issue on appeal should be considered by this Court.

Merits

A 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)). "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, 819 (1975). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." Id. at 819-20. "To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment." Id. at 820.

The right of self-representation "must be preserved even if the court believes that the defendant will benefit from the advice of counsel." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). In fact, even if the decision to proceed *pro se* is to the defendant's detriment, the decision "must be honored out of that respect for the individual which is the lifeblood of the law." Faretta, 422 U.S. at 834; see also State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). According to the South Carolina Supreme Court, "[a] defendant's right to waive the assistance of counsel is not unlimited," however. Fuller, 337 S.C. at 241, 523 S.E.2d at 170. A defendant must request to waive counsel "clearly" and "prior to trial." Id. "So long as the defendant makes his request prior to trial, the only proper inquiry is that mandated by Faretta." Barnes, 407 S.C. at 35, 753 S.E.2d at 550 (citing State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010)).[5]

[5] No prejudice inquiry or harmless error analysis may be conducted because the erroneous denial of a Faretta request is a structural error. State v. Barnes, 407 S.C. 27, 37, 753 S.E.2d 545, 550-51 (2014). See also McKaskle v. Wiggins, 465 U.S. 168 (1984).

Timely Request

Appellant made his request the week prior to the start of trial. Therefore, Appellant's request was timely. See Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999) (declining "to hold that a motion to proceed *pro se* made on the day of trial, but before the commencement of trial proceedings, is either timely or untimely as a matter of law" and recognizing the "variety of reasons which might excuse a last minute request by a defendant to proceed *pro se*"). See also State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010) (discussing the timeliness of a request for self-representation in the context of a capital trial). Additionally, just as in Fuller, Appellant's request to proceed *pro se* "was made in an atmosphere of his escalating dissatisfaction with his attorney" and Appellant "complained to the trial court that his counsel had been ineffective in preparing for trial." See Fuller, 337 S.C. at 242, 523 S.E.2d at 171. As the trial judge found, Appellant's "purpose in making the request was not to delay or stall the proceedings, but rather to address his growing concerns about his attorney." See id.

Competency to Waive Right to Counsel

The United States Supreme Court confronted the competency standard to waive the right to counsel in Godinez v. Moran, 509 U.S. 389 (1993). The Court held the competency standard for pleading guilty or waiving the right to counsel was the same as the competency standard for standing trial. Id. at 391. The Court explained "that the standard for competency to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" Id. at 396 (quoting Dusky v. United States, 362 U.S. 402 (1960)). The Court specifically rejected imposing a higher standard of competency for waiving the right to counsel or entering a guilty plea than the standard of competency required of a defendant to stand

trial. Id. at 397-398. According to the Court, there was "no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights." Id. at 399. The Court was emphatic there was "not a heightened standard of *competence*" required to waive the right to counsel. Id. at 401 (emphasis in original). However, in Godinez, which foreshadowed a future decision, the Court provided that states were "free to adopt competency standards" "more elaborate than the Dusky formulation," but explained the Due Process Clause did not impose additional requirements. Id. at 402.

Over a decade later, the United States Supreme Court re-visited the issue of competency to waive counsel in Indiana v. Edwards, 554 U.S. 164 (2008), and addressed the issue even more squarely. Specifically, the Court examined "whether the Constitution permits a State to limit [a] defendant's self-representation right by insisting upon representation by counsel at trial – on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." Id. at 174. In addressing that specific question, the Court held "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under Dusky but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." Id. at 178.

A few years later, South Carolina added its voice to the chorus of state courts addressing the competency question in the aftermath of Edwards. "The dispositive issue" in Barnes was "whether South Carolina [would] adopt the higher competency standard permitted by Edwards and thus alter the traditional Faretta threshold inquiry which permits any defendant competent to stand trial to waive his right to counsel." Barnes, 407 S.C. at 35, 753 S.E.2d at 549. In Barnes, a capital defendant unequivocally told the trial court that he wanted to represent himself. Id. at 31-34, 753 S.E.2d at 547-49. The trial court refused to allow the defendant to represent himself after his own

psychiatrist testified that while he was competent to stand trial, he was not competent to waive his Sixth Amendment right to counsel. Id. The South Carolina Supreme Court ruled that no such higher standard of competency existed and reversed. Id. at 36, 753 S.E.2d at 550.

> We decline to impose a higher competency standard upon an individual who wishes to waive his right to an attorney and represent himself at trial than that required for the waiver of other fundamental constitutional rights afforded a criminal defendant, such as the right against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers. A defendant who is competent to stand trial is also competent to waive these fundamental rights and plead guilty. We do not find public policy supports a distinction between a defendant who wishes to plead guilty and a defendant who wishes to proceed to trial as the Sixth Amendment guarantees every criminal defendant the right to proceed *without* counsel when he voluntarily and intelligently elects to do so.

Id. at 36, 753 S.E.2d at 550 (internal citations and quotation omitted) (emphasis in original).

