STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Saluda County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEFFERY JAMES WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2019-001481

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in allowing appellant to represent himself at trial where the record shows the *Faretta* colloquy did not contain a sufficient warning regarding the dangers of self-representation and appellant therefore could not have knowingly, intelligently, and voluntarily waived his right to counsel?

STATEMENT OF THE CASE

On November 19, 2018, a Saluda County grand jury indicted appellant for threatening a public official. R.* On August 26, 2019, appellant was tried before the Honorable Frank R. Addy, and a jury. Aug. 26, Tr. 1.

Appellant proceeded to trial *pro se* with Bennett Casto as stand-by counsel. Aug. 26, Tr. 1. Douglas Fender, assistant solicitor, represented the state. Aug. 26, Tr. 1.

On August 28, 2019, the jury found appellant guilty as indicted. Aug. 26, Tr. 266, ll. 14-16. Judge Addy sentenced appellant to five years' imprisonment. Aug. 26, Tr. 281, ll. 6-8.

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 287, 490 (2018).

ARGUMENT

The trial court erred in allowing appellant to represent himself at trial where the record shows the *Faretta* colloquy did not contain a sufficient warning regarding the danger of self-representation and appellant therefore could not have knowingly, intelligently, and voluntarily waived his right to counsel.

Introduction

The state alleged that on August 10, 2018, appellant called the Saluda County Magistrate's Office and made threats of a sexual nature against Judge Joyce Schults. Aug. 6, Tr. 9, ll. 20-24. When questioned, appellant told police he called the magistrate's office and that he was upset. Aug. 26, Tr. 148, ll. 13-19. The same day, police arrested appellant and charged him with threatening a public official. Aug. 26, Tr. 155, ll. 10-11.

Relevant facts

On May 21, 2019, a motion for continuance was held before the Honorable Walton J. McLeod, IV. May 21, Tr. 1. Dietrich Lake represented appellant, and Douglas Fender, assistant solicitor, represented the state. May 21, Tr. 1. At the hearing, Judge McLeod asked appellant if he wanted to represent himself and appellant responded unequivocally that he did not want to represent himself but that he was no longer satisfied with Counsel Lake's representation and would like to hire another attorney. May 21, Tr. 4, l. 13-5, l. 20.

The state objected to the continuance, arguing that appellant previously filed a speedy-trial motion and the state was prepared to try the case. May 21, Tr. 8, ll. 1-7. Defense counsel Lake told the court that he was "concerned" about appellant's mental health and whether appellant was able to assist in his own defense, and he requested appellant be evaluated to determine his competency to stand trial. May 21, Tr. 8, l. 20-9, l. 12. Counsel Lake and the

solicitor referred to a prior incident involving an "involuntary commitment" while appellant was being treated by the Department of Veterans Affairs. May 21, Tr. 10, ll. 3-8; 13, ll. 1-25; 17, ll. 4-14. At the end of the hearing Judge McLeod stated, "there seems to be a reasonable indication that the Department of Veterans Affairs has found [appellant] incompetent," and he ordered a mental evaluation for appellant before trial. May 21, Tr. 17, ll. 5-24.

On August 6, 2019, defense counsel's motion to be relieved and a *Faretta*[1] hearing were held before the Honorable Frank R. Addy. Aug. 6, Tr. 1. Lake told the court that since the last hearing appellant had been evaluated and found to be competent. Aug. 6, Tr. 5, ll. 19-20. No documents in support of that assertion were presented to the court. Lake moved to be relieved as counsel, telling the court that, although his relationship with appellant had been difficult for much of his representation, after the May hearing it had deteriorated severely. Appellant notified the state and the Bar that he wished Lake to be relieved as his counsel, even contacting the Office of Disciplinary Counsel and filing grievances against Counsel Lake. Aug. 6, Tr. 5, l. 24-6, l. 12. Lake told the court he was "surprised" at the outcome of the competency evaluation and he still had concerns regarding appellant's mental health. He believed appellant "need[ed] counsel." Aug. 6, Tr. 5, ll. 19-23; 6, ll. 23-25; 7, ll. 12-20.

During the *Faretta* colloquy, appellant agreed he wanted Lake relieved as counsel. Aug. 6, Tr. 10, ll. 23-25. Appellant was forty-nine years old at the time. Regarding his education appellant said could read and write, he graduated from high school, and he joined the United States Marines, where he served for four years. Aug. 6, Tr. 11, l. 18-12, l. 17. Appellant also stated he was being treated for post-traumatic stress disorder (PTSD) and took the following

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1 *Faretta v. California*, 422 U.S. 806 (1975).

medications: Trazodone "for sleep," Prazosin "for nightmares," and Prozac "for anxiety."[2] Aug. 6, Tr. 14, ll. 14-15; 15, l. 16-16, l. 22. Judge Addy inquired if appellant had any prior experience with criminal trials, and appellant responded that he had a prior conviction from 1999 and he had been recently released after serving eighteen years of a twenty-year sentence. Aug. 6, Tr. 18, ll. 1-23.

