STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Charleston County

J. Mark Hayes, II, Circuit Court Judge

JAMES ALBERT GILES,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2020-000333

PETITION FOR WRIT OF CERTIORARI

JAMES K FALK
Falk Law Firm
PO BOX 1058
CHARLESTON, SC 29402
(843) 606-6007

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in granting Appellant's mid-trial motion to relieve trial counsel when the trial judge failed to adequately warned Appellant of the dangers of self-representation; failed to make a thorough record; and failed to conduct a proper *Faretta* hearing.

STATEMENT OF THE CASE

The Applicant was indicted at the September 2007 term of the Union County Grand Jury for Burglary, First Degree (2006-GS-44-1207), Kidnapping (2006-GS-44-1208), Strong Arm Robbery (2006-GS-44-1209).The Applicant was represented by Vanessa Cason, Esquire. On September 12, 2007, the Applicant underwent trial by jury and was convicted of the charges as indicted. The Honorable John C. Hayes, III, sentenced the Applicant to concurrent terms of thirty (30) years for Burglary, First Degree, thirty (30) years for Kidnapping, and fifteen (15) years for Strong Arm Robbery. Appendix p. 239 lines 21-24. The trial court later reduced Appellant's sentence to twenty years concurrent on all three charges. Appendix 334 line 22 through 335 line 14.

A Notice of Appeal was timely filed on behalf of the Applicant and an appeal was perfected. The South Carolina Court of Appeals by written order affirmed the Applicant's conviction and sentence. State v. Giles, 2010-UP-154 (Ct. App. filed on February 23, 2010). On May 24, 20 I 0, the Applicant submitted a Petition for Writ of Certiorari, seeking review of the Court of Appeals decision. This Court granted certiorari and affirmed the decision of the Court of Appeals. State v. Giles. Op. No. 27353 (filed on January 15, 2014). The Remittitur was sent on February 21. 2014.

On July 22, 2014 Appellant filed a Post-Conviction Relief application in the Union County Circuit Court. Case no. 2014-CP-44-295. Appellant's ground for relief are summarized below:

> 1. Ross A. Burton was ineffective for coercing Appellant into signing a consent order to provide a blood sample, because the Court order was based on incorrect authority.
> 2. Vanessa Cason was ineffective for:
> a. Failing to move to suppress certain evidence and by failing to conduct an adequate investigation before trial

b. Failing to conduct an adequate investigation of:
   i. State's witness Barbara Willburn.
   ii. The circumstances by which Appellant provided the blood sample.
   iii. The State's chain of custody documentation.

c. Failing to make an objection to the trial judge erroneous Batson ruling.

d. Failing to properly select an unbiased jury.

e. Failing to conduct an effective cross examination the State's regarding items that were analyzed at trial.

f. Failing to file a motion to dismiss my kidnapping charge.

g. Failing to establish that Mr. William F. Gault was not identified in the incident reports as the one who took the crime scene photographs.

h. Failing to provide Appellant with all his discovery.

i. Asking Appellant to plead to a 20 year sentence because Judge Hayes was the toughest Judge that come to Union

j. Failing to prepare for trial

k. Failing to formulate a reasonable defense theory.

l. Failed in her responsibilities as stand-by counsel by not communicating with Appellant.

3. Lanelle Durant provided ineffective assistance as appellate counsel by:

a. Failing to preserve issues for appellate review.

b. Failing to raise on appeal that four jurors struck from the original jury panel were seated after the trial judge made an erroneous Batson ruling.

c. Failing to raise the trial court's lack of subject matter jurisdiction because Appellant's indictments were not true-billed before a legally constituted Grand Jury.

4. The trial judge erred in:

a. Denying Appellant's request for a continuance to enable Appellant time to review recently-produced discovery.

b. Granting Appellant's motion at mid-trial to waive my right to counsel, without thoroughly warning me of the dangers and disadvantages of self-representation '

5. Court lacked subject matter jurisdiction because Appellant's indictments were invalid·

6. Gross Prosecutor Misconduct and perjury

7. Criminal conspiracy . . . Conspirators and blame for violating S.C. Code Ann. § 16-17-410 include the "Court Administrative Judge," the solicitor, the Grand Jury foreman, the Clerk of Court, and the trial judge.[1]

On January 25, 2018 Appellant's PCR counsel Beth Ramsey Faulkner, Esquire filed an Amended and Supplemental in which she alleged:

