

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Saluda County

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Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHNNY TYLER PADGETT,

APPELLANT

APPELLATE CASE NO 2019-000902

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ANDERS BRIEF OF APPELLANT

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MAR 04 2020

SC Court of Appeals

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**STATEMENT OF ISSUE ON APPEAL**

Whether the trial judge erred in finding that appellant voluntarily waived his right to counsel where appellant informed the judge that he did not wish to represent himself but wanted a different lawyer because he did not trust his appointed counsel and the trial judge gave appellant the Hobson's choice of representing himself against his wishes or proceeding with an attorney that he did not trust?

## STATEMENT OF THE CASE

Appellant was indicted by the Saluda County grand jury for failure to stop for a blue light. R. 203-204. Appellant's trial was held before the Honorable Walton J. McLeod, IV and a jury from May 21 – 22, 2019. R. 1. Appellant represented himself and the state was represented by Brian Eckstrom. R. 1.

The jury found appellant guilty as charged. R. 190. The judge sentenced appellant to six months imprisonment. R. 201.

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). A circuit judge’s findings of fact are reviewed for clear error while the denial of the right of self-representation based upon those findings of fact is reviewed de novo. Id. Appellate courts “must consider the defendant's testimony, history, and the circumstances of his decision, as presented to the circuit judge at the time the defendant made his request.” Id.

### STATEMENT OF FACTS

On January 9, 2019, Jacqueline Roberson, a patrol officer with the town of Saluda, initiated her blue lights on a vehicle that had allegedly not used its turn signal. R. 93, l. 20 – 94, l. 21. The vehicle appeared to stop at first but then sped away from Roberson. R. 94, l. 22 – 95, l. 18. The vehicle came to stop approximately a half-mile later after getting a flat tire. R. 96, l. 21 – 99, l. 4. Appellant was identified as the driver of the vehicle and was arrested for failure to stop for blue lights. R. 99, ll. 5 – 21.

## ARGUMENT

The trial judge erred in finding that appellant voluntarily waived his right to counsel because appellant informed the judge that he did not wish to represent himself but wanted a different lawyer because he did not trust his appointed counsel and the trial judge gave appellant the Hobson's choice of representing himself against his wishes or proceeding with an attorney that he did not trust.

### **Relevant Facts**

Prior to the start of appellant's trial, defense counsel informed the judge that appellant wanted him to be relieved. R. 4, ll. 4 – 9. When the judge asked appellant if he wanted to represent himself, appellant responded: "No, no, I'm not . . . going [to] represent myself on this case because I want a lawyer to help me in this case." R. 4, l. 21 – 5, l. 4. The judge informed appellant that Bennett Casto was his defense counsel to which appellant replied: "Mr. Casto [is] not doing what I want him to do." R. 5, ll. 14 – 17.

Upon further questioning by the judge, appellant clarified that he did not want to represent himself, but instead wanted to be represented by a different attorney. R. 6, ll. 7 – 15. When the judge told appellant that he came into the hearing with the understanding that appellant wanted to represent himself, appellant stated: "I'm not going to take that risk of representing myself." R. 6, ll. 18 – 22. The following exchange then took place:

The Court: All right, sir. You acknowledge to me that you need a lawyer to represent you; is that correct?

[Appellant]: I'm not going to represent myself.

The Court: Okay. Again, are you acknowledging to me that you understand you need an attorney to help you defend this case; is that correct?

[Appellant]: I want the Court to appoint me an attorney who [is] willing to help me with my case and be honest with me about my case. So far, they [are] not being honest about my case. . . . [Casto is] not being honest with me.

R. 6, l. 23 – 7, l. 10. Appellant informed the judge that he did not believe Casto was “in [his] favor.” R. 8, ll. 1 – 9. The judge then addressed Casto to say that because appellant was not waiving his right to counsel, Faretta<sup>1</sup> did not apply. R. 8, ll. 10 – 14. Casto replied: “It sounds like . . . [appellant] wishes to get another attorney. . . . Judge, I’ll just tell you I’m pleased . . . to do . . . whatever you order.” R. 8, ll. 17 – 20.

The trial judge then told appellant:

The way I see it, Mr. Casto and [appellant] is you’ve got a lawyer who has been assigned to your case. The case has been called for trial. A jury is here. You are here. The state’s attorney is here. Your . . . attorney is here. You have the right to represent yourself, or you can proceed forward with Mr. Casto. I’ll let you speak with Mr. Casto and decide what you’re going to do, but we’ll pick up with jury selection in about an hour in this case.

R. 11, ll. 3 – 11. After a break, court was reconvened for jury selection at which time the trial judge told appellant:

[W]e’re about to bring the panel back in here, but as you’ll recall, we did a hearing earlier where . . . you explained to the Court that you did not want to represent yourself. You weren’t happy with your current lawyer, but I told you you either can represent yourself or you can have an attorney. So you’re going to have an attorney today.

R. 14, ll. 11 – 18. Appellant then told the judge: “Look, it’s only fair I let you know, I don’t trust [Casto] in my case. I’m going to have to take a chance and do it myself.” R. 15, ll. 2 – 4. Casto asked the judge to give appellant his Faretta warnings. R. 16, l. 19 – 18, l. 1. The judge again

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<sup>1</sup> Faretta v. California, 422 U.S. 806 (1975).

asked appellant if he wanted to represent himself and appellant replied that he had “no choice” but to represent himself. R. 18, ll. 21 – 25.