When Judge Addy asked appellant if he wanted to represent himself, appellant at first agreed that he did but later in the hearing indicated that his sister was looking for a lawyer that would take his case pro bono. Aug. 6, Tr. 13, ll. 16-18; 17, ll. 4-10. Judge Addy asked appellant whether he had the resources to retain another attorney and appellant said he did not. Appellant also told the court he did not want to have another attorney appointed to him but agreed that Judge Addy could appoint Bennett Casto to "help him" at trial. Aug. 6, Tr. 21, ll. 9-24; 23, l. 23-24, l. 5. Judge Addy stated, "you realize, again, I think it's a good idea that you have a lawyer" and advised appellant two times that if he decided to represent himself he would be held to the same standard as a lawyer. Aug. 6, Tr. 13, ll. 20-23; 22, ll. 2-8. Ultimately, Judge Addy allowed appellant to proceed *pro se* at trial with Mr. Casto as "stand-by" counsel. Aug. 6, Tr. 24, ll. 8-25.

Discussion

Faretta requires the accused be: (1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation. *Faretta v. California*, 422 U.S. 806 (1975); *Bridwell v. State*, 306 S.C. 518, 413 S.E.2d 30 (1992). In the absence of a specific inquiry by the trial judge addressing the disadvantages of proceeding *pro se*, this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some

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2 Trazodone is an antidepressant. Prazosin is used to treat high blood pressure. Prozac is used to treat depression, obsessive-compulsive disorder, bulimia nervosa, premenstrual dysphoric disorder, and panic disorder. All information found at mayoclinic.org.

other source. *Prince v. State*, 301 S.C. 422, 392 S.E.2d 462 (1990); *Wroten v. State*, 301 S.C. 293, 391 S.E.2d 575 (1990). "The burden is on the state to demonstrate the validity of a defendant's waiver of his right to counsel." *State v. Dial*, 429 S.C. 128, 133, 838 S.E.2d 501, 504 (2020) (citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977); *see United States v. Cash*, 47 F.3d 1083, 1088 (11th Cir. 1995) ("On direct appeal, the government bears the burden of proving the validity of the waiver.")).

The record does not indicate that appellant unequivocally asserted his right to represent himself. In fact, during the May 2019, hearing before Judge McLeod, appellant said he did not wish to represent himself, and in the August 2019, hearing, although he first responded yes when Judge Addy asked him if he wanted to represent himself, he later said his sister was trying to find him another attorney. Appellant never insisted on representing himself. The record indicates that he was dissatisfied with the attorney he had retained and because he could not afford to retain another attorney and his other option was a court appointed attorney, appellant felt he had no other good choice.

Appellant's waiver of his right to counsel was not knowing or voluntary because he was not sufficiently warned about the dangers inherent in self-representation by the court or otherwise. During the *Faretta* colloquy, the court advised appellant that he believed it would be a good idea for him to have an attorney and also told him he would be held to the same standard as a lawyer at trial. The court's gentle advice was not an adequate warning of the danger of self-representation under *Faretta*.

Although a specific inquiry by the judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but the accused's understanding. *Wroten v. State*, 301 S.C. 293, 391 S.E.2d 575 (1990). "In the absence of an

inquiry by the judge, courts look to the record to determine if the accused had sufficient background to understand the disadvantages of self-representation." *State v. Cash*, 309 S.C. 40, 42, 419 S.E.2d 811, 813 (Ct. App. 1992).

Cash provides ten factors courts have considered in determining whether the accused had sufficient background to understand the disadvantages 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 he knew of the nature of the charge and of the possible penalties; (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case; (5) whether he 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 he knew of legal challenges he could raise in defense to the charges 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. *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065–1067 (11th Cir.1986); *see also Strozier v. Newsome*, 926 F.2d 1100 (11th Cir.1991) (restating the factors noted in *Fitzpatrick*), cert. denied, 502 U.S. 930, 112 S.Ct. 350, 116 L.Ed.2d 289 (1991).

Cash at 43, 419 S.E.2d at 813.

There is very little evidence in the record that appellant understood the risks of proceeding *pro se*. Appellant was forty-nine at the time and had a high school education. Appellant told the court he had PTSD and took medication for anxiety and depression. In addition, prior defense counsel to appellant expressed grave concern regarding appellant's mental health and ability to assist in his own defense, much less represent himself at both hearings. The record does show that appellant had been convicted of a crime in 1999 and had been outside society and in prison for seventeen years.

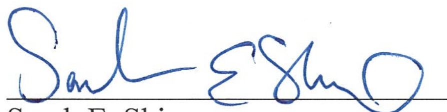
The exchange between appellant and Judge Addy was short and perfunctory. Appellant never indicated verbally that he did not understand the nature of the charges against him or the

possibly penalty. Nevertheless, the record reflected he and Lake had a difficult time communicating, and therefore it was unlikely Lake was able to convey to appellant the difficulty of self-representation in his case. Moreover, after representing appellant for over a year, Lake told the judge he thought appellant needed to be represented by counsel.

Judge Addy appointed Mr. Casto as stand-by counsel for appellant but failed to inquire if appellant was aware of trial procedures other than telling him that he would be held to the same standards as a lawyer. This statement without any further explanation, respectfully, meant nothing. Appellant could not know what standard a lawyer was held to or that he would be required to comply with certain procedural and evidentiary rules without being explicitly told. Accordingly, appellant could not have understood the gravity of this decision or the disadvantages of self-representation.

CONCLUSION

Based on the foregoing arguments, appellant's convictions should be reversed, and the case remanded to Saluda County Court of General Sessions for a new trial.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of September, 2020.

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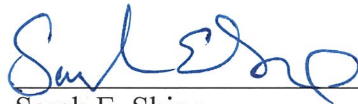
CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 2nd day of September, 2020; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Jeffery James Williams, #270812, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 2nd day of September, 2020.



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