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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Florence County
Court of Common Pleas

Honorable Thomas A. Russo, Trial Judge
Honorable D. Craig Brown, Post-Conviction Relief Judge

Appellate Case No. 2020-000998

Justin Jamal Lewis,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

Whether the post-conviction relief court erred when it summarily dismissed Petitioner's post-conviction relief application where the court found that because Petitioner proceeded *pro se* at his trial he was barred from raising ineffective assistance of counsel claims regarding defense counsel's pre-trial conduct?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE PRESENTED

Did the PCR court properly dismiss Petitioner's application, which solely raised issues of ineffective assistance of pretrial counsel, without an evidentiary hearing where Petitioner knowingly and voluntarily elected to relieve his appointed counsel and represent himself the morning of trial, knowing the trial court would not grant a continuance, and thereby assumed responsibility for the entire case, including appointed counsel's pre-trial investigation?

STATEMENT OF THE CASE

Justin Jamal Lewis (Petitioner) is incarcerated with the South Carolina Department of Corrections. Applicant was indicted at the June 2017 term of the Florence County Grand Jury for distributing heroin (2017-GS-21-00764). Petitioner proceeded *pro se* at trial with Wallace H. Jordan, Jr., Esquire (Jordan) as standby counsel. Deputy Solicitor Todd S. Tucker prosecuted the case.

Petitioner's case proceeded to a bench trial September 4-5, 2018, before the Honorable Thomas A. Russo. Petitioner was convicted as indicted. Judge Russo sentenced Petitioner to fifteen years' imprisonment for distribution of narcotics-second offense pursuant to section 44-53-370(b)(1) of the South Carolina Code. However, after realizing Petitioner's offense was considered a first offense, Judge Russo immediately amended the original sentencing sheet to reflect Petitioner's offense as a first offense, maintaining the fifteen year sentence.

Petitioner moved for sentencing reconsideration on September 21, 2018, and he was present for a hearing on his motion on October, 3, 2018. Judge Russo continued that hearing to allow Petitioner more time to prepare. The Clerk's file contains a letter, not specifically addressed to anyone, filed October 29, 2018, indicating Petitioner wished to appeal his conviction and sentence; however, this letter was sent prior to the judgment in Petitioner's case becoming final. Thereafter, on December 7, 2018, Petitioner was again transported to court for a motions hearing, but Judge Russo continued the hearing because Petitioner was not prepared to proceed.

Judge Russo then elected to consider Petitioner's motion for reconsideration based upon the parties' written submissions. On December 17, 2018, Judge Russo granted Petitioner's motion for reconsideration stating, "Although the Court's original imposition of Fifteen (15) years imprisonment was legally valid and within the sentencing range, the Court has decided to give some consideration to the fact that [Petitioner] should have been sentenced under a lesser range."

Judge Russo amended Petitioner's sentence from fifteen years' imprisonment to twelve years' imprisonment. Petitioner did not appeal his conviction or sentence.

Petitioner timely commenced his post-conviction relief action on February 28, 2019, which was amended October 10, 2019. The State made its Amended Return and Motion to Dismiss on December 13, 2019, seeking dismissal of the action on the basis Petitioner was not entitled to post-conviction relief as a matter of law because he represented himself at trial. A hearing convened on December 16, 2019, at the Florence County Courthouse before the Honorable D. Craig Brown. Because the State's amended return was filed shortly before the hearing, the Court heard brief arguments on the State's request for summary dismissal, then directed the parties to submit memoranda on the issue.

Judge Brown signed an order filed June 19, 2020, granting the State's motion and summarily dismissing Petitioner's application for relief with prejudice. Petitioner timely appealed the denial of his application for post-conviction relief.

STATEMENT OF THE FACTS

At the outset of Petitioner's trial, Petitioner moved to relieve his counsel. App. p. 5. Petitioner informed the trial court he always wished to proceed to trial on his charge, but he could never get in touch with Jordan. Petitioner also stated he had been unable to see the video the State would present at trial. App. pp. 5-10. Jordan stated his relationship with Petitioner was strained, but refuted Petitioner's contention he never attempted to communicate with Petitioner. App. p. 10. Further, Jordan stated he was prepared for trial and explained why he had been unable to show Petitioner the video. App. pp. 11-13, 24. Ultimately, Petitioner got tired of waiting to see the video and left. App. pp. 12-13.

After hearing Petitioner's reasons for wanting to relieve counsel, Judge Russo ruled Jordan would represent Petitioner. App. pp. 10-33. However, Petitioner then indicated he wished to proceed *pro se*, and the trial court conducted a colloquy regarding the dangers of self-representation with Petitioner. App. pp. pp. 33-34, 40-48. Judge Russo also inquired whether Petitioner wanted a jury or a bench trial. Tr. pp. 33-50. Petitioner elected a bench trial. App. p. 52. The trial court ultimately allowed Petitioner to proceed *pro se*, with Jordan as standby counsel. App. p. 48.

