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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge
Appellate Case Tracking No. 2018-001909

The State, Respondent,

v.

Dana L. Morton, Appellant.

RETURN TO PETITION FOR REHEARING

On July 21, 2021, this Court remanded this case for a determination by the trial court of whether Appellant voluntarily waived his right to counsel and knowingly went forward *pro se*. Additionally, this Court properly affirmed the other determinations by the trial court raised by Appellant. Appellant has filed a Petition for Rehearing and this Court requested a Return. This Court should deny the Petition for Rehearing and continue with the remand to the circuit court.

I. Faretta Issue

This Court properly concluded the case should be remanded for consideration of whether a knowing and intelligent waiver of the right to counsel existed. This Court followed proper precedent in determining remand was the appropriate course of action. See State v. Cash, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991) ("We now hold that, except in **extraordinary cases** where it is clear that a hearing on remand would serve no useful purpose, the remedy when the record fails to show a knowing and intelligent waiver of the right to counsel will be a remand for a Dixon hearing." (emphasis added)). Appellant has not demonstrated how this is the

extraordinary case referenced in Cash that warrants automatic reversal. Additionally, as the South Carolina Supreme Court indicated recently in State v. Dial, 429 S.C. 128, 135, 838 S.E.2d 501, 505 (2020):

> [W]e remand Dial's case to the circuit court for the court to conduct an evidentiary hearing pursuant to Dixon to determine whether Dial knowingly and intelligently waived his right to counsel. At this hearing, both the prosecution and the defense are permitted to present evidence on the issue, and if the trial court finds the waiver was not knowing and intelligent, it shall grant the defendant a new trial.

Id. This is the appropriate procedure and there is no reason for this Court to grant the Petition for Rehearing.

II. Appointment of Public Defender

The determination of whether a public defender should have been appointed is tied to whether Appellant properly waived his right to counsel, a determination which will be made on remand to the circuit court. If waiver was not knowingly and intelligently waived, he will be entitled to a retrial and a determination of his entitlement to counsel can be made at that point. If he knowingly and voluntarily waived his right to counsel with his eyes wide open, then he was properly allowed to proceed *pro se* and no appointment of counsel was necessary—especially in light of the late timing of the spurious request that was solely intended to create delay.

Even if the merits of the issue are considered, the trial court indicated Appellant's actions were designed, not to ensure proper representation, but instead, to create delay. He waited until the day of trial to move to relieve counsel, even though all of the events which allegedly caused his desire to relieve counsel occurred in advance of the day of trial. He made no attempt to relieve counsel at a time in which it would not cause delay to relieve counsel and appoint new counsel.

Further, his request to appoint a public defender was entirely unrealistic and would certainly have resulted in the exact delay the trial court found Appellant sought to create. He sought to appoint counsel and still proceed to trial on his own theory of defense in the case on the same day. As a matter of fact, he specifically asked for a public defender and "five minutes, ten minutes" to prepare the case. (T.25; R.25). Counsel could not be appointed to represent him and continue the same day on which trial was already scheduled.[1] It would be entirely unfair to subject an attorney to trial the day he is appointed on a new case, and Appellant's counsel would be insisting on the horror of the situation had it occurred. Otherwise, the trial court was entirely correct that the ultimate goal of Appellant's actions was delay, and appointing counsel—instead of requiring Appellant to proceed with current counsel who was ready to go forward or act *pro se*—would only give Appellant the delay he sought.

In addition, pursuant to section 17-3-30 of the South Carolina code, Appellant must provide an affidavit of indigency which would be required to be screened for accuracy and to ensure Appellant met the requirements for appointed representation. Appellant did not come to court with an affidavit, so one would have to be completed, screened, and approved before trial could proceed. Additionally, pursuant to Rule 608(b)(4), SCACR, there is no presumption of indigency without reference to Appellant's family's net income, which is entirely absent from this Record. As a matter of fact, nothing in this record establishes the entitlement to a public defender or appointed counsel.

[1] Requiring a public defender or other appointed attorney to take the case, obtain the case file and all discovery, meet with his client for the first time, and proceed to trial without any delay would be guaranteeing a claim of ineffective assistance of counsel.

III. Reliable Confidential Informant

Initially, it is questionable whether this issue is even preserved for review given the nature of the objection initially raised. Even if preserved, Investigator Lachica merely explained the terminology used by law enforcement and never labeled the informant, George Vaughn, as "reliable." He never bolstered Vaughn by indicating he was reliable or that he believed Vaughn to be reliable.

The first time reliable was attributed to Vaughn in front of the jury was by Appellant. Numerous times Appellant referenced the term "reliable" in his examination of both Vaughn and Investigator Lachica. (R. 341; 901). It is because of the fact Appellant used and discussed the term that any error in Investigator Lachica's mere reference to the terminology is harmless. See State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected to evidence is harmless). This Court properly concluded any reference by Investigator Lachica was cumulative—cumulative to Appellant's own use of the term.

IV. Cross-Examination Limitation

This Court properly concluded the issue is not preserved for review on appeal. Appellant did not raise the issue with sufficient certainty, nor did he proffer the required testimony or evidence he relies on to make his argument. Appellant at trial brought up several charges that did not result in conviction and the State objected saying he could only address prior convictions. The Court addressed the objection and admission of the evidence pursuant to Rule 609, SCRE. He never was asked to consider Rule 608(c), SCRE, the issue of bias or motive to misrepresent. Appellant never connected his questioning about the charged crimes to an allegation of motive to misrepresent or bias. As a result, the issue as raised is not preserved for review on appeal. See

State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Further, Appellant never proffered any information about the charges he sought to use in cross-examination, so the Record is devoid of information regarding when the charges occurred, what Vaughn was actually charged with, and whether any were actually dropped as a result of the deal with law enforcement to act as an informant in this case. Because there is no proffer, there is nothing for this Court to review to determine prejudice from the failure to be able to admit the testimony. See State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct. App. 2006) ("[A] proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been.") (citing State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979); State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 868 (Ct. App. 2005)).

CONCLUSION

For all of the foregoing reasons, the State requests the panel deny the petition for rehearing, find a remand to the circuit court to consider the knowing and intelligent waiver of counsel is the appropriate remedy in this case, and affirm the remaining arguments raised by Appellant.

Respectfully submitted,

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Petition for Rehearing by emailing a copy to Appellant's counsel of record, E. Charles Grose, Jr., at his primary email address as provided by the Attorney Information System (AIS).

I further certify that all parties required by Rule to be served have been served.
This 10th day of August, 2021.

CAROLINE COLLINS
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Caroline Collins

From:	Caroline Collins
Sent:	Tuesday, August 10, 2021 11:11 AM
To:	charles@groselawfirm.com
Cc:	William Blitch
Subject:	The State v. Dana L. Morton (2018-001909)
Attachments:	MORTON Dana - Return to Petition for Rehearing - 2018-001909 (02668139xD2C78).PDF

Good Morning Mr. Grose,

Attached please find a copy of the Return to Petition for Rehearing in The State v. Dana L. Morton (2018-001909). This document will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt.

Thank you!

CAROLINE COLLINS, Administrative Coordinator
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