THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2018-001909

The State, ...Respondent,

v.

Dana L. Morton,.....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Appellant Dana Morton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional

Rules

ADDITIONAL STATEMENT OF CASE

On November 14, 2019, Dana Morton served his Initial Brief of Appellant. On March 12, 2020, the State served its Motion to Remand for Hearing for the trial court to determine, pursuant to *Faretta v. California*, 422 U.S. 806 (1975), whether Mr. Morton made a knowing and voluntary waiver of his Sixth Amendment right to counsel. On March 17, 2020, Mr. Morton filed his Memorandum in Opposition to the State's Motion to Remand for Hearing. By written order dated April 16, 2020, this Court denied the State's motion.

On June 18, 2020, the State filed its Initial Brief of Respondent ("State's Brief"). This Reply Brief follows.

IN REPLY

Question I

Did the trial judge err, in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution, by requiring Dana Morton to represent himself when Mr. Morton did not affirmatively waive his right to counsel and the trial judge did not warn Mr. Morton about the dangers of self-representation as required by *Faretta v. California*, 422 U.S. 806, 807 (1975)?

As a threshold matter, the State's Brief, at 3, acknowledges "the transcript does not reflect a proper *Faretta* warning. *And see* State's Brief, at 4 ("The State acknowledges the transcript fails to provide a colloquy between the judge and [Mr. Morton] regarding the dangers of self-representation." As it did in its Motion for Remand for Hearing, the State argues, "[T]he case should be remanded to the circuit court for a determination of whether [Mr. Morton] knew of the dangers of self-representation such that the trial court properly required him to proceed *pro se*," *id.,* at 3, where "the question would become whether [Mr. Morton] knew of the dangers through other means, had prior experience such that he would

have the requisite knowledge to make a valid waiver, or otherwise made a valid knowing and voluntary waiver of his right to counsel," *id*., at 4. As will be discussed below, the State misrepresents the record and tries to reframe the issue presented in this appeal.

The State contends Mr. Morton indicted to the trial judge "he believed counsel was railroading him and asked for appointment of a public defender." State's Brief, at 3 (citing Tr. 24;[1] R. *). The statement misrepresents the record. The record actually reflects that Mr. Morton was addressing the trial judge when he stated:

> Your Honor, like I stated earlier, I'm here on a special appearance. This is not a moral court. I don't believe that you a moral judge, but if y'all want to go ahead and proceed and try to railroad me the best that you can, you can go ahead, sir, because actually we'll be taking in this matter because anyone can see, if I could get a public defender, five minutes, ten minutes where I could prepare a case, and put in y'all words where I won't be speaking while you're speaking, where I don't have to be locked up and taken away from my family, then I – that would be fine with me.

Tr. 25, lines 13-23. The unfortunate phrasing notwithstanding, Mr. Morton was (1) objecting to the trial judge requiring him to represent himself, (2) requesting the appointment of a public defender, and (3) affirming his willingness to proceed to trial that very same day.

Mr. Morton, accordingly, did not waive his right to counsel, and he framed the issue before this Court as whether it was error for the trial judge to require him to represent himself when he did not affirmatively waive his right to counsel and the trial judge did not warn him about the dangers of self-representation. Once this Court concludes Mr. Morton did not waive his right to counsel, the need to reverse the convictions and remand the case for a new trial becomes apparent.

---

[1] The cite to page 24 of the transcript appears to be a scrivener's error. Page 25 appears to be the correct cite to the trial transcript.

The State wants to reframe question before this Court as whether Mr. Morton knew of the dangers of self-representation from a source independent from the trial court.[2] Regardless of whether he knew the dangers of self-representation, Mr. Morton did not waive his Sixth Amendment right to counsel. This Court does not need to reach this issue, and a remand for this determination would not serve any useful purpose[3] This Court, accordingly, should reverse the convictions and remand the case for a new trial.

Question II

Did the trial judge err, in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution, by failing to appoint a public defender to represent Dana Morton when the undisputed evidence demonstrated Mr. Morton could not afford an attorney and he was prepared to proceed to trial?

The State contends Mr. Morton

> waited until the day of trial to request new counsel, had no valid reason to remove his current counsel, never presented an affidavit of indigency or other proof of qualification for a public defender, and selected to represent himself when presented with the dual option of going forward with retained counsel or proceeding pro se.

State's Brief, at 7; *and see id*., at 3 (Mr. Morton "did not provide an affidavit of indigency or other proof that he would qualify for a public defender.") and *id.,* at 8 (again discussing an affidavit of indigency).[4]

---

[2] Footnote 6, at p. 22, of the Brief of Appellant anticipated the State might argue that Mr. Morton waived his right to counsel by his conduct. The record does not support this finding, and the State does not make this argument on appeal. Nor could it for the reasons set forth in the Brief of Appellant.