The dissent noted that Barnes' psychiatric expert testified that Barnes failed to finish high school. Id. at 44. According to intelligence quotient testing, Barnes was in the "'very low part of the low/average range of intellectual functioning.'" Id. Additionally, Barnes "had a significant psychiatric history including psychiatric disorders, admissions, post-traumatic disorder, paranoia, cognitive difficulties and lapses, and issues with judgement and decision-making." Id. According to the expert, "these issues interacting with each other impaired [Barnes'] ability to knowingly and intelligently waive his right to counsel in this case." Id. Nevertheless, the majority determined the only competency consideration for the exercise of one's right to self-representation was the competency to stand trial. Id. at 36, 753 S.E.2d at 550.

South Carolina dealt with attempts by trial judges to impose higher competency standards for waivers of right to counsel, particularly in the context of death penalty trials, prior to the United States Supreme Court's decision in Edwards. In State v. Brewer, 328 S.C. 117, 120, 492 S.E.2d 97, 99 (1997), the Court reversed, finding a trial judge's refusal to grant the request for self-representation erroneous because the judge imposed a higher competency standard to waive counsel

because the defendant was facing death. According to the Court, "there is no prohibition against a capital defendant knowingly and intelligently waiving the right to counsel." Id. The trial judge denied the motion to waive counsel "based on the fact that the trial judge did not believe that [Brewer]'s decision to represent himself in a death penalty case was a good decision." Id. The Court held the wisdom of the decision to waive counsel was of no mind as long as the decision was made voluntarily and knowingly. Id. See also Reed, 332 S.C. at 41-42, 503 S.E.2d at 750.

The trial judge committed a legal error by imposing a higher level of competency for self-representation than for proceeding to trial. Our Supreme Court made clear in Barnes that the level of competency to waive the right to counsel is the same level of competency required to be tried or waive any other constitutional right. Any defendant competent to stand trial is competent to waive his right to counsel. Neither the trial judge nor the state questioned Appellant's competency to be tried. By insisting upon a Blair hearing and an examination of Appellant's mental health records as a pre-requisite to permitting Appellant to exercise his constitutional right to self-representation, the judge committed a legal error.

"Clear" Waiver

The South Carolina Supreme Court held that a request to waive counsel "must be clearly asserted by the defendant." State v. Sims, 304 S.C. 409, 415, 405 S.E.2d 377, 381 (1991); see also, Reed, 332 S.C. at 41, 503 S.E.2d at 750. Appellant's request to waive his right to counsel and proceed *pro se* was clear. This Court held Appellant's withdrawal of his motion barred review of this claim on appeal. Such an argument is unpersuasive in light of the judge refusing to honor Appellant's request of self-representation immediately based upon his misapprehension of the law and forcing Appellant to pick between his right to self-representation and his right to a speedy trial.

The Sixth Amendment to the United States Constitution provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial." U.S. Const. amend. VI; see also Klopfer v. North Carolina, 386 U.S. 213 (1967); Wheeler v. State, 247 S.C. 393, 147 S.E.2d 627 (1966). Additionally, our state constitution guarantees that "[a]ny person charged with an offense shall enjoy the right to a speedy trial." S.C. Const. art. I, § 14. "The main goals of this right are to prevent undue pretrial incarceration, minimize the anxiety stemming from public accusation of a crime, and limit the possibility of long delays impairing an accused's defense." State v. Langford, 400 S.C. 421, 440, 735 S.E.2d 471, 481 (2012) (citing State v. Waites, 270 S.C. 104, 107, 240 S.E.2d 651, 653 (1978)); see also Barker v. Wingo, 407 U.S. 514, 522 (1972).

The judge compounded his erroneous determination that a higher level of competency was necessary for the waiver of counsel than required to proceed to trial by forcing Appellant to choose between his constitutional right to self-representation and his constitutional right to a speedy trial. This "choice" was borne out of the judge's mistake of law requiring a different level of competency to waive counsel than to be tried. Any determination that Appellant's request was not clear in light of his withdrawal of the motion where the judge forced him to choose between his right to self-representation and his right to a speedy trial would equate to a determination that Appellant was not competent to be tried at all in light of the competency standards for proceeding to trial and self-representation being the same.

Knowing and Voluntary Waiver

"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." Faretta, 422 U.S. at 835. Thus, the decision to proceed *pro se* must be made knowingly, intelligently, and voluntarily. Id. "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." Barnes, 407 S.C. at 36, 753 S.E.2d at 550; see also State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) (explaining "it is the responsibility of the trial judge to determine whether there is or is not an intelligent and competent waiver"). "Faretta requires that a defendant 'be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.'" Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) (quoting Faretta, 422 U.S. at 835). "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." Prince v. State, 301 S.C. 422, 423-424, 392 S.E.2d 462, 463 (1990).