The judge proceeded to question appellant as to his past experiences in criminal court and whether he understood the elements and possible punishments of his current charge. Appellant indicated that he had been in criminal court before and that he knew the elements of the offense and possible punishments for his current charge. R. 19, l. 6 – 25, l. 2. Appellant acknowledged that he would need to follow the rules of court and that he would object if he heard any hearsay testimony. R. 25, l. 6 – 27, l. 17. The judge advised appellant that he believed appellant would be better served if he was represented by an attorney and appellant stated that he was voluntarily waiving his right to counsel and wished to represent himself. R. 31, ll. 4 – 23.

The judge found that appellant voluntarily waived his right to counsel and informed appellant that the trial would proceed with him representing himself. R. 31, l. 24 – 32, l. 1. Casto was appointed to be standby counsel. R. 32, ll. 2 – 7.

### **Discussion**

The right of a criminal defendant to represent himself was formally recognized in Faretta v. California, 422 U.S. 806, 834-835 (1975). Faretta announced the now familiar rule that a defendant has the right to represent himself, so long as he knowingly and intelligently waives his right to counsel. Id. “Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.” Id.

“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.” Osbey v.

State, 425 S.C. 615, 619, 825 S.E.2d 48, 50 (2019) (internal quotations omitted). “Whether a defendant has intelligently waived his right to counsel depends upon the particular facts and circumstances surrounding each case, including the background, experience, and conduct of the accused.” State v. Samuel, 422 S.C. 596, 603, 813 S.E.2d 487, 491 (2018). A defendant’s ability to adequately represent himself in a criminal trial is irrelevant in determining whether to grant his request to proceed pro se; the proper inquiry is only whether he had the competence to *choose* to represent himself. Id.

A defendant’s request to represent himself must be clear and unequivocal in order to protect an inadvertent waiver of the right to assistance of counsel. U.S. v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). “A defendant may waive counsel by an affirmative, verbal request, or a defendant’s actions may constitute a waiver by conduct.” Osbey v. State, 425 S.C. 615, 619, 825 S.E.2d 48, 50 (2019) (internal quotations omitted). However, before a defendant’s conduct can be construed as a waiver of the right to counsel, it must be shown that the waiver was knowing and intelligent, which requires that he be aware of the dangers and disadvantages of self-representation. Id. At 620, 825 S.E.2d at 50.

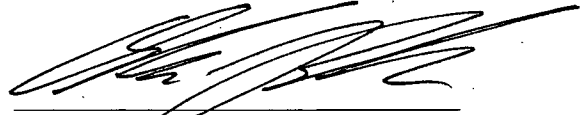
Appellant did not make a knowing and intelligent waiver of his right to counsel in this case. Appellant repeatedly informed the trial judge that he did not want to represent himself and that he needed a lawyer to help him. Appellant also clearly informed the judge that he did not trust his appointed counsel and was not comfortable being represented by Casto. The judge, instead of granting appellant’s request and appointing new counsel for appellant, gave appellant an ultimatum to either represent himself or proceed with Casto.

Appellant reluctantly chose to represent himself only because the judge refused to grant his request to be represented by a different lawyer. This was evident by appellant’s statement

that he was “going to have to take a chance” and represent himself because he did not trust Casto. While a criminal defendant does not have a right to counsel of his choosing, the context of appellant’s case resulted in an involuntary waiver of his right to counsel. Appellant cannot be found to have made a voluntary and intelligent waiver of his right to counsel while under the threat of proceeding to trial with an attorney that he did not trust. Therefore, the trial judge erred in finding that appellant voluntarily waived his right to counsel and proceed pro se.

**CONCLUSION**

By reason of the foregoing argument, appellant's conviction should be reversed, and this case remanded to the Saluda County Court of General Sessions for a new trial.



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Adam Sinclair Ruffin  
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of March, 2020.

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APPELLANT

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Johnny Tyler Padgett states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Walton J. McLeod, IV, which was held on , and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Johnny Tyler Padgett.

Respectfully Submitted,



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Adam Sinclair Ruffin  
Appellate Defender  
ATTORNEY FOR APPELLANT

This 4th day of March, 2020.

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**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Entire trial transcript;
- (3) State's Ex. 1 (Body-worn camera footage);
- (4) State's Ex. 2 (camera footage).

I certify that this designation contains no matter which is irrelevant to this appeal.

March 4, 2020



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Adam Sinclair Ruffin  
Appellate Defender

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Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of my ability this Anders 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."

March 4, 2020.



Adam Sinclair Ruffin  
Appellate Defender

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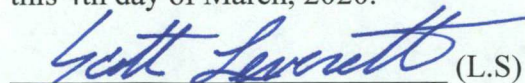
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blich, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Johnny Tyler Padgett, 124 Bouknight Ferry Rd, Saluda, 29138, this 4th day of March, 2020.



Adam Sinclair Ruffin  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 4th day of March, 2020.

 (L.S)

Notary Public for South Carolina  
My Commission Expires: September 27, 2028.

