STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

EDWARD T. CHANDLER,

Appellant.

Appellate Case No. 2016-001554

RETURN TO PETITION FOR REHEARING

The Respondent now makes this return in opposition to Appellant Chandler's petition for rehearing. In making its response, Respondent would maintain and crave reference to all arguments previously presented in Respondent's Final Brief of Respondent. Respondent respectfully submits the following:

(1) This Court found that the issue raised, whether the trial court erred "by requiring him to demonstrate a heightened level of competency" and was "improperly forced" to choose between self-representation and a speedy trial was not preserved for review. This was proper because, as admitted by page six of the petition for rehearing, Chandler withdrew his motion to represent himself. The next time he moved to represent himself, it was several days into the trial, and his request was granted. See Ligon v.

Norris, 371 S.C. 625, 634, 640 S.E.2d 469, 472 (Ct. App. 2006) ("An objection withdrawn at trial constitutes an express waiver of the issue and does not preserve the issue for appellate review.").

The red herring in Chandler's argument is the claim that his speedy trial rights would be violated if he was tried three months later during the next available term of court rather than that term of court. See Barker v. Wingo, 407 U.S. 514, 522 (1972) (finding "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case"). If the delay in the trial occurred, it would have been because Chandler waited until six days before trial to represent himself. Chandler, not the trial court, would have created the delay. There is nothing improper about the prosecution advising, and the trial court agreeing, to take measures to properly ensure any waiver of counsel was done knowingly on Chandler's part. Chandler cites the ten-point factor test of In re Christopher H., 359 S.C. 161, 167-68, 596 S.E.2d 500, 504 (Ct. App. 2004). The first factor calls for consideration of the accused's age, educational background, and physical **and mental health**. Id. (emphasis added). The trial court would not have erred in gathering more information to perform this analysis, and if the trial court delayed trial to do this, Chandler's right to a speedy trial would not be violated merely because he was tried three months later. Further, it is speculative that merely because the trial court would have sought information concerning Chandler's mental competency, the trial court would have made an error of law in executing the ten point test required of trial judges under In re Christopher.

"Because an exercise of the right of self-representation necessarily entails a waiver of the right to counsel – a defendant obviously cannot enjoy both rights at trial –

the exercise of the right of self-representation must be evaluated by using many of the same criteria that are applied to determine whether a defendant has waived the right to counsel." United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). Under Frazier-El, in order for a defendant to conduct his own defense, the court **must be certain** that the defendant's choice is (1) clear and unequivocal, (2) knowingly, intelligently, and voluntarily made, and (3) is timely. Id.

"The requirement that the assertion be clear and unequivocal 'is necessary to protect against an inadvertent waiver of the right to counsel by a defendant's occasional musings,' and it also 'prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation.'" United States v. Bush, 404 F.3d 263, 271 (4th Cir. 2005) (quoting Frazier-El, 204 F.3d at 558-59). "This protection against an inadvertent waiver of the right to counsel is especially important because representation by counsel does not merely tend to ensure justice for the individual criminal defendant, it marks the process as fair and legitimate, sustaining public confidence in the system and in the rule of law." Frazier-El, at 559 (citation and internal quotation marks omitted).

The question of whether the trial court would have improperly considered Chandler's competency, however, is a hypothetical question because Chandler withdrew his request to represent himself after Chandler spoke with his attorney. R. pp. 22-24. Chandler's trial was not delayed and the status of his mental health did not prevent the trial court from allowing Chandler to represent himself once he unequivocally chose to represent himself several days into the trial. The mental health question was never ripe.

Instead, the trial began four days later. A jury was selected and the trial court heard several motions before recessing for the day. The next day the trial resumed. The trial court dealt with a juror issue. Then he made his opening remarks to the jury. The State and co-counsel for Chandler made their opening arguments. Over the next two days, the State called twelve witnesses: the 911 operator, two of Victim's sons, Victim, Victim's neighbor, the convenience store owner, two Edgefield Sheriff's deputies, the EMS responder, the Edgefield crime scene investigator, the latent print examiner, and the SANE nurse, before Chandler started complaining about his attorney. R. pp. 393.

It was only at this point during trial that Chandler asked to represent himself. This was the third day of trial, counting jury selection, and occurred when court resumed following a lunch recess. R. p. 393. Chandler complained that his attorneys were not doing anything he told them to do. He wanted the trial court to look at some papers. He complained that his defense attorneys were not going to call Investigator Smith, which Chandler thought was important because he was the lead investigator who "made all of these mistakes and they are trying to hide it." R. pp. 393-94 (direct quote, p. 394, lines 1-2). Chandler claimed, "Your Honor, they are working together. I will be honest with you and I cannot let that happen. They are working together, him and the Solicitor, they are." R. p. 394, lines 1-5. Chandler also let the trial court know that he was scared. R. p. 394, line 9.

Chandler complained that his attorneys were recommending he not testify and did not want to call any witnesses. R. pp. 394-95. He claimed his attorney "has not cross-examined anybody. He cross-examined one person and it really don't matter." R. p. 395, lines 13-17. Actually, at that point in the trial, defense counsel examined nine of the

State's twelve witnesses, asking a total of 188 questions. Chandler pleaded he needed somebody else to represent him or he needed to represent himself. R. p. 395, lines 17-21.