[1] A verbatim account of Appellant's PCR claims are included at Appendix pages 246-260, and 263

1. Applicant alleges that Ross Burton's performance was ineffective during representation of Applicant because Applicant was coerced into signing a court order to provide a blood sample. Furthermore, the court order was based on *Schmerber* v. *California,* 384 U.S. 75 (1966), and this order was a *Schmerber* violation. Furthermore, this signing of the order was a violation of Applicant's constitutional rights related to search and seizures.
2. Vanessa Cason failed to move to suppress any blood and DNA evidence and any testimony or expert opinions stemming from the unlawful collection of the blood sample from Applicant, as set forth above.
3. Vanessa Cason failed to object to the procedure used to strike and choose the jury. The state made a Batson motion after the selection of the first jury, and defense was asked to give race neutral reasons for striking all but two jurors struck by counsel for Applicant. Judge Hayes ruled that the reason provided by Applicant was insufficient, relying on State v. Easley, and he granted the state's motion and a new jury was selected. Judge Hayes later put on the record that the law he previously cited in State v. Easley was in error but did not change his ruling. Ms. Cason failed to object to any of the procedure in selection of the jury, which resulted in the seating of four jurors that had previously been struck the first time by Applicant, one of which was selected to be the foreman of the jury. The result was a tainted jury that ultimately convicted Applicant in less than 30 minutes of deliberation.
4. Vanessa Cason's opening statement to the jury was a mere three sentences. She failed to adequately explain Applicant's defense to the jury or to make any appeal to the jury on Applicant's behalf. Furthermore, in one of her three sentences, she indicated "the defense will attempt to show that the state's evidence is questionable at best and that many of the items, that the state is going to put up have been tampered with..."However, she never attempted to show throughout the trial that any of the evidence had been tampered with.
5. Vanessa Cason failed to investigate the state's witnesses, including the alleged victim, Barbara Wilburn. Upon information and belief of Applicant, Barbara Wilburn was found incompetent to testify in the trial of James Carson Rice in the year 2000 or 2001. Had Ms. Wilburn been investigated, Ms. Cason should have found out about the incompetence ruling, which likely would have impacted the testimony of Barbara Wilburn in Applicant's trial.
6. Vanessa Cason failed to make a motion to dismiss the kidnapping charge. There was nothing in the incident report that ever stated that Ms. Wilburn alleged she was seized, confined or kidnapped against her will. No substantial evidence was presented at trial that Appellant seized, confined or held Ms. Wilburn against her will.
7. Vanessa Cason failed to cross-examine Ms. Wilburn on the kidnapping allegations and elements.
8. Vanessa Cason failed to file a Rule 5 and/or *Brady* motion requesting the state's evidence against Applicant. This includes requesting any information known by the state about its potential witnesses, including the victim, Barbara Wilburn. Accordingly, evidence that was turned over to Ms. Cason was not turned over in time for her to adequately prepare for trial. This is evidenced by

> the Chain of Custody from the Union Public Safety Department, which was printed on August 31, 2007, as printed on the document, and Applicant's trial started on September 11, 2007. This failure to obtain evidence in a timely manner denied Ms. Cason the time she needed to properly file and serve any necessary motions, including any motions to suppress. Furthermore, Ms. Cason failed to turn over evidence to Applicant she received from the state.
> 9. Vanessa Cason failed to file a motion to suppress or object to the admission of testimony and evidence taken from the crime scene and the blood sample collected from Applicant based on a lack of establishment of chain of custody. Furthermore, the state failed to establish a chain of custody and there were in fact, breaks in the chain of custody in the evidence collected from the crime scene and the blood sample collected from Applicant. Appendix p. 266 through 270.

On December 10, 2014 J. Rutledge Johnson, Esquire filed the State's Return. Appendix pages 271 through 280. On January 30, 2018 an evidentiary hearing was held in the York County Circuit Court before the Honorable J. Mark Hayes, II. N. Beth Ramsey Faulkner. Esquire appeared on behalf of Appellant and Justin Hunter, Esquire appeared for the State. Ross Burton, Lanelle Durant, Vanessa Cason, and Appellant testified as witnesses.

On April 20, 2018 Judge Hayes issued an Order of Dismissal denying Appellant's PCR application. Appendix page 387.

This appeal followed.

