

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

GERALD EDWARDS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000439

BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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S.C. SUPREME COURT

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Rules

Rule 243(i)(1), SCACR2

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by failing to advise Edwards of the dangers of proceeding *pro se*, where only a brief and inadequate colloquy took place the week before trial, where a different judge relied on the colloquy and erroneously concluded that Edwards knowingly and intelligently waived his right to counsel?

STATEMENT OF THE CASE

Gerald Edwards was indicted by a Charleston County grand jury during its April 2014 term for armed robbery and possession of a knife during the commission of a violent crime. App. 451 – 455. Following a hung jury during his first trial, his case was called for trial before the Honorable R. Markley Dennis on February 9, 2015. App. 10. Following a hearing before the Honorable Kristi Harrington the prior week, Edwards appeared *pro se*. Chad Simpson and Nick Lewis appeared on behalf of the State.

After a two-day trial, the jury found Edwards guilty as indicted. App. 401 ll. 4 – 23. Judge Dennis sentenced him to twenty years' incarceration on the armed robbery charge and five years on the possession of a weapon charge. App. 412 ll. 2 – 25. The sentences were crafted to run concurrent. Id.

This brief, filed contemporaneously with a petition for writ of certiorari under Rule 243(i)(1), SCACR, follows.

STANDARD OF REVIEW

“The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” State v. Thompson, 355 S.C. 255, 261, 584 S.E.2d 131, 134 (Ct.App.2003) (citing Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). The erroneous deprivation of this right constitutes per se reversible error. Thompson, 355 S.C. at 261, 584 S.E.2d at 134.

“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, 813 S.E.2d 487 (2018). Appellate courts review “a circuit judge’s findings of historical fact for clear error.” Id. In doing so, appellate courts 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. United States v. Singleton, 107 F.3d 1091, 1097 (4th Cir. 1997).

ARGUMENT

The trial court erred by failing to advise Edwards of the dangers of proceeding *pro se*, where only a brief and inadequate colloquy took place the week before trial, where a different judge relied on the colloquy and erroneously concluded that Edwards knowingly and intelligently waived his right to counsel.

Relevant facts

Gerald Edwards was alleged to have brandished a knife while in the process of shoplifting sealant at a Home Depot in Charleston, South Carolina on January 3, 2014. App. 120 l. 18 – 122 l. 6; App. 131 l. 4 – 143 l. 23. Michael Smith, a loss prevention officer, approached a man at a Home Depot after he allegedly observed the man put a bottle of floor sealant valued at eighty-seven dollars into his jacket. *Id.* Smith then traveled to the North Charleston Home Depot location where a return had been attempted by a female for water filters and floor sealant. App. 178 l. 15 – 184 l. 16.

Smith supposedly identified Edwards as the man who stole the sealant. *Id.* While Edwards was standing behind a police car, handcuffed, Smith ride by in a law enforcement car and identified him. *Id.*; App. 80 ll. 2 – 19.

Discussion

Following legitimate complaints regarding his appointed counsel, the trial court erroneously concluded that Edwards waived his right to counsel entirely, violated his Sixth Amendment right to counsel, and forced him to represent himself in a two-day trial at the conclusion of which he received a twenty-year sentence.

A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions.¹ State v. Starnes, 388 S.C. 590, 698 S.E.2d 604 (2010). Under Faretta v. California, 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. 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998). “A defendant’s right to waive the assistance of counsel is not unlimited.” State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999).

“Once trial commences, that right [to proceed pro se] is subject to the trial court’s discretion which requires a balancing of the defendant’s legitimate interests in representing himself and the potential disruption and possible delay of proceedings already in progress.” U.S. v. Wesley, 798 F.2d 1155, 1155–56 (8th Cir.1986) (citations omitted); see also U.S. v. Stevens, 83 F.3d 60, 66–67 (2d Cir.1996) (“[O]nce a trial has begun, a defendant’s right to represent himself ‘is sharply curtailed,’ and the judge considering the motion must weigh ‘the prejudice to the legitimate interests of the defendant’ against the ‘potential disruption of proceedings already in progress.’”).

In Faretta, the United States Supreme Court held that criminal defendants have a fundamental right to self-representation under the Sixth Amendment. 422 U.S. at 819–21, 95 S.Ct. 2525. In order to effectively invoke this right of self-representation, the defendant must clearly and unequivocally assert his desire to proceed *pro se* and such request must be made knowingly, intelligently and voluntarily. United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). Where a defendant invokes his right of self-representation before trial, the only inquiry

¹ U.S. Const. am. 6; S.C. Const. art. I, § 14.

the circuit judge may undertake is that required by Faretta. State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545, 550 (2014). Thus, the only basis upon which a circuit judge may deny a defendant's pre-trial motion to proceed *pro se* is if the court determines the defendant has not knowingly, intelligently, and voluntarily waived his right to counsel. State v. Reed, 332 S.C. 35, 41, 503 S.E.2d 747, 750 (1998).