[3] The State acknowledges our state's precedent recognizes a remand is not appropriate when a "remand would serve no useful purpose." State's Brief, at 5 (citing *State v. Cash,* 304 S.C. 223, 403 S.E.2d 632 (1991) and *State v. Dixon*, 269 S.C. 107, 236 S.E.2d 419 (1977)).

[4] This Reply Brief focuses on the affidavit of indigency issue. The Brief of Appellant, at 6, discusses the breakdown of the attorney-client relationship, including prior

This Court must reject these arguments for four reasons. First, it is the circuit court's obligation to screen an individual to determine whether the person qualifies for representation by a public defender. Rule 602, SCACR. Second, Mr. Morton did provide some evidence of indigency when he informed the trial court that his wife "took a loan so" he could pay trial counsel and represented, "I don't have any money, and I still owe Mr. Yarborough money now, and he knows this." Mr. Yarborough, in fact, confirmed Mr. Morton "hired [him] with an initial retainer, and was not able to pay after that." Tr. 29-30. At this point, the trial judge should have screened Mr. Morton for a public defender. Third, "[n]othing [in the Indigent Defense Act or Rule 602, SCACR] is designed to limit the discretionary authority of a judge to appoint counsel in any case."[5] S.C. Code Ann. § 17-3-100. "The fact that the accused may have previously engaged and partially paid private counsel at his own expense in connection with pending charges shall not preclude a finding that he is financially unable to retain counsel." S.C. Code Ann. § 17-3-10. Fourth, the State's Brief, at 7, misleads this Court by arguing Mr. Morton "selected to represent himself when presented with the dual option of going forward with retained counsel or proceeding pro se." As discussed in Question I above, Mr. Morton did not waive his right to counsel

---

trial counsel's faulty advice and unwillingness to present Mr. Morton's defense. Regarding making the request for a public defender on the day of trial, the State's Brief does not explain how Mr. Morton would be able to get in front of a circuit court judge without assistance of counsel, who also did not raise the issue prior to trial, despite being aware of the breakdown in the attorney client relationship and having kicked Mr. Morton out of his office. Tr. 961.

[5] The State poses questions about Mr. Morton's indigency, implying its concern for the State's resources. The procedure followed by the trial judge, however, did not conserve any State resources. The trial judge appointed the Chief Circuit Public Defender as Mr. Morton's legal advisor.

and objected to the trial court requiring him to represent himself. Mr. Morton did not make a voluntary selection.

The State's Brief, at 7-8, wants this Court to believe Mr. Morton requesting a public defender was intended for delay. The record contradicts this assertion. As seen in Question I above, Mr. Morton requested "five minutes, ten minutes" with a public defender in order to be prepared to proceed to trial. Although the charges are extremely serious, the underlying facts of Mr. Morton's case are not complicated. The record demonstrates Mr. Morton was prepared to present his defense. He had the Sixth Amendment right to have counsel assist him in presenting his defense.[6]

The trial court erred as a matter of law by not screening Mr. Morton for a public defender. This Court should reverse the convictions and remand this case for a new trial.

(Question III begins on next page)

[6] The State's Brief, at 7, argues Mr. Morton's "request to appoint a public defender was entirely unrealistic and would certainly have resulted in the exact delay the trial court found Appellant sought to create." As seen, that assertion is not supported by the record. Mr. Morton request only five to ten minutes with a public defender in order to proceed to trial that week. Even though the trial judge required Mr. Morton to proceed to trial without counsel, the record reflects Mr. Morton was prepared to present his defense. Additionally, the trail judge appointed the Chief Circuit Public Defender as a legal advisor to Mr. Morton. The record reveals the trial judge frequently called on the Public Defender to act more as counsel than as an advisor for Mr. Morton. Thus, Mr. Morton's request to appoint a Public Defender and proceed to trial that day was an entirely realistic request.

Question III

Did the trial judge err by overruling Dana Morton's objection to prosecution witnesses testifying that George Vaughn was a "reliable" confidential informant when such testimony constituted impermissible vouching for the credibility of the informant?[7]

The State argues, "Investigator Lachica merely explained the terminology used by law enforcement and never labeled the informant, George Vaughn, as 'reliable.'" State's Brief, at 9. The State further contends Investigator Lachica "never made reference to Vaughn, the informant in this case, nor did he indicate that he believed Vaughn to be a "confidential reliable informant," and, "[a]s a result, nothing in his direct testimony resulted in bolstering or vouching for Vaughn's testimony." *Id.,* at 10. These contentions are not supported by the record. As discussed in the Brief of Appellant, at 25, "The manner of questioning by the State" can constitute improper vouching when "the jury could have perceived that the assistant solicitor [and law enforcement witness] held the opinion that [the informant witness] was, in fact, telling the truth." *State v. Kelly*, 343 S.C. 350, 369,

[7] The State's Brief, at 9, fn. 4, implies—but does not actually argue—this issue might not be preserved for appeal. Mr. Morton objected as soon as Investigator Lachica started to testify about a confidential reliable informant because of "the fact of they [are] using the difference between confidential informant, and reliable confident informant because if they trying to take the informant and move them to reliable." Tr. 113. This objection is sufficient to object to the testimony based on improper vouching or bolstering. "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (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, 912–13 (Ct. App. 2004). "Further, it is incumbent upon the [circuit court] to apply [the appellate] Court's precedent." *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) (citing S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents.")). This issue, accordingly, is preserved for appeal.