Investigator Jason Pate, a narcotics officer, testified at trial he and Investigator Rollins Rhodes set up a controlled drug buy targeting Petitioner. App. pp.66-67. The investigators utilized David Daniels as a confidential informant to conduct the controlled buy. App. p. 67. Daniels was picked up but never arrested for conspiracy to distribute drugs. App. pp. 78; 81-82. Daniels testified he worked as a confidential informant for money, not to work off any charges. App. p. 82.

Daniels informed the investigators he could purchase heroin from Petitioner. App. pp. 70, 73, 83-84. Daniels knew Petitioner through another heroin dealer. App. p. 107. Daniels' car was searched prior to the buy to ensure there were no illegal drugs in the car. App. pp. 68, 84. Thereafter, the investigators installed audio and video recording equipment in Daniels' car. App. pp. 69, 84. After the video and audio recording devices were placed in the car, Daniels was given seventy-five dollars for the buy. App. pp. 69, 85. Thereafter, Daniels went to a store, purchased gas, and then met with Petitioner. App. pp. 69, 86. Daniels testified he did not purchase anything illegal while getting gas. App. pp. 91. Daniels called Petitioner to make sure the buy was still on. App. p. 86. Daniels asked Petitioner if he had some "mud," which is a street name for heroin. App. p. 87.

Daniels then went to the gas station, got gas, and immediately went to pick up Petitioner. App. p. 88. When Daniels arrived at Petitioner's location, Petitioner got into the car. App. p. 88. Thereafter, Daniels drove his car around the block and purchased heroin from Petitioner. App. 89-pp. 90. During the car ride, Petitioner asked Daniels if Daniels knew of anyone interested in purchasing Lortab. App. pp. 90, 115. After the transaction, Daniels drove back to the corner where he picked up Petitioner, and Petitioner exited the car. App. p. 90.

Daniels then immediately went to meet the investigators at a predetermined location. App. pp. 70, 92. Once at the location, Daniels gave the investigators a zip lock bag containing six bindles of a substance which later tested positive for heroin. App. pp. 71, 92. Daniels told the investigators he purchased the heroin from Petitioner. App. p. 72. After giving the drugs to the investigators, the investigators searched Daniels and his car again. App. p. 92. The audio and video recordings corroborated Daniels' version of events. During cross-examination of Daniels about the video, Petitioner admitted to being in the video. App. p. 108. The recordings, the bindles

of the heroin, and the SLED analysis were admitted into evidence without objection from Petitioner. App. pp. 59, 192.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly dismissed Petitioner’s application without an evidentiary hearing, which solely raised issues of ineffective assistance of pretrial counsel, where Petitioner knowingly and voluntarily elected to relieve his appointed counsel and represent himself the morning of trial, knowing the trial court would not grant a continuance, and thereby assumed responsibility for the entire case, including appointed counsel’s pre-trial investigation.

Petitioner alleges the PCR court erred in summarily dismissing his application because, although Petitioner represented himself at trial, he argues he was entitled to be heard on his pre-trial claims of ineffective assistance of counsel. However, Petitioner knowingly and voluntarily waived his right to representation and appeared *pro se* at trial,¹ and therefore, the PCR court properly dismissed all of Petitioner’s allegations for failure to state a claim upon which relief can be granted because Petitioner assumed responsibility for the case when he elected to represent himself, and in any event, he failed to request a continuance or object to the admission of the items of evidence he alleges his appointed counsel failed to investigate properly. Accordingly, this Court should deny certiorari.

Criminal defendants have a right to refuse counsel and represent themselves in a criminal proceeding. Faretta v. California, 422 U.S. 806 (1975). Before the start of Petitioner’s bench trial, Judge Russo repeatedly advised Petitioner of his right to counsel, as well as warning Petitioner about the dangers of representing himself. App. pp. 33-34, 40-48. Petitioner knowingly and voluntarily waived his right to representation and elected to proceed at trial *pro se*, with previously

¹ The record clearly establishes Petitioner had a full understanding of the consequences of waiving his right to representation and proceeding *pro se* at trial. For a knowing and intelligent waiver to occur, the defendant must be “(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation.” Osbey v. State, 425 S.C. 615, 619, 825 S.E.2d 48, 50 (2019). Notably, Petitioner does not dispute this issue, and he has not raised a claim that his waiver of counsel was unknowing or involuntary. He argues only that he should be allowed to proceed on allegations of pre-trial ineffective assistance.

appointed counsel Jordan acting only as standby counsel. App. pp. 47-48. Thus, Petitioner is expressly barred from raising ineffective assistance claims about his own conduct in trial. *Id.* at 834 n.46 (“Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel.”). Neither may he raise an allegation regarding Jordan’s pretrial conduct because Petitioner assumed responsibility for correcting any pretrial errors when he elected to represent himself. *See Cook v. Ryan*, 688 F.3d 598 (9th Cir. 2012) (holding a *pro se* defendant could not complain of quality of defense by arguing ineffective assistance of counsel even if pretrial counsel erred because the defendant had the opportunity to correct those errors).

