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SC Court of Appeals

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.

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, Dana Morton petitions for rehearing because this Court overlooked or misapprehended the matters set forth in this pleading.

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)?

This Court held, “Our supreme court has repeatedly found the appropriate remedy in such a case is not a new trial but a remand to the trial court for a determination of whether the waiver was intelligently made.” Slip Opinion, at 2 (citing *State v. Dixon*, 269 S.C. 107, 109, 236 S.E.2d 419, 420-21 (1977); *State v. Cash*, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991); and *State v. Dial*, 429 S.C. 128, 135, 838 S.E.2d 501, 505 (2020)). The cases relied upon by this Court are distinguishable from the case at bar. In *Dixon*, “[t]he trial court

allowed the appellant to represent himself,” after inquiring into Dixon’s “education and work experiences,” and under circumstances where there was “no doubt that [Dixon] was offered, and did waive the court’s offer to appoint counsel.” 269 S.C. at 108-09, 236 S.E.2d at 420. In *Cash*, the “[a]ppellant appeared *pro se* before the trial court,” and “[t]he record fails to show that the trial judge made any finding that appellant’s decision to proceed *pro se* was accompanied by a knowing and intelligent waiver of his right to counsel.” 304 S.C. at 224, 403 S.E.2d at 633. In *Dial*, the accused “appeared in [magistrate] court several times before trial, each time without counsel,” and the magistrate’s return stated “he advised Dial on three separate occasions before trial of his right to be represented by an attorney,” and [e]ach time, Dial requested to represent himself.” 429 S.C. at 131, 838 S.E.2d at 503. “The [magistrate’s] return [was] silent as to whether the magistrate advised Dial of the dangers of representing himself.” *Id.* Thus, in each of these cases, there was evidence indicating the accused voluntarily represented himself, but the record failed to demonstrate the accused made the decision intelligently pursuant to *Faretta v. California*, 422 U.S. 806 (1975).

Here, the trial judge affirmatively stated to Mr. Morton the court “can require you to go ahead to court without an attorney.” R. 24-25. Mr. Morton objected because requiring him to proceed without counsel would be to “railroad” him and argued, “[I]f I could get a public defender, five minutes, ten minutes where I could prepare a case, . . . that would be fine with me.” R. 25. Thus, the record before this Court unequivocally demonstrates that Mr. Morton did not want to represent himself. The State, in fact, acknowledged 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)). Additionally, Mr. Morton expressly

argued a remand would not serve any useful purpose. Final Reply Brief of Appellant, at 1-3. This Court's opinion is silent on the exception to the rule requiring remand for a *Dixon* hearing when remand would serve no useful purpose. This Court should address whether a remand would serve no useful purpose.

Once this Court recognizes the distinctions between the case at bar and *Dixon*, *Cash*, and *Dial*, and concludes that remand would serve no useful purpose, the need to reverse the trial court and order a new trial is apparent.

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?

This Court conflated Questions I and II when observing, "Morton argues the trial court erred in requiring him to represent himself, in failing to appoint a public defender when he did not affirmatively waive his right to counsel, and in not adequately informing him of the dangers of self-representation." Slip Opinion, at 2. As a result, this Court never addressed Question II as an independent ground for reversal. Mr. Morton, in fact, pointed to three errors of law committed by the trial court when it concluded Mr. Morton did not qualify for a public defender:

First, the trial judge's finding that Mr. Morton was trying to delay his trial is not supported by the record. *See* [*State v. Brown*, 421 S.C. 337, 343, 806 S.E.2d 724, 728 (Ct. App. 2017)]. As seen above, Dana Morton's decision to relieve his counsel "was driven by trust issues," *Id.* 407 S.C. at 32, 753 S.E.2d at 548, and not intended for delay as he was ready to proceed to trial after getting "five minutes, ten minutes" to prepare his public defender.

Second, the trial judge's ruling that Mr. Morton was not indigent, because he previously retained counsel, ignored S.C. Code Ann. § 17-3-10.

Moreover, both Mr. Morton and trial counsel represented to the trial judge that Mr. Morton was unable to pay for his legal representation beyond the initial retainer, which Mr. Morton's wife paid by securing a loan.