540 S.E.2d 851, 860–61 (2001), *reversed on other grounds by Kelley v. South Carolina,* 534 U.S. 246 (2002).

The prosecution wanted the jurors to know Investigator Lachica considered his informant "reliable." After reviewing Investigator Lachica's training, education, and experience as a narcotic officer, the Solicitor asked, "[D]id you ever employee citizens of South Carolina to perform undercover purchases of illegal narcotics?" Investigator Lachica explained how law enforcement pays informants or allows informants "to work off charges." Next, he explained law enforcement selects informants from people who know people in the illegal drug trade. After this testimony, the Solicitor asked, "And when you speak about informants, are there different – what would be the difference between a confidential informant and a confidential reliable informant?" Mr. Morton objected because the prosecution was trying to make informant George Vaughn more reliable. After the trial judge overruled Mr. Morton's objection, Investigator Lachica explained:

> Confidential reliable informant is somebody who has – they start off as a, a confidential informant, and, once they've purchased drugs from us in the past or purchased drugs from us or for us, and it leads to the confiscation of illegal narcotics or substances by them doing what they say they were gonna do, and it being on video, audio, and we move them up slowly, but surely up the ladder to reliable to where we change it from confidential to confidential reliable informant.

After this explanation, the Solicitor immediately asked, "Investigator Lachica, do you know George Vaughn?" Investigator Lachica explained Mr. Vaughn participated in two or three operations prior to Mr. Morton's case, implied his informant was selected because he did not have a record for providing "false information," and discussed the process for corroborating information provided by an informant. Thus, the prosecution made it very clear that informant Vaughan met Investigator Lachica's criterial to be considered

"reliable." Tr. 110-17. The trial judge, furthermore, recognized the informant "was presented as a reliable, confidential informant." Tr. 222. "There is no other way to interpret the language used [by the prosecution] other than to mean" the government considered its informant to be reliable. *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011).

Also, during closing arguments, the Solicitor talked about law enforcement's "trust" of Mr. Vaughn. Tr. 1043. Improper vouching, of course, can occur during the prosecution's opening statement or closing argument. *E.g. Tappeiner v. State*, 416 S.C. 239, 785 S.E.2d 471 (2016) (solicitor improperly vouched for credibility of child victim during closing argument); *Gilchrist v. State*, 350 S.C. 221, 565 S.E.2d 281 (2002) (state improperly vouched for witness's credibility in its opening statement).

The State's Brief, at 10-11, faults Mr. Morton for questioning the informant about his purported reliability. As seen, the prosecution first introduced the informant's credibility into the trial. When overruling Mr. Morton's objection, the trial judge told Mr. Morton, "You can look into whether or not you believe that to be true," and, "I'll give you an opportunity to ask questions about it." Tr. 113-14. In addition to exercising his Sixth Amendment confrontation right, Mr. Morton was merely following the trial judge's instructions. If the trail judge had sustained the objection, Mr. Morton would not have needed to cross-examine the informant about his purported reliability.

Finally, the State's Brief, at 9-10, argues, "Any error in referencing the terms was entirely harmless as the only person who discussed the term 'reliable' as it related to Vaughn was" Mr. Morton. As seen above, this contention is not supported by the record. The State introduced the concept of the informant's reliability and Mr. Morton contested

that evidence. Equally as important, the State overlooks the proper standard of review for harmless error. "The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012). Here, this Court cannot deem the error harmless beyond a reasonable doubt because the credibility of the informant was a central issue for the jurors to determine. *State v. Chavis*, 412 S.C. 101, 110, 771 S.E.2d 336, 341 (2015) ("The determination whether a bolstering error is harmless depends on whether the case turns on the credibility of the" witness.).

The trial court erred as a matter of law by allowing the prosecution to deem its informant "reliable." This Court should reverse the convictions and remand this case for a new trial.

Question IV

Did the trial judge err, in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution, by denying Dana Morton his rights to confront and cross-examine George Vaughn about his prior unadjudicated drug charges when that evidence was permissible impeachment?