Petitioner argues his case is distinguishable from *Cook* because Petitioner did not have an opportunity to correct any errors in Jordan’s representation since the trial started immediately after the trial judge granted his request to remove Jordan as counsel. PWC p. 13. However, Petitioner’s case is significantly different than Cook’s death penalty trial. Petitioner was charged with a drug offense and the State’s case against him consisted only of the videotaped controlled drug buy and the testimony of the informant, the officers who set up the buy, and the SLED analyst who tested the drugs. App. pp. 3-4, 366-68. Petitioner conceded he was the second person on the videotape with the informant; there were no other witnesses or passengers in the car where the controlled buy took place. App. pp. 88-90, 108.

Moreover, Judge Russo gave Petitioner numerous opportunities prior to trial to articulate some reason why he was so dissatisfied with Jordan’s representation, and Petitioner’s only complaint was that Jordan did not view the drug-buy video until the week before trial, and Petitioner was upset regarding a miscommunication between Jordan and him, which resulted in Petitioner spending several hours waiting unsuccessfully to speak to Jordan. App. pp. 5-33.

Although Petitioner asserted he felt Jordan was not ready for trial, he did not offer any specifics regarding investigation or research he wanted Jordan to do that was not done, and Jordan informed the trial court he had spent the week before preparing extensively and was ready to begin the trial that morning. App. pp. 5-13, 24. Additionally, Petitioner never requested a continuance to allow time for further investigation and, in fact, repeatedly told Judge Russo he did not want a continuance. App. pp. 43, 45. Although Petitioner argues the request would have been futile, Petitioner assumed the responsibility for making a record for appellate and collateral review, and he did not do so. See Faretta, 422 U.S. at 834 n.46 (noting a pro se defendant is still obligated “to comply with relevant rules of procedural and substantive law”)

Additionally, Petitioner did not challenge the admission into evidence of either the video, the bag with the substance analyzed by SLED, or the analyst’s report. App. pp. 59, 192. For example, Petitioner argues Jordan’s alleged deficiencies left Petitioner in the dark about the results of the drug analysis and potential issues with the chain of custody. PWC p. 14. Yet, Petitioner consented to the entry of the bag containing the substance and the analyst’s report into evidence without objection. App. pp. 59, 192. More importantly, Petitioner did not call any witnesses at trial because, as he informed the solicitor and the trial court, *the State called all of the witnesses Petitioner would have called himself*. App. p. 59. Thus, if Petitioner had any arguments against the admission of the evidence or the testimony of the witnesses, whether because of Jordan’s conduct or otherwise, he waived them by failing to make any pretrial motions or appropriate objections throughout trial – a responsibility he knowingly and voluntarily assumed.

In this case, Petitioner, knowing his trial was imminent, chose to relieve his appointed counsel, who asserted to the trial court he was ready and prepared to proceed with Petitioner’s defense. App. pp. 11-13, 24, 33-34, 40-48. After doing so, Petitioner indicated to the trial court

the State's witness list already contained all of the witnesses he wanted to present. App. p. 59. Additionally, Petitioner stipulated to the admission of the video tape and the questioned substance and did not object to the admission of the lab report. App. pp. 59, 192. By doing so, he waived any potential challenges to that evidence. All of this conduct is unassailable, as Petitioner cannot raise an ineffective assistance claim against himself. Id. at 834 n.46. Moreover, under the facts of this case, the PCR court properly granted summary dismissal as to Petitioner's pretrial claims because Petitioner assumed responsibility for his own defense and failed to raise any objection to Jordan's investigation or pretrial conduct, other than those described above, which the trial court heard and deemed insignificant. Petitioner failed request a continuance in order to pursue further investigation, did not call any witnesses other than those already called by the State, and did not challenge any of the evidence admitted against him.

“When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel.” Faretta, 422 U.S. at 835. The PCR court's grant of summary dismissal in this case was proper, and this Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny certiorari and affirm the PCR court's summary dismissal of Petitioner's application for relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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