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. Singleton, 107 F.3d at 1097. Moreover, as the United States Supreme Court has emphasized, “the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.” Godinez, 509 U.S. at 399, 113 S.Ct. 2680 (emphasis in original). In other words, whether a defendant is capable of effectively representing himself has no bearing upon his ability to elect self-representation. *Id.* at 400, 113 S.Ct. 2680; see also Faretta, 422 U.S. at 836, 95 S.Ct. 2525 (holding a defendant's “technical legal knowledge ... [is] not relevant to an assessment of his knowing exercise of the right to defend himself”). Thus, this Court has held that:

[t]he 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. 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.

State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997) (internal citations omitted) (emphasis added).

Waiver is most commonly understood as an affirmative, verbal request. United States v. Goldberg, 67 F.3d 1092, 1099 (3d Cir.1995); State v. Boykin, 324 S.C. 552, 556, 478 S.E.2d 689, 690 (Ct.App.1996). To effectuate a valid waiver of the right to counsel, the two-

pronged Faretta test must be met in which the accused is (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. Prince v. State, 301 S.C. 422, 423–24, 392 S.E.2d 462, 463 (1990) (citing Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). The trial judge must determine whether there is a knowing and intelligent waiver by the defendant. State v. Dixon, 269 S.C. 107, 236 S.E.2d 419 (1977) (citing Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). If the trial judge fails to address the disadvantages of appearing *pro se*, as required by the second prong of Faretta, “this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source.” Prince, 301 S.C. at 424, 392 S.E.2d at 463; accord Wroten v. State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990). While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding. Gardner v. State, 351 S.C. 407, 411–12, 570 S.E.2d 184, 186 (2002); Wroten, 301 S.C. at 294, 391 S.E.2d at 576. If the record demonstrates the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied. Id.

To determine if an accused has sufficient background to comprehend the dangers of self-representation, courts consider a variety of factors 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 of 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.

Gardner v. State, 351 S.C. 407, 412–13, 570 S.E.2d 184, 186–87 (2002).

On February 6, 2015, a hearing took place before the Honorable Kristi Harrington. Shirene Hansotia indicated that while meeting with Edwards for his retrial, “he indicated he would like to represent himself and go *pro se*.” App. 2, l. 23 – 3, l. 6. The trial court engaged in a brief colloquy wherein it inquired about his background and understanding of the case. App. 3, l. 21 – 7, l. 23. Edwards, age forty-six at the time of trial, graduated high school and was trained as a barber. Id. He never took any legal classes; he was only in possession of a “Georgetown Law Journal.” Id. Edwards revealed that at the time of the hearing, he did not wish to have Hansotia represent him. Id.

The trial court suggested to Edwards that he would want the “very best counsel” he could have, and he replied “[e]xactly,” seemingly suggesting that he desired counsel. Id. Edwards advised the court that his three previous attempts at relieving counsel were all denied. Id. Nonetheless, he noted that he was “scared to death to have her” represent him. Id. Edwards attempted to tell the trial court that he was trying to obtain new counsel but was interrupted. App. 7, ll. 1 – 12.

Other than asking Edwards about his age, educational background, charges, and potential sentences, the trial court failed to elicit information regarding the remaining factors from Gardner. Therefore, evidence exists relating only to the third prong and part of the first prong. It would appear based on counsel’s remarks that this was a retrial, Edwards was previously involved in at least one criminal trial. However, the trial court did not ask any questions or elicit

and responses pertaining to that factor. Additionally, the fourth prong was unsatisfied: whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation. Unlike State v. Samuel, 422 S.C. 596, 813 S.E.2d 487 (2018), trial counsel was not called to the stand and questioned under oath.

Furthermore, there is no evidence to support the contention that Edwards was attempting to delay or manipulate the proceedings. Likewise, there exists no evidence, no guidance or cautionary remarks regarding the legal challenges Edwards could raise in defense to the charges against him. In fact, the trial court made a directed verdict motion for Edwards before subsequently ruling on it. App. 330, l. 1 – 332, l. 15. Although Edwards challenged the admissibility of some items of evidence, he overlooked some objections and conflated some South Carolina Rules of Evidence.

The introductory exchange between the trial court and Edwards consisted largely of *pro forma* answers to *pro forma* questions thus satisfying the ninth prong. After only a brief inquiry, the motion to proceed *pro se* was granted. App. 6, l. 2 – 8, l. 1. Seemingly, this was done following possible mistreatment as evidenced by Edwards’ contention that defense counsel cursed at him during a video conference. Id. Notably, the assistant solicitor requested, following discussion and subsequent agreement with Ms. Hansotia, that she sit with Edwards during the trial. App. 8, ll. 2 – 12. It was suggested that she be made available, but the request was denied. Id. The hearing concluded with the following remarks by the trial court: “So we’ll see what happens Monday.” Id.