The Brief of Appellant, at 27-28, argues the trial judge should have allowed Mr. Morton to cross-examine the informant about prior unadjudicated drug charges, pursuant to Rule 608(c), SCRE to show evidence of bias, prejudice and motive to misrepresent. The State's Brief, at 13, contends the trial judge addressed Mr. Morton's objection "pursuant to Rule 609, SCRE" and "was never asked to consider Rule 608(c), SCRE." Thus, it is important to review what transpired at trial. After the Solicitor objected, the trial judge allowed Mr. Morton to show the Solicitor which of the informant's charges he intended to

use during the examination. After conferring with Mr. Morton, the Solicitor stated, "[T]hey're several non-convictions is that – I don't know if that's what he was reading, but those would not be appropriate to bring out in front of this Court." The Solicitor did not cite authority for the State's objection. Mr. Morton explained he wanted to question the informant about how many times he had been "caught," not limited to convictions. The trial judge ruled, "[G]enerally you're not allowed to use non-convictions to try to attack someone's credibility." Tr. 260-61. The trial judge did not base the court's ruling on any particular rule of evidence. Although the ruling might implicitly reference the general rule contained in Rule 609, SCRE,[8] the ruling also implicitly recognizes exceptions to the general rule such as Rule 608, SCRE.

Also, when making this ruling, the trial judge was aware of the prior *in camera* hearing to determine the admissibility of the informant's prior criminal record. Tr. 217-27. The trial judge recognized:

> Well, we've got a little bit of a different situation here because he's been presented as a confidential informant, and part of the qualification process that's already been testified to is that he have a prior drug record, and have contacts with people in the drug world.

Tr. 221. And:

> [S]o you might use that record for that purpose. Has nothing to do with credibility necessarily, but also it can be used for the purpose of establishing whether or not he was properly qualified as a informant, someone who would have contacts in the drug world.

Tr. 222. And:

[8] Mr. Morton's legal advisor was the only person to mention Rule 609, SCRE during the trial. Tr. 220, line 24; 224, line 3. Ironically, the State seemingly wants this Court to consider the legal advisor as Mr. Morton's attorney while asking this Court to excuse the trial judge requiring Mr. Morton to represent himself.

> Generally these, these prior convictions would be relevant only if they go to someone's credibility, but, in this case, as I pointed out, there's also the factor that this gentleman was presented as a reliable, confidential informant who has contacts in the drug world.

Tr. 222. The trial judge, therefore, was aware the informant's connections to the "drug world," "qualification process" to become an informant, and his reliability as an informant were legitimate inquiries on cross-examination. This issue, accordingly, is preserved for appeal. *Rogers* and *Phillips, supra*.

The State's Brief, at 13, argues Mr. Morton "never proffered any information about the charges he sought to use in cross-examination." The record, however, reflects that informant had "several non-convictions" and Mr. Morton wanted to question the informant about how many times he had been "caught" with drugs. Tr. 260-61.

On the merits, after acknowledging the Confrontation Clause and Rule 608, SCRE, the State argues, "in this case neither Appellant at trial nor his counsel on appeal have attempted to connect the proposed cross-examination into charged by unadjudicated crimes to the current case and a claim of bias or prejudice." State's Brief, at 14-16. As discussed above, the trial judge was aware the informant's connections to the "drug world," "qualification process" to become an informant, and his reliability as an informant were legitimate inquiries on cross-examination. The proposed cross-examination could not be more connected the Mr. Vaughn's bias and prejudice as an informant.

The trial court erred as a matter of law by limiting Mr. Morton's cross-examination of the prosecution's informant. This Court should reverse the convictions and remand this case for a new trial. This Court cannot deem the error harmless beyond a reasonable doubt because the credibility of the informant was a central issue for the jurors to determine. *Chavis, supra.*

CONCLUSION

For the reasons set forth in the Brief of Appellant and this Reply Brief, this Court reverse Dana Morton's conviction and remand this case for a new trial.

Respectfully Submitted,

By s/*E. Charles Grose, Jr.*

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Appellant Dana Morton

July 17, 2020
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2018-001909

The State, ...Respondent

v.

Dana L. Morton,.....Appellant.

Certificate of Service

I certify that I have served the Initial Reply Brief of Appellant on the State of South Carolina by email, on the date reflected below, addressed to:

William M. Blitch, Jr. , Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
wblitch@scag.gov

s/E. Charles Grose, Jr.
E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
E-mail: charles@groselawfirm.com

July 17, 2020

The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

July 17, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *State of South Carolina v. Dana L. Morton*
Appellate Case No. 2018-001909

Dear Ms. Kitchings:

Enclosed for filing, please find Mr. Morton's Initial Reply Brief of Appellant, along with a certificate of service.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

s/E. Charles Grose, Jr.
E. Charles Grose, Jr.

cc: William M. Blitch, Jr., Esquire