"The ultimate test of whether a defendant has made a knowing and intelligent waiver of the right to counsel is not the trial judge's advice, but the defendant's understanding." Brewer, 328 S.C. at 119, 492 S.E.2d at 98 (citing Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992)). See also State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). "A determination by the trial judge that the accused lacks the expertise or technical legal knowledge to proceed *pro se* does not justify a denial of the right to self-representation; the only relevant inquiry is whether the accused made a knowing and intelligent waiver of the right to counsel." Id. "A decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one." Id. at 120, 492 S.E.2d at 99.

According to the South Carolina Supreme Court, "a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred." Wroten v. State, 301 S.C.

293, 294, 391 S.E.2d 575, 576 (1990).[6] Therefore, "[i]n 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, [the reviewing court] will look to the record to determine whether [the defendant] 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. In other words, "[i]f 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, 301 S.C. at 294, 391 S.E.2d at 576.

According to this Court, a variety of factors may be considered by a reviewing court when determining if an accused has sufficient background to comprehend the dangers of self-representation, 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 the possible penalties; (4) whether the accused was represented by counsel before trial and 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 the 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.

In re Christopher H., 359 S.C. 161, 167-168, 596 S.E.2d 500, 504 (Ct. App. 2004).

In Faretta, the defendant "weeks before trial" told the judge he wanted to represent himself. Id. at 835. The trial judge originally ruled that the defendant could represent himself, but later reversed his decision after the defendant was unable to satisfactorily answer technical questions concerning the law. Id. at 808-10. The United States Supreme Court reversed. The Court held,

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[6] The trial judge must "make a meaningful inquiry into [a defendant's] background to determine whether [the defendant] had sufficient experience or knowledge to waive counsel." Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 371 (2001).

"We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule in the California code provisions that govern the challenges of potential jurors on voir dire. For his technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." Id. at 836.

In Reed, 332 S.C. at 41, 503 S.E.2d at 749-750, 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 by two capital trial qualified attorneys." Further, "[t]he trial judge warned [Reed] of the dangers and disadvantages of self-representation. [Reed] stated that he understood what he was waiving but still chose to waive counsel." Id. at 41, 503 S.E.2d at 750. In fact, 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. When the judge informed Reed of the dangers and disadvantages of self-representation, Reed "continued to assert that he understood what he was waiving and demonstrated to the judge that he was making a knowing, intelligent perhaps unwise, voluntary decision to represent himself." Id. at 41-42, 503 S.E.2d at 750.

In Graves v. State, 309 S.C. 307, 310, 422 S.E.2d 125, 127 (1992), the South Carolina Supreme Court examined the entire record, both the trial and PCR transcripts, to determine whether facts beyond the trial judge's colloquy with Graves showed he had sufficient background or was apprised of his rights by some other source. The record revealed Graves had completed three years at the John J.R. Law School of Criminal Justice, had an extensive criminal background, and had worked at a law library. Id. Additionally, Graves' trial counsel testified at the PCR hearing that he had discussed with Graves some of the risks of proceeding *pro se*. Id.

In Starnes, 388 S.C. 590, 601, 698 S.E.2d 604, 610 (2010), the Court held a capital defendant's waiver of counsel was valid where the waiver was addressed several times prior to trial, and during the hearing on the motion to proceed *pro se*, the trial court "methodically and carefully explained the dangers of self-representation and ensured [Starnes] understood the various issues at trial." The trial judge inquired into Starnes's mental state, his knowledge of the numerous aspects of a trial, his knowledge of the elements of the charges against him, and his knowledge of available defenses. Id.

In accordance with controlling precedent, the judge engaged in the necessary colloquy with Appellant to ensure his waiver of counsel was knowing and voluntary. Appellant explained he had completed over a year of college and was twenty-eight years old at the time the state called the case. According to the prosecutor, Appellant had been tried recently in General Sessions court. The only reason Appellant's request was not honored immediately was due to the judge' misapprehension of the competency required to waive counsel.

"A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard." McKaskle v. Wiggins, 465 U.S. 168, 174 (1984). "The pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." Id. The trial judge erred in failing to honor Appellant's request for self-representation where Appellant made a timely and clear request. The judge's failure to honor the request was due to the judge's mistake of law – that a higher degree of competency was required for waiving counsel than proceeding to trial or waiving any other constitutional rights. In light of the judge's erroneous view of the case law, the judge forced Appellant to choose between his right to a speedy trial and his right to self-representation. Although Appellant initially chose to

proceed to trial immediately, his displeasure with counsel was evident from the beginning, particularly as Appellant voiced his displeasure to the judge repeatedly over counsel's failings. The judge's error requires reversal.

In conclusion, Appellant respectfully requests this Court rehear the matter due to its misapprehension of the rules governing error preservation. After determining the issue is properly preserved for appellate review, Appellant respectfully requests this Court consider the merits of his issue on appeal and reverse his convictions and sentences.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 24th day of October, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County

Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

EDWARD T. CHANDLER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Edward T. Chandler, #326951, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 24th day of October, 2019.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 24th day of October, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029