At the outset of trial before the Honorable R. Markley Dennis, an exchange took place regarding the prior hearing:

The Court: I wasn’t present at the hearing and I’m not trying to set aside what Judge Harrington said because you obviously - - I’m sure she

explained to you [that] you have the Constitutional right to - - and I'm sure it was spoken very clearly on that - - to represent yourself. But I need to make sure that she discussed with you in depth the possible problems about representing yourself and the dangers of representing yourself.

Edwards: Yes, sir.

The Court: And you've had time to reflect on that and consider that, and it is still your decision to represent yourself in this matter, sir?

Edwards: Your Honor, honestly, I feel that I need counsel. But the counsel that I had appointed to me is, uh - - we've been having problems for almost about a year.

App. 15, l. 19 – 16, l. 14. (emphasis added). The trial court relied on the assertion by the assistant solicitor that the colloquy was fairly lengthy without requesting the transcript or testimony from any other witnesses, concluding “Yeah, I’m sure. I mean, she went into that. She has to.” App. 18, ll. 2 – 10. When asked whether he still wished to proceed *pro se*, Edwards responded “I have no choice.” App. 18, ll. 15 – 18. The trial court agreed and noted that Edwards *had* a choice the previous week: “Well, you had a choice. You could have gone with the attorney but you didn’t want that attorney.” App. 18, ll. 19 – 21.

Edwards reiterated that his choice came as a result of mistreatment, suggesting that Ms. Hansotia told him “it’s personal for me” and that she cursed at him. App. 19, ll. 1 – 14. Edwards quite honestly told the court that he “didn’t feel comfortable with her representing [him] after she told [him] it was personal.” *Id.* Judge Dennis, not believing Edwards’ statement under oath that Judge Harrington would not let him tell her, interrupted Edwards to inquire with the assistant solicitor who again suggested that the matter was discussed “at some length.” App. 19, ll. 15 – 23.

Judge Dennis advised Edwards that it was unwise to proceed without counsel but did not give Edwards an opportunity to secure new counsel. App. 20, ll. 5 – 10. Relying on a hearing

from the prior week which he did not attend and without concluding that Edwards waived his right to counsel, Judge Dennis concluded that Edwards would proceed *pro se*:

Okay. Well, let me talk about - - I find that he's - - of course, that's been explored by Judge Harrington's ruling and the record will fully support my relying on that. But I have made a determination that as he sits today he certainly has indicated a desire to proceed, that he didn't want that attorney. He wants to proceed and represent himself.

He's advised me that he understands the potential problems associated with that. And he appears to be certainly intelligent and articulate. And he's been involved in the jury process, which I qualified and asked questions, very pertinent questions during that process. SO I note that he is apparently prepared to go forward.

App. 20, l. 11 – 21, l. 2.

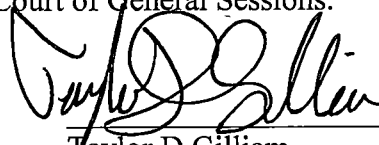
As was the case in Watts v. State, 347 S.C. 399, 556 S.E.2d 268 (2001), the trial court mistakenly relied on remarks from the assistant solicitor. The trial judge failed to make a meaningful inquiry into Edwards' background to determine whether he had sufficient experience or knowledge to waive counsel. As was the case in Watts, “[t]he record fails to demonstrate Petitioner was warned adequately of the dangers of self-representation when he relieved his appointed counsel, and affirmatively demonstrates Petitioner was *not warned* by the [] judge, as Faretta v. California requires.” Id. at 404, 556 S.E.2d at 371. (emphasis in original).

The trial court erred on more than one occasion. It erred by failing to conduct a complete and thorough Faretta colloquy on February 6, 2015. It likewise erred on February 9, 2015 when it relied on a prior hearing without any evidence of the testimony from that hearing. Edwards never waived his right to counsel; he had a disagreement with his attorney, and he was in the process of attempting to obtain new counsel. It was clearly erroneous and an abuse of discretion to simply assume that a full colloquy had taken place.

Edwards advised the court on February 9, 2015 that he needed counsel. App. 16, ll. 10 – 14. However, the trial proceeded without a finding that he made a voluntarily and knowing waiver of his right to counsel. In fact, he never waived his right to counsel. The trial court erroneously assumed that the Faretta colloquy from the prior week was adequate. In doing so, Edwards was denied his Sixth Amendment right to counsel. Unlike his first trial which resulted in a hung jury, Edwards represented himself against his will and was convicted. App. 440 l. 14 – 441 l. 21.

CONCLUSION

Edwards respectfully requests this Court reverse his convictions and sentences and remand this matter to the Charleston County Court of General Sessions.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of September, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

GERALD EDWARDS,

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V.

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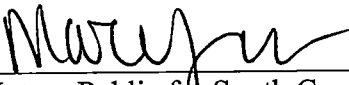
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant pursuant to White v. State in the above referenced case has been served upon Benjamin Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Appellant pursuant to White v. State has been served on Gerald Edwards, #173780, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 5th day of September, 2018.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of September, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.