STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAHRU HAROLD SMITH,

APPELLANT.

APPELLATE CASE NO 2018-000505

FINAL BRIEF OF APPELLANT

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2. Did the judge err in refusing to continue the trial in order for the visually impaired Appellant to obtain prescription eye glasses so that he could see in order to exercise his Sixth Amendment right to self-representation?

3. Did the judge err in sentencing Appellant to five years for possession of a weapon during the commission of a violent crime after sentencing him to life without parole for murder and armed robbery?

STATEMENT OF THE CASE

The State obtained indictments against Appellant, Jahru Harold Smith, for murder and possession of a weapon during the commission of a violent crime, indictment #2015-GS-23-2033 and armed robbery, indictment #2015-GS-23-2034. The indictments list the August 2015 term but 2015 is crossed out and 2016 is handwritten above. The date listed below the name of the witness who testified before the grand jury is February 13, 2015. The indictments are stamped as true billed and include the signature of the grand jury foreman but do not include a date. The indictments were stamped as received by the clerk's office on April 24, 2015. There was no objection to the indictments at trial.

Appellant proceeded to jury trial, with his co-defendant and brother, Bobby Leon Smith, on March 12, 2018, before the Honorable Robin B. Stilwell. Alex Kornfeld initially represented Appellant at trial. Counsel moved for a continuance to allow Appellant, who is visually impaired, to obtain prescription reading glasses. The judge denied the motion for a continuance and Appellant moved to relieve counsel and represent himself. The judge granted Appellant's motion to represent himself and allowed trial counsel, Mr. Kornfeld, to serve as stand-by counsel. When the judge again denied Appellant's request for a continuance to obtain prescription reading glasses, Appellant refused to remain in the courtroom and the judge ordered Mr. Kornfeld to represent Appellant. Brian J. Moroney, Jr. and W. Jeffrey Weston prosecuted the case. The jury returned verdicts of guilty and the judge sentenced Appellant to life without parole for murder and armed robbery and five years for possession of a weapon during the commission of a violent crime.

STANDARDS OF REVIEW

As to issues one and two addressing the denial of motions for continuance in order for the visually impaired Appellant to obtain prescription eye glasses that would allow him to see, the standard of review is abuse of discretion. " 'The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion.' " State v. Geer, 391 S.C. 179, 189, 705 S.E.2d 441, 447 (Ct. App. 2010) (quoting State v. Yarborough, 363 S.C. 260, 266, 609 S.E.2d 592, 595 (Ct. App. 2005)). " 'An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support.' " Id. (quoting State v. Irick, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)); see also State v. Funderburk, 367 S.C. 236, 239, 625 S.E.2d 248, 249–50 (Ct. App. 2006) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law."). Even if there was no evidentiary support, " '[i]n order for an error to warrant reversal, the error must result in prejudice to the appellant.' " Geer, 391 S.C. at 190, 705 S.E.2d at 447 (quoting State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005)); see also State v. Wyatt, 317 S.C. 370, 372–73, 453 S.E.2d 890, 891–92 (1995) (stating that error without prejudice does not warrant reversal).

As to the third issue involving sentencing, the standard of review is also an abuse of discretion. "A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010).

ARGUMENTS

1. **The trial judge erred in refusing to continue the case in order for the visually impaired Appellant to obtain prescription eye glasses so that he could see to assist his attorney with his defense.**

Appellant's trial took place in Greenville County. The very first pre-trial motion involved Appellant's request for prescription eye glasses. Trial counsel told the judge, "I just spoke to my client. And Mr. Smith is being held in the Anderson County Detention Center." (R. p. 9, lines 24-25). Trial counsel additionally told the judge, "When he was arrested at that time, his glasses broke. He does not have his glasses. And he receives some disability due to the fact of his blindness. He tells me that he can barely see, and everything looks like a TV screen. And he cannot read. He tells me because of that, he cannot actively assist in his defense in picking the jury. And he requests that he be given glasses at this time so that he can – can assist in his defense, Your Honor." (R. p. 10, lines 2-10). The judge responded, "Well, I don't know that it would serve any useful purpose to give him a pair of glasses that didn't meet his prescription." (R. p. 10, lines 11-13). Trial counsel responded, "Right. I understand, Your Honor. I do know that he does have limited vision. He did have very thick glasses the times I saw him before. I don't know how long it would take him to get glasses." (R. p. 10, lines 14-19). The judge then asked trial counsel, "Do you feel – do you feel that that prejudices him in some way in the jury selection process?" (R. p. 10, lines 20-22). Trial counsel answered, "Your Honor, he does. Because he wants to be able to, I guess, confer with me concerning who is selected on his jury." (R. p. 10, lines 23-25). The judge found that Appellant was not prejudiced by the fact that he did not have prescription glasses to see during jury selection. (R. p. 11, lines 15-16). Appellant objected. (R. p. 11, line 19 – p. 12, lines 1-8).