ARGUMENT

The PCR court erred in granting Appellant's mid-trial motion to relieve trial counsel when the trial judge failed to adequately warned Appellant of the dangers of self-representation; failed to make a thorough record; and failed to conduct a proper *Faretta* hearing.

Relevant Facts

In 2006 Alan Ross Burton, Esquire was initially appointed to represent Appellant and remained his attorney for "a few months". Appendix p. 287 line 22 through 288 line 9. On September 11, 2006 Attorney Burton advised Appellant to sign a consent order by which the State obtained a sample of Appellant's blood. Appendix p. 289 lines 9 through 14. At some time later, Appellant then asked the circuit court to relieve Attorney Burton and the court then appointed Vanessa Cason, Esquire. Appendix p. 303 lines 5 through 9. Attorney Cason continued to represent Appellant up unitl the second day of trial when, at Appellant's request, she moved to be relieved. Appendix p. 146 lines 22-25.

The court asked Appellant whether he wanted to relieve Attorney Cason and he responded: *Well I would like to go through the trial but, your Honor, but I'm asking for a continuance. I need more time to represent myself.* Appendix p. 148 lines 20 22. Thereafter the following colloquy took place:

> THE COURT: Let's take it one step at a time. You want to relieve Ms. Cason as your attorney?
>
> MR. GILES: Yes, sir. And - -
>
> THE COURT: Let me finish. Do you understand - as I understand it you're not an attorney, correct?

MR. GILES: Sir?

THE COURT: You haven't been to law school have you?

MR. GILES: No, sir.

THE COURT: And do you understand that an attorney is a beneficial asset to you. That is you have a right to an attorney and you have one and an attorney even though you read those things that you tell me an attorney has the experience of law school and has been out practicing and knows the practical aspects. Sometimes when you read something it doesn't tell you everything. You've got to know the practical aspects and the legal rulings on it. So an attorney is - it would be beneficial for you to keep an attorney and also it's dangerous for you to represent yourself. We are half way through trial and you know some smatherings (*sic*), just bits and pieces of the law, but you can't know and I'm not faulting you it's not - don't take this personally but you can't by not being a lawyer know how everything dove tails, how everything works together and what's important and what's trivial and what is of some importance to the jury and to the court and what's not. So I warn you that representing yourself - I can tell you I'm not going to grant a continuance but representing yourself is rather dangerous and not the smartest thing to do. I'm just being as open and honest as I can.

MR GILES: I understand.

THE COURT: Do you still want to relieve her of representing you and continue on your own?

MR. GILES: I got to continue the case today?

THE COURT: Yes, sir.

MR. GILES: I'm not prepared.

THE COURT: That's why you have an attorney and she is prepared. You might not be satisfied with the way she is prepared but if she has not represented you efficiently that's a matter that can be taken up at a later time. I know that sounds stupid to say well if she isn't representing you right let's don't worry about it now let's worry about it later. Our system does have a safety net so that if you believe - if you are found guilty and sentenced and believe you have not been properly represented there is a way to bring that before the court and have that fully tried. That is a different issue. The issue right now is whether or not the

> state can prove beyond a reasonable doubt that you committed these offenses. So do you want Ms. Cason to continue to represent you? I'll give you a minute to talk to her. Listen to me right now, Mr. Giles. I'm going to give you a chance to talk with those people in just a minute. In fact we'll take a little break and I'll and then I'll come back and we can make a determination. If you want to release her from representing you I'll do it. I don't think it's the smartest thing to do as I've told you.
>
> Appendix p. 148 line 23 through p. 151 line 4.

The colloquy proceeded after the brief recess:

> THE COURT: Ms. Cason, where are we?
>
> MS. CASON: Mr. Giles is going to continue with the motion. He does want to represent himself.
>
> THE COURT: I'll grant that motion. Is that correct, Mr. Giles?
>
> MR. GILES: Yes, sir.
>
> THE COURT: I'll grant the motion and have Ms. Cason remain as standby counsel.
>
> Appendix p. 152 lines 7-14.

Discussion

Defendants in criminal trials may waive their Constitutional right to assistance of counsel if they know what they are doing and their choice is made with eyes open. Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S. Ct. 236, 242, 87 L. Ed. 268, 275, (1942). However when defendants manage their own defense, they *relinquish many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits.* Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 581 (1975). Therefore when a criminal defendant

choses to go forward without counsel, the trial judge retains the serious and weighty responsibility of determining whether there is an intelligent and competent waiver by the accused. Johnson v. Zerbst, 304 U.S. 458, 465, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466-1467 (1938). The record must establish that a pro se defendant was warned of the risks of self-representation; that the defendant knew what he was doing and that it was his knowing a voluntary decision to go forward without counsel. Wroten v State, 301 S.C. 293, 294, 391 S.E.2d 575, 576 (1990) *citing* Faretta, 422 U.S. at 835.

