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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.

Reply to the State's Return to the Petition for Rehearing

Dana Morton replies to the State's Return to his Petition for Rehearing (hereinafter "Petition" or "State's Return").

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)?

Dana Morton contends the trial judge erred by requiring him to represent himself over his objection and without warning him about the dangers of self-representation as required by *Faretta v. California*, 422 U.S. 806, 807 (1975). He further contends a "remand would serve no useful purpose" under the unique facts and circumstances of this case. *State v. Cash*, 304 S.C. 223, 225, 403 S.E.2d 632, 634 (1991). The State argues Mr. Morton "has not demonstrated how this is the extraordinary case referenced in *Cash* that warrants

automatic reversal." State's Return, at 1-2.[1] Three unique facts and circumstances of this case militate in favor of reversal without remand for a further hearing.

First, as discussed in the petition for rehearing, all of the cases relied on by this Court in its opinion involved waivers of counsel. Petition, at 1-3. The record in those cases, however, did not contain evidence that the trial court warned the accused about the dangers of self-representation as required by *Faretta*. Here, Mr. Morton did not waive his right to counsel. Rather, the trial judge required Mr. Morton to represent himself. R. 24-25.

Second, Mr. Morton objected to the trial court requiring him to represent himself because requiring him to proceed without counsel would be to "railroad" him. R. 25. By using the less than artful term "railroad," Mr. Morton obviously understood the dangers of self-representation and did not want to assume those risks.

Third, as discussed in Mr. Morton's Brief of Appellant, at 4-8, the attorney-client relationship had deteriorated to the point where prior counsel could no longer represent Mr. Morton effectively. Mr. Morton had "a strong belief" his prior counsel was "in cahoots with the State Solicitor" to persuade him to accept a guilty plea that would take him away from his family (R. 16), and his counsel acknowledged he might have been "harsh with [Mr. Morton] about the possibility of taking a plea" (R. 28). The details of the breakdown in the attorney-client relationship emerged when Mr. Morton called his former attorney as a witness during his case-in-chief. Counsel explained that Mr. Morton had three defenses: (1) "an entrapment defense," (2) the "fake drug defense," and (3) "mistreat[ment] by the police officers." Mr. Morton immediately corrected his prior lawyer: "Now, mistreatment

[1] Even though the State's Return does not contain pages numbers, this pleading refers to the actual page number of the document to provide clarity to the citation to the State's pleading.

is not a defense when you done some wrong.[2] So we can exclude that one." Outside the presence of the jurors, Mr. Morton explained his prior lawyer tried "to feed [him] an entrapment" defense, but Mr. Morton "didn't want that" defense. Mr. Morton explained, "It wasn't real drugs." R. 959-64 (footnote added). Prior counsel, in fact, refused to consider Mr. Morton's fake drug defense. When Mr. Morton brought a package of fake drugs to his former counsel's law office, counsel testified he told Mr. Morton, "I don't know if those are drugs or not. I told you to get them out of my office." R. 854-55. By being "harsh" in recommending a plea and refusing to present Mr. Morton's desired defense, counsel abandoned his client.

As the United States Court of Appeals for the Fourth Circuit recently reminded, "A significant conflict of interest arises when an attorney's interest in avoiding damage to his own reputation' is at odds with his client's 'strongest argument—*i.e.*, that his attorneys had abandoned him." *United States v. Glover*, No. 19-4801, 2021 WL 3483282, at *5 (4th Cir. Aug. 9, 2021) (cleaned up). Here, Mr. Morton's prior counsel was unwilling to present the "fake drug defense"—the strongest defense—that Mr. Morton ultimately presented at trial. Counsel's unwillingness to present Mr. Morton's defense constituted an unreconcilable conflict of interest.

These three facts—lack of waiver of counsel, Mr. Morton's understanding that requiring him to proceed without counsel would be to "railroad" him, and his former counsel's unwillingness to present Mr. Morton's desired defense—are already developed on this record and will not change on remand. Accordingly, "remand would serve no useful

[2] Mr. Morton informed the trial judge he would accept a charge for selling fake drugs. R. 694.

purpose" under the unique facts and circumstances of this case. *Cash*, 304 S.C. at 225, 403 S.E.2d at 634.