Later Appellant again objected stating:

> Excuse me, Your Honor. I still . . . got to object to this. Because, one, I can't even go over the jury questionnaire: right? I don't know what to ask my attorney to ask these folks. You know what I'm saying? And – and, two, right – I have a right to face my jury of peers. I can't see them, man. You're going to force me to go through a trial a blind man. And the only thing I'm asking you to do right is to give me a deferment. It won't take no people no more than two and a half weeks to have me some glasses made, if you'd issue an injunction; right? I'd be ready to go to trial. As a matter of fact, I'll try the trial myself.

(R. p. 19, line 15 – p. 20, lines 1-5). The judge assured Appellant that his objection was protected on the record and if convicted, Appellant could appeal the judge's decision. (R. p. 20, lines 6-11). Appellant responded stating, "I don't want to wait until after I'm convicted, as you say, and then assert the right. I want to assert the right here and now. Because this matter can be resolved right now; right. The only thing I'm asking is to be provided some eyes so I can see to defend myself. That's the only thing that I'm asking." (R. p. 20, lines 18-24). Appellant also noted, "And, I mean, the – the Prosecution have waited three years; right? What's – what's a couple more weeks to try this case?" (R. p. 21, lines 1-3).

The judge advised Appellant, "I understand, Mr. Smith. And I appreciate your position. Just understand that I'm not convinced that your – your inability to see well prejudices you legally in this instance." (R. p. 21, lines 4-7). Appellant then said:

> Okay. Let me put it to you this way right here then. This is how it prejudices me: right? Because, one, I'm asserting my Sixth Amendment right to defend myself; right? That's how it prejudices me. And I cannot defend myself if I cannot see to read, go over discovery, or whatever evidence that the Prosecution might have, or any exculpatory evidence that the might have that's favorable or nonfavorable to me.

(R. p. 21, lines 8-16). The judge then told Appellant that he had been appointed counsel but asked if he wanted to fire counsel. (R. p. 21, lines 23-24; p. 22, lines 16-17). Appellant

responded, "No. I don't want to fire my counsel. I want – I want to assert the right to defend myself with the assistance of counsel." (R. p. 22, lines 18-20). The judge then told Appellant, "What you're saying is legally inconsistent. Okay." (R. p. 22, lines 21 -22).

After some more discussion about jury selection, the following exchange took place between Appellant and the judge:

> THE COURT: It seems to me, Mr. Smith, that if you were sincere and you were making an honest motion before this Court, you would have brought the prescription, and you would have told me your eyesight is with specificity –
>
> DEFENDANT: How can I do that if I'm incarcerated –
>
> THE COURT: -- as opposed to just standing up and saying I can't see. You would have armed Mr. Kornfeld [trial counsel] –
>
> DEFENDANT: Today is my first time seeing my attorney since last year. This is the first time I've seen my attorney since last year; right? He could have – he could have been here and told you this if he would have came to see me when – once he found out that a trial date had been set. He knew I was in Anderson County. He could have – he could have told you this. I tried to call him. I couldn't get in touch with him.

(R. p. 24, lines 6-23). Trial counsel did not deny that he was seeing his client for the first time since last year on the morning of trial and simply told the judge that he wrote to his client.[1] (R. p. 24, line 25 – p. 25, lines 1). Finally, Appellant told the judge, "Now, you're saying that – I could have brought you my prescription up in here. I'm saying if I had my prescription and I could have brought it to you, I, certainly would have done so." (R. p. 25, lines 14-17). The judge then ruled stating, "Okay. Mr. Smith, I appreciate it. And you've been heard on the record. I respectfully, respectfully and with no animus or ill will towards you, I respectfully deny your motion." (R. p. 25, lines 18-21). The trial judge erred.