Trial judges in South Carolina are required to conduct "*a hearing to determine whether a request to proceed pro se was accompanied by a knowing and intelligent waiver*." Watts v. State, 347 S.C. 399, 403, 556 S.E.2d 368, 370 (2001) *citing* State v. Bateman, 296 S.C. 367, 369, 373 S.E.2d 470, 471 (1988). 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. 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. Watts 347 S.C. at 402.

In Gardner v. State, this Court recognized a non-exclusive list of ten factors that courts consider in determining whether defendants understand the dangers 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 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 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. 351 S.C. 407, 412-413, 570 S.E.2d 184, 186-187 (2002). *See also*, State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct. App. 1992).

The record establishes that Appellant was not familiar with the trial process and did not have his "eyes wide open" when making a decision to relieve his attorney. The trial court provided Appellant with only a pro forma warning about the dangers of self-representation. The extent of the trial court's warning was: *it would be beneficial for you to keep an attorney and also it's dangerous for you to represent yourself.* Moreover, with the exception of a question whether Appellant went to law school the colloquy between the trail court and Appellant addressed none of the topics identified in both Gardner v. State, and State v. Cash,. id.

When the trial court asked appellant for the specific reasons he wanted to relieve his trial counsel, the responses Appellant provided reveal his misunderstanding of the trial process. Initially Appellant listed several reasons why he was dissatisfied with his first lawyer: *Your Honor, I mean - I just don't have the representation that I should be having on this case. I mean my first lawyer never did come to see me at all.* Appendix p. 145 lines 2-4. *Your Honor, things are not adding up. I mean how my blood got took from me nobody raised the issue of what is the proper procedure, nobody don't know. They tell me they take my blood and that was it. I filed for a fair and speedy trial in December. My lawyer wouldn't do nothing.* Appendix p. 145 lines 17 through 22. The only specific reason he gave for wanting to relieve Attorney Cason was that she did not provide him with his discovery. Appendix p. 146 lines 10 through 12. These reasons may be relevant in a subsequent PCR action, however they do not provide a reasonable justification for

wanting to relieve Attorney Cason on the second day of the trial. Appellant's answers are evidence that Appellant misunderstood the trial process and his possible remedies.

In his order dismissing Appellant's PCR application the PCR judge noted Appellant's having filed several motions with the trial court and having successfully objected to the admission of his prior criminal record, as evidence that Appellant had some knowledge of the legal process. Appendix pages 407 through 410. However an equally telling example of Appellant's unfamiliarity with the legal process is shown by his efforts during jury selection. The State made a Batson challenge to the defense using all ten of its strikes to exclude eight white males and two white females. Appendix p. 37 line 23 through p. 38 line 10. When asked for a race neutral justification for striking the jurors trial counsel replied: *Your Honor, the defendant believes that the strike was not racially motivated but that he did not feel that* (the venire man) *was right for the jury*. Appendix p. 38 lines 23- 25. Counsel went on to state that: *I actually believe it's probably going to be the explanation for all the strikes with the exceptions of the ones that were excused.* Appendix p. 39 lines 2-4. Although Appellant was still represented by trial counsel during jury selection, it is clear that trial counsel did not provide any guidance regarding the use of the defense's peremptory challenges. The trial court found that defendant's reasons for striking the ten jurors was insufficient under Batson and the panel was quashed. Appendix p. 40 lines 6-20.

The trial court's warning to Appellant regarding the dangers of self-representation was inadequate. The trial court failed to conduct the colloquy suggested in Gardner v State and State v. Cash. There is insufficient evidence in the record that Appellant's decision to relieve trial counsel was made with his "eyes wide open". Therefore the trial court erred in relieving lawyer Carson and allowing Appellant to proceed *pro se*.

CONCLUSION

For the reasons set forth herein, Petitioner James Alan Giles respectfully requests this Court grant certiorari to allow full briefing on the issue.

Respectfully submitted,

/s/ James K Falk

Falk Law Firm
ATTORNEY FOR PETITIONER

This 25th day of August, 2015