On two prior occasions, Mr. Morton expressed concern to this Court that the State might argue he waived his right to counsel by his conduct. Memorandum in Opposition to Motion for Remand, at 9, and Brief of Appellant, at 22, fn. 6. The State has not advised this Court whether it intends to pursue such a strategy; however, the record in this case would not support this finding because of the deterioration in the attorney-client relationship. Additionally, the trial judge did not follow the correct procedure for finding a waiver of right to counsel by conduct, to wit:

> A defendant may waive his right to counsel through his conduct. Most courts have held that the defendant must first be warned that his misconduct will thereafter be treated as a waiver. [T]o the extent that the defendant's actions are examined under the doctrine of waiver, there can be no valid waiver of the Sixth Amendment right to counsel unless the defendant also receives *Faretta* warnings. Any subsequent misconduct will be treated as a waiver by conduct.

State v. Thompson, 355 S.C. 255, 263, 584 S.E.2d 131, 135 (Ct. App. 2003) (internal citations and quotations omitted). A remand could not cure the trial court's failure to follow the correct procedures. Accordingly, "remand would serve no useful purpose" under the unique facts and circumstances of this case. *Cash*, 304 S.C. at 225, 403 S.E.2d at 634.

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?

Dana Morton contends the trial court should have appointed a public defender to represent him at trial. The State initially argues, "The determination of whether a public

defender should have been appointed is tied to whether [Mr. Morton] properly waived his right to counsel" and urges that "determination" should "be made on remand." State's Return, at 2. As discussed in Question I above, "remand would serve no useful purpose" under the unique facts and circumstances of this case. *Cash*, 304 S.C. at 225, 403 S.E.2d at 634.

On the merits, the State argues Mr. Morton's desire for appointed counsel "were designed . . . to create delay," "his request to appoint a public defender was entirely unrealistic," and an affidavit of indigency was necessary to appoint a public defender. State's Return, at 2-3. This Court must reject these arguments for three reasons. 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) ("An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law."). As seen above, Mr. Morton's decision to relieve his counsel "was driven by trust issues." *Id.* 407 S.C. at 32, 753 S.E.2d at 548. Second, Mr. Morton was prepared to proceed to trial after only "five minutes, ten minutes" to prepare his public defender. Although the charges involved in this case are serious—both in the nature of the charges and potential penalties—Mr. Morton's case and defense is not complicated. Third, the State overlooks S.C. Code Ann. § 17-3-100, which provides, "Nothing [in the statues or rule] is designed to limit the discretionary authority of a judge to appoint counsel in any case."

Given the deterioration in the attorney-client relationship, and given Mr. Morton's financial situation, the trial court erred by not appointing a public defender to represent Mr. Morton.

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?

Dana Morton contends the trial court erred by allowing law enforcement to brand George Vaughn a "reliable" confidential informant. This Court held the objected to testimony was cumulative to other testimony by the same witness. Mr. Morton disagreed and argued, "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." Petition, at 5. The State's Return does not address this argument.

The State contends, "Investigator Lachica merely explained the terminology used by law enforcement and never labeled the informant, George Vaughn, as "reliable." State's Return, at 4. The State never explains why the prosecutor would question Investigator Lachica about "the difference between a confidential informant and a confidential reliable informant" (R. 90-91), if the prosecution did not intend for the jurors to believe George Vaughn was, in fact, "reliable." Nor could it because the only reason to ask this question was to bolster the credibility of George Vaughan. That the prosecutor immediately followed this questioning by asking, "Investigator Lachica, do you know George Vaughn?" (R. 91) confirms this intent. Consider how the testimony developed in the courtroom. After the trial court overruled Mr. Morton's objection, the following exchange took place between the prosecutor and Investigator Lachica:

> Solicitor Mabbs: Thank you, Your Honor.
>
> Investigator Lachica, can you explain again what, what would make somebody a confidential and reliable informant?