Third, by appointing the Circuit Defender as Mr. Morton's advisor and requiring Mr. Morton to consult with his advisor when it was convenient for the trial court,¹ the trial judge created an unusual form of hybrid representation that typically is not recognized in South Carolina. *State v. Devore*, 416 S.C. 115, 121, 784 S.E.2d 690, 693 (Ct. App. 2016) ("Since there is no right to "hybrid representation" that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.").

Final Brief of Appellant, at 23-24 (footnote original).

Mr. Morton also pointed out he

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." R. 29-30.

Final reply Brief of Appellant, at 4.

This Court should address these arguments. Once this Court considers these arguments, the need to reverse the trial court and order a new trial is apparent.

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?

This Court summarily dismissed this question by holding:

¹ E.g., R. 107, 122, 141, 44, 188, 221, 238, 257, 376, 382, 550, 553, 313, 617, 619, 642, 645, 654, 655, 683, 748, 752, 756, 823, 918, 930, 936, 944, 997-99, 992, 998-1000, 1027. Additionally, the trial judge seemed be concerned about prejudice to the State's coffers when the court stated, "Why should the State pay for an attorney when you can afford to pay an attorney?" R. 29. The appointment of the Circuit Public Defender as Mr. Morton's advisor contradicts this concern.

As to the testimony describing a confidential informant (CI) as reliable, we find any error in its admission was harmless because similar evidence was admitted without objection when Morton recalled the witness. *See State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (finding the admission of improper evidence was harmless because it was cumulative to other evidence).

Slip Opinion, at 2, fn. 1. This Court erred by relying on *Blackburn*. In *Blackburn*, the testimony of one witness “was improperly admitted as a part of the res gestae,” but that evidence was cumulative to the testimony of six other witnesses that testified for the prosecution. 271 S.C. at 329, 247 S.E.2d at 337. Here, only one witness (Investigator Anthony Lachica) testified about the reliability of the informant. Accordingly, this witness’ testimony is not cumulative to evidence introduced through any other witness.

Once the trial judge overrules an objection to a witness’s testimony, there is no need to keep objecting to the same testimony by the same witness. *See State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) (“[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court.”). In fact, Mr. Morton was following the trial judge’s instruction, “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.” R. 90-91.

Once this Court recognizes that Investigator Lachica’s testimony about the reliability of the informant was not cumulative to any other evidence presented at trial, the need to reverse the trial court and order a new trial is apparent.

(Question IV begins on next page)

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?

This Court summarily dismissed this question by holding:

As to the limitation of the cross-examination of the CI, we find no reversible error. *See State v. Santiago*, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006) (finding the failure to make a proffer of excluded evidence precludes review on appeal).

Slip Opinion, at 2, fn. 1. This holding overlooks the objection and the *in camera* argument on the State's objection. Mr. Morton asked the informant, "So, how many charges would you say you had, Mr. Vaughn, that dealt with drugs?" When the informant claimed he did not know the number of charges, Mr. Morton stated it was "at least six." The State acknowledged the informant had "three prior drug convictions" and "several non-convictions." Mr. Morton explained, "I asked him how many times had he been, you know, caught, in there. I'm not saying convictions." R. 236-39. This Court has stated:

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) (internal quotations omitted) (citing Jean Hoefler Toal *et al.*, *Appellate Practice in South Carolina* 57 (2d ed.2002)). The record reflects Mr. Morton raised this issue in a timely manner, with sufficient specificity for the trial court to understand the evidence he intended to present, and the trial judge ruled against him. This issue, accordingly, is preserved for appeal, and this Court should rule on the merits.

CONCLUSION

For the reasons set forth above, this Court should grant rehearing, withdraw its opinion, reverse the trial court, and order a new trial.

IT IS SO MOVED.

Respectfully Submitted,

By s/E. Charles Grose, Jr.

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Certificate of Service

I certify that I have served this pleading, along with a copy of the provisionally filed Supplemental Record on Appeal on the State of South Carolina by emailing a copy, on the date reflected below, to:

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August 4, 2021

The Honorable Jenny Abbott Kitchings
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Re: *State of South Carolina v. Dana L. Morton*
Appellate Case No. 2018-001909

Dear Ms. Kitchings:

Enclosed please find Mr. Morton's petition for rehearing, 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: Mr. Dana Morton
William M. Blich, Jr., Esquire