Chandler's public defender explained, "Judge, we just went and talked about possible scenarios that could play out and possible options that we could have and some ways in which I'm leaning on those options." R. p. 396, lines 10-13. He further elaborated, "And that's based largely on my experience of having tried a number of cases now and there's really, whatever decision you make, there's risk and there's reward. . . . And sometimes the reward is pretty minimal and the risk is pretty great." R. p. 396, lines 10-18.

Following Chandler's further remonstrations, the trial court found it prudent to move the discussion to the judge's chambers before Chandler said something in open court against his interests. The trial court initially advised Chandler that he could not dismiss his attorneys after the trial began. R. pp. 399-402.

The trial court offered a parable about a defendant who represented himself and did fairly well until he failed to understand the trial court's rulings and "got aggravated with me and he got real loud and belligerent and started waving his arms and raised his voice and I warned him." R. p. 403, lines 9-15. Chandler replied "Sorry about that." R. p. 403, line 16. At that time, the trial court denied Chandler's motion to represent himself and warned him the jury is watching everything he does and his body language. R. pp. 404-05. The prosecutors left the chambers so the trial court could speak with Chandler about the specific things he felt the defense attorneys should be doing. R. pp. 413-20.

The trial resumed and testimony was taken from two more witnesses – a serologist and forensic DNA analyst. The serologist found pre-ejaculate on the oral

swab. R. pp. 434-35. The DNA analyst testified she could not develop a DNA profile from the swab. R. p. 448.

Then Chandler moved to represent himself. R. p. 480. Chandler explained he wanted to call or recall a total of eight witnesses. R. p. 482. He was allowed to represent himself after the trial court gave extensive instructions about the dangers of self-representation. R. pp. 480-87.

Chandler took over representation, handling the State's last two witnesses. He was able to call all eight witnesses he previously requested and testified himself, as he had wanted. Tr. pp. 541-712. Chandler made his own closing argument. R. pp. 673-99.

The trial court did not err in finding the issue was not preserved since Chandler withdrew his request to represent himself until several days into the trial. Once Chandler renewed his motion to represent himself, he was allowed to without consideration of his mental health history and without continuing the trial.

(2) Neither Appellant nor his trial attorneys ever claimed the trial court was unduly considering his competency to represent himself or the trial court was making him choose between his right to a speedy trial and the right to represent himself. So this Court correctly found the issue was not preserved for review. In order for an issue to properly be preserved for appellate review, the issue must be: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). None of Chandler's arguments were raised below.

In response, Appellant asks this Court to make a startling rule that would allow this Court to review complaints for the first time on appeal because a pro se litigant

would not be able to knowingly and intelligently waive these issues, although Appellant is claiming he would have been knowingly and intelligently waiving his right to counsel and was competent to represent himself. See United States v. King, 582 F.2d 888, 890 (4th Cir. 1978) ("The defendant must be made aware that he will be on his own in a complex area where experience and professional training area greatly to be desired.").

Federal law contradicts Appellant's presumption against a waiver of the right to self-representation. "[T]he right to self-representation and the right to representation by counsel, while independent, are essentially inverse aspects of the Sixth Amendment and thus that assertion of one constitutes a de facto waiver of the other." United States v. Singleton, 107 F.3d 1091, 1096 (4th Cir. 1997) (citations omitted).

The Fifth Circuit Court of Appeals addressed the differences between the waiver of a right to counsel and the waiver of the right to represent oneself, noting, "The important distinction in the manner in which the two rights come into play requires that a different waiver analysis be applied to the right of self-representation than to the right to counsel. Unlike the right to counsel, the right of self-representation can be waived by defendant's mere failure to assert it." Brown v. Wainwright, 665 F.2d 607, 610-11 (5th Cir. 1982). "Even if defendant requests to represent himself . . . the right may be waived through defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether." Id. at 611. The Fifth Circuit further surmised, "Since the right of self-representation is waived more easily than the right to counsel at the outset, before assertion, it is reasonable to conclude it is more easily waived at a later point, after assertion." Id. Thus the Fifth Circuit concluded, "A waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to

represent himself." Id.

Chandler withdrew his motion to represent himself, never complained that the trial court was unduly considering any mental health issues Chandler might have suffered from, and never complained he was forced to choose between the right to represent himself and his speedy trial rights. He never asserted a right to a speedy trial. Therefore, this Court properly found that the issues Chandler now complains about are not preserved. Accordingly, the State respectfully requests the petition for rehearing be denied.

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENT

October 30, 2019

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THE STATE,

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Return To Petition For Rehearing on Appellant by delivering addressed to his attorney of record, Susan B. Hackett, Esquire, SCCID, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 30th day of October, 2019.

Anne Mueller

Anne A. Mueller
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

October 30, 2019

Susan B. Hackett, Esquire
SCCID, Division of Appellate Defense
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Columbia, SC 29211

RE: The State v. Edward T. Chandler
Appellate Case No: **2016-001554**

Dear Ms. Hackett:

Enclosed please find two copies of the State's Return to Petition for Rehearing in the above-referenced case.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: The Honorable Jenny A. Kitchings (with original and 6 copies)
Victim Advocacy Division