> A: Confidential reliable informant is somebody who has – they start off as a confidential informant, and, once they've purchased drugs from us in the past or purchased drugs from us or for us, and it leads to confiscation of illegal narcotics or substances by them doing what they say they were gonna do, and it being on video, audio, and we move them up slowly, but surely up the ladder to reliable where we change it from confidential to confidential reliable informant.
>
> Q: Investigator Lachica, do you know George Vaughn?

R. 91.

This Court must also reject the State's contention that "Investigator Lachica merely explained the terminology used by law enforcement," State's Return, at 4, because our supreme court disfavors prosecution jargon when use of that jargon prejudices a defendant. *See, e.g., State v. Kromah*, 401 S.C. 340, 356, 737 S.E.2d 490, 498 (2013) ("The title of 'forensic interviewer' is a misnomer."). Here, use of the term "reliable" is inherently bolstering. "Reliable" means "that may be relied on or trusted; dependable in achievement, accuracy, honesty, etc." https://www.dictionary.com/browse/reliable (last viewed Aug. 21, 2021).

The State also relies on *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), *overruled on other grounds by State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016), arguing "any error in admission of evidence cumulative to other unobjected to evidence is harmless." State's Return, at 4. Reliance on *Schumpert* is misplaced for the same reason that reliance on *State v. Blackburn*, 271 S.C. 324, 247 S.E.2d 334 (1978)—the case relied on by this Court in its opinion—is misplaced. *See* Petition, at 4-5 (discussing *Blackburn*). In *Schumpert*, a criminal sexual conduct case, our supreme court considered a challenge to hearsay evidence that exceed the time and place exception now codified in Rule 801(d)(1)(D). Our supreme court found this evidence cumulative because "two other

witnesses testified without objection" about the same information. *Id*., 312 S.C. at 507, 435 S.E.2d at 862. Here, no other witness testified to the same information.

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?

Dana Morton contends the trial court denied him his constitutional rights to confront George Vaughn with his prior unadjudicated drug charges. This Court held this issue was not preserved for appeal. Mr. Morton disagrees because he informed the trial court that George Vaughn had "at least six" drug charges. *See* Petition, at 6. The State argues Mr. Morton "did not raise the issue with sufficient certainty" and "never proffered any information about the charges he sought to use in cross-examination." For the reasons set forth in his petition for rehearing, at 6, Mr. Morton disagrees; however, if the State is correct, then the trial court's limitation on the cross-examination of George Vaughn is prejudice resulting from the trial judge forcing Dana Morton to represent himself.[3] An attorney would have known how to preserve this issue for appeal. *See, e.g., Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (counsel was deficient in failing to object to trial court's ruling disallowing her from cross-examining victim about the dismissal of victim's carjacking charge).

[3] By pointing out prejudice resulting from the trial court forcing him to represent himself, Mr. Morton does not imply that showing prejudice is required to obtain relief when a trial court denies the right to counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006) (reaffirming the "denial of counsel" is structural error) (citing *Gideon v. Wainwright,* 372 U.S. 335, (1963).

CONCLUSION

For the reasons set forth in the petition for rehearing and this reply, this Court should grant rehearing, withdraw its opinion, reverse the trial court, and order a new trial.[4]

Respectfully Submitted,

By s/*E. Charles Grose, Jr.*

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[4] Dana Morton additionally requests the Court convene an oral argument. This Court initially noticed this case for oral argument but then submitted the case for consideration without oral argument. The arguments raised by the parties at the rehearing stage are evidence this Court would benefit from an oral argument.

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Certificate of Service

I certify that I have served a copy of this pleading on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2021-06-15-01, Section (c)(13), by emailing at copy to counsel, at their AIS email address, as reflected below:

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August 23, 2021

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
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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 Reply to the State's Return to his 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. Blitch, Jr., Esquire