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[1] Trial counsel's failure to visit Appellant prior to trial and determine that Appellant needed his prescription eye glasses may be an issue that will need to be addressed in post-conviction relief.

In United States v. Scheur, 547 F. Supp. 2d 580, 588 (E.D. La. 2008), Judge Eldon E. Fallon, United States District Judge for the Eastern District of Louisiana ordered special accommodations for Scheur, who was blind. The judge wrote:

> "The constitutional guarantee of due process in a criminal trial 'is, in essence, the right to a fair opportunity to defend against the State's accusations.' " Ferrell v. Estelle, 568 F.2d 1128, 1131 (5th Cir.1978) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). "That guarantee encompasses both the right of a defendant to confront witnesses against him and his right to assist in his own defense." Id. But as the United States Court of Appeals for the Fifth Circuit further explained in Ferrell, a case involving a deaf defendant, these rights are not absolute:
>
> The Constitution does not, however, guarantee every defendant a perfect trial. The rights vouchsafed are practical, reasonable rights rather than ideal concepts of communication, and even these pragmatic rights may not be exercised without limit. The Constitution does not require that every defendant comprehend the English language with the precision of a Rhodes Scholar or appreciate the nuances of a witness' expressions or behavior with the skill of a doctor of psychology. Nor may a defendant press the exercise of his right to the point at which he disrupts the public's right to an orderly trial. Id. (fn #10 omitted).

In granting special accommodations by allowing the defendant to use a hand- held braille computer the district judge relied on a case decided by the Illinois Supreme Court and wrote:

> The Supreme Court of Illinois has set forth an authoritative road map for courts to follow when faced with the trial of a disabled defendant:
>
> The general rule in handling the trial of a criminal defendant who is handicapped by deafness, blindness or other affliction is that a trial judge should afford such a defendant reasonable facilities for confronting and cross-examining the witnesses as the circumstances will permit. He need only give such aid to intelligent appreciation of the proceeding as a sound discretion may suggest. The fact of blindness or deafness of the accused may lessen the ability and capacity of the defendant to utilize his constitutional rights, but this will not prevent his being subject to trial. In the proper administration of justice, however, the court should give a person accused of crime a reasonable opportunity to obtain the benefit of his constitutional rights.
>
> People ex rel. Myers v. Briggs, 46 Ill.2d 281, 263 N.E.2d 109, 113 (1970). To exercise its discretion in this respect, however, "the court must first make some meaningful inquiry into the nature and extent of the defendant's [disability]." People v. Williams, 331 Ill.App.3d 662, 265 Ill.Dec. 136, 771 N.E.2d 1095, 1099

(2002). As noted above, the Court conducted an evidentiary hearing on April 17, 2008, regarding Scheur's disability and is now prepared to exercise its discretion.

United States v. Scheur, 547 F. Supp. 2d 580, 587–88 (E.D. La. 2008).

Appellant in the present case was simply asking for a continuance in order to obtain prescription reading glasses so that he could see in order to be able to assist in his defense. The request was reasonable and necessary. As correctly noted by Appellant, he was arrested ten days after the incident on February 3, 2015, but the State did not call the case to trial until March 12, 2018, three years later. A two to three-week continuance would have provided Appellant with a reasonable opportunity to obtain the benefit of his constitutional right to due process and to assist in his own defense. The delay in the request should not be attributed to Appellant as trial counsel admitted that he had not personally visited Appellant in Anderson County prior to trial. The judge's insinuation that Appellant was not being honest or sincere about his ability to see is not supported by the record where trial counsel advised the judge that Appellant received disability compensation because of visual impairment. (R. p. 10, lines 3-4).

Denying Appellant the opportunity to obtain prescription reading glasses for trial is analogous to denying a non-English speaking or deaf defendant the benefit of an interpreter at trial. "The right to an interpreter rests most fundamentally, however, on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment." United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973). While the appointment of interpreters in court proceedings for the deaf and non-English speakers is controlled by statutes in South Carolina,[2] a similar accommodation should be made for the blind, especially when the defendant is indigent and is simply requesting prescription reading glasses.

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[2] S.C. Code §15-27-15 for deaf people and S.C. Code §15-27-155 for non-English speaking people.

In State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51–52 (1996), the South Carolina Supreme Court wrote:

> The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion. State v. Tanner, 299 S.C. 459, 385 S.E.2d 832 (1989). Reversals of the refusal of a continuance are about as "rare as the proverbial hens' teeth." State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). Where there is no showing that any other evidence on behalf of the appellant could have been produced, or that any other points could have been raised had more time been granted for the purpose of preparing the case for trial, the denial of a motion for continuance is not an abuse of discretion. State v. Squires, 248 S.C. 239, 149 S.E.2d 601 (1966).

In the present case there is a showing that Appellant needed a continuance in order to obtain prescription eye glasses. The need for the eye glasses is directly linked to Appellant's constitutional due process rights to assist in his own defense as well as confront witnesses against him. Based on counsel's representation to the judge that Appellant was visually impaired, the judge should have made a meaningful inquiry into the nature and extent of Appellant's disability and made such accommodations as deemed necessary. What little inquiry was made by the judge in the present case was not meaningful. The present case is analogous to State v. Wrapp, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017), where the Court found the trial judge erred in refusing to grant a continuance and proceeding with a trial in absentia without making proper findings in regard to notice. The trial judge in the present case abused his discretion in refusing to grant a continuance so that Appellant could obtain prescription eye glasses.

2. The trial judge erred in refusing to continue the case in order for the visually impaired Appellant to obtain prescription eye glasses so that he could see in order to exercise his Sixth Amendment right to self-representation.

Later, after the trial judge denied the motion for a continuance, Appellant moved to represent himself. Trial counsel told the judge, "I spoke with Jahru Smith, my client, at lunch.

And he now says that you misunderstood him, I guess, I concluded. But he wants to represent himself and assert his Sixth Amendment right, and have me act as standby counsel. Those aren't the exact words that he said." (R. p. 36, line 21 – p. 71, line 1). When questioned, Appellant told the judge, "Yes, sir. As I previously informed the Court that I'd like to assert my Sixth Amendment right to self-representation with the assistance of counsel." (R. p. 37, lines 12-15). After questioning Appellant about self- representation, Appellant told the judge, "As I informed you before, it is impossible for me to do that without my mandate prescription eyeglasses. And the fact of the matter is the new evidence that the Prosecution has turned over to my attorney, I have not had the opportunity to review, as well as other material in the case." (R. p. 39, lines 4-9). The judge ruled, "All right. Mr. Smith, I'll allow you to represent yourself. I'm not going to continue the case. Okay. You can – you can use Mr. Kornfeld to assist you in the review of documents. And we'll take our time. Any document that's turned over –" (R. p. 39, lines 14-18). Appellant objected. (R. p. 39, lines 19-21).

When Appellant stated that he wished to leave the courtroom, the judge encouraged him to stay but Appellant responded, "For what? How am I going to stay? Man, I'm blind. How in the hell you going to allow me to represent myself and I'm blind? But I'm telling you I can see if you allow me time to get my prescription eyeglasses. That's not fair. That is not fair at all." (R. p. 40, line 22 – p. 41, line 1). The following took place between Appellant and the judge:

> DEFENDANT: Yes. I'm saying my counsel and me, we're leaving. Y'all go ahead and try the case. That's what you're doing anyway. I ain't got no counsel.
>
> THE COURT: I'm directing Mr. Kornfeld to stay and to represent you.
>
> DEFENDANT: Well, I'm directing him to not represent me. I'm representing myself.

(R. p. 41, lines 3-9). Appellant then left the courtroom. (R. p. 41, lines 10-11). The judge then stated:

> All right. Just to be very clear about matters, I'm ordering, Mr. Kornfeld, for you to continue to represent Mr. Smith in this proceeding. I recognize that he has made a motion to have you removed as counsel or to represent himself. However, he's elected to leave the courtroom. I don't want him to be prejudiced by that decision any more than is absolutely necessary. I know that you have prepared this case. You've had the opportunity to discuss the same with him. And, inasmuch, he deserves representation, and I'm going to leave you on the case. I think that's appropriate under the circumstances.
>
> And I'll state clearly for the record in case I haven't articulated clearly enough, because Mr. Smith, essentially, didn't want to have a discussion or to articulate his position clearly. He says he couldn't see. Well, that may or may not be true. I don't know that. I don't have any type of prescription which would suggest to me that he is blind, that he's legally blind, or that his ability to see is so compromised that he can't function. Now, that very well may be the case. But I don't have anything that demonstrates that, other than his representation. So I -- I don't -- I don't have anything in the record substantively which demonstrates by a preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt, or even rises to probable cause that he is legally prejudiced by not having glasses today.
>
> And any prejudice that he may suffer individually from having his vision compromised is compensated by having an attorney, an able-bodied attorney, who is able to review documents and conduct the trial of this case. Again, he's elected to excuse himself from the courtroom, which is unfortunate. I wish he wouldn't. I'd rather put up with his antics than have him leave the courtroom. But he made that decision. And I'm not going to continue the case simply because he makes a representation that he can't see. If that were the case, then people with handicaps would never – they could never go the trial. And I'm not convinced, again, that he suffers from a definable handicap, because he hasn't given me any evidence to convince me of the same. It's simply a bald-faced assertion. It may be true or not be true. But it isn't sufficient in the court of law. Are we ready for the jury?

(R. p. 41, line 17 – p. 42, 43, lines 1-11). The trial judge erred. In failing to grant a continuance and make the reasonable accommodation of providing the opportunity for the visually impaired Appellant to obtain prescription eye glasses, the trial judge denied Appellant the right to self-representation. The trial judge's statement that Appellant's visual impairment was "simply a bald-faced assertion" is not supported by the record where trial counsel advised the judge that Appellant received disability for being blind.[3] (R. p. 10, lines 3-4). Before concluding the trial proceedings for that day the trial judge stated, "If some how, we can get him glasses, get him glasses." (R. p. 119, lines 17-18). It is unclear from the record what, if any, action was taken in regard to obtaining prescription eye glasses for Appellant.

Prior to the proffer of Appellant's prior attorney as to whether or not Appellant waived the attorney client privilege by instructing the attorney to inform law enforcement about the location of a weapon, Appellant's trial counsel told the judge, "Your Honor, is there a – I tried to get Jahru to come in earlier today. . . .I guess it was his lunch and he didn't. Is there a possibility – I don't know where he is – that maybe I could get him to come in for this and maybe he could testify concerning this? Maybe he wants to, maybe he doesn't." (R. p. 280, line 24 – p. 281, lines 2-6). The following exchange then took place:

> THE COURT: You can, certainly, ask him. Let's go ahead and put Ms. Gorton on the stand. Okay.
>
> MR. KORNFELD: Okay
>
> THE COURT: Is he there in the cell, or is he – he's downstairs?
>
> THE COURTROOM DEPUTY: He's downstairs. And he used some profanity about him talking to him at lunchtime.

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[3] Any issue in regard to trial counsel's failure to obtain evidence of Appellant's visual impairment or failure to obtain prescription eye glasses will need to be addressed in post-conviction relief.

THE COURT: Is that right?

MR. KORNFELD: Not to me.

THE COURTROOM DEPUTY: Through the officer.

THE COURT: I understand. I understand. So what you're suggesting is that they may be a little bit on the outs, at least, from Mr. Smith's perspective. Swear Ms. Gorton in.

(R. p. 281, lines 7-20). It is unclear from the record whether Appellant was given the opportunity to return to the courtroom for the proffer.

The judge ruled that Appellant waived the attorney client privilege and allowed former counsel to testify against Appellant at trial. After ruling the judge stated, "I will tell you that I – I certainly, wish that he were here to respond and, perhaps, assist in – in the cross-examination of Ms. Gorton. But he has voluntarily elected to excuse himself from the courtroom. And there's nothing I can do about that." (R. p. 293, lines 23 – p. 294, lines 1-2). It is unclear from the record whether Appellant was given the opportunity to return to the courtroom for the testimony of his former attorney.

The next day, before the trial resumed, trial counsel told the judge, "Your Honor, I haven't talked to him [Appellant] this morning. I talked to one of the officers. And he indicated that he didn't want to come up again." (R. p. 351, lines 9-11). The mother of Appellant's child, Tiffany Petty, was called as a witness by the State and testified that Appellant was legally blind and received a disability check as a result. (R. p. 371, lines 12-25). Following a discussion with Appellant during the lunch break trial counsel told the judge, "I spoke with Jahru at lunch. And he has instructed me, again, to do a few things. But, one, he's instructed me to leave the courtroom. He's instructed me that I am no longer his lawyer. And he's instructed me to inform the Court, again, that he asserts his Sixth Amendment right to self-representation. And that he

needs the assistance of glasses to legally help him with his case. He cannot have – he cannot get glasses because he is in the Anderson County Detention Center and has not been provided any." (R. p. 431, lines 19 – p. 432, lines 1-4). The judge ordered trial counsel to continue to represent Appellant and ruled, "With respect to the glasses issue, again, I've heard that and I've ruled on it. And I'll not – I'll not articulate the Court's position again. The ruling stands." (R. p. 432, lines 14-16).

After denying trial counsel's motion for a directed verdict, the judge stated:

> I'll, also, take the opportunity again to address the fact that he's -- that he, Mr. Jahru Smith, has elected not to participate in the trial. He's here again today. He has clothes to dress out. He's elected not to come into the courtroom. And, again, I've tried to encourage him to come into the courtroom.
>
> I, also, recognize the motions with respect to his --I recognize that he's made a motion to defend himself, which I granted. But once he found out that that was not going to operate to cause a continuance, he left the courtroom again.
> Oftentimes, when you look at a transcript of a record, it's difficult to ascertain what, actually, happened. And I just want to state on the record that, from the Court's perspective, that motion of self-representation, that was entirely pretextual and an attempt from the Defendant to delay the trial. When that was unsuccessful, then he, for the second time, excused himself from the courtroom and elected not to participate in the trial.
>
> So I think it's clear that was a pretextual motion made by him. And I'll state as well, after colloquy, I granted his motion. And then he elected, again, not to
> participate. So I believe that addresses all of the issues that you had raised, Mr. Kornfeld.

(R. p. 491, line 20 – p. 492, lines 1-20).

Prior to Appellant's brother and co-defendant testifying the following took place:

> THE COURT: Mr. Kornfeld, did you have the opportunity to discuss with Mr. Jahru Smith whether he would like to come into the courtroom, sir?

MR. KORNFELD: An officer came out and told me he said his peace. He's got nothing to say, and he wants to fire me.

THE COURT: Who spoke to him?

THE COURTROOM DEPUTY: Ashley Wilson.

THE COURT: All right. So he indicated clearly to law enforcement that he doesn't intend to come out?

THE COURTROOM DEPUTY: That's correct.

THE COURT: Good enough.

(R. p. 498, lines 10-21).

After the jury reached verdicts, Appellant indicated that he did not wish to attend sentencing. (R. p. 627, line 21 – p. 628, lines 1-20). Trial counsel renewed motions stating, "I reassert, on behalf of my client, his motion concerning the fact that he wanted to represent himself and fire me, but for the fact that he could not see and he needed glasses and was unable to get them." (R. p. 643, lines 9-12). The next day the judge ordered Appellant to appear for sentencing. (R. p. 647, line 13 –25). Appellant refused to appear. (R. p. 648, line 2). The judge again ordered Appellant to appear for sentencing. (R. p. 652, line 15 – p. 653, lines 1-11). Appellant then entered the courtroom and the judge sentenced him to life without parole for murder and armed robbery and five years for possession of a weapon during the commission of a violent crime. (R. p. 653, line 14 – p. 654, lines 1-16). The trial judge erred in refusing to continue the case in order for the visually impaired Appellant to obtain prescription eye glasses so that he could see in order to exercise his Sixth Amendment right to self-representation. The failure to make a reasonable accommodation deprived Appellant the right to self-representation.

"A South Carolina criminal defendant has the constitutional right to represent himself under both the federal and state constitutions." State v. Barnes, 407 S.C. 27, 35, 753 S.E.2d 545,

550 (2014). "The request to proceed *pro se* must be clearly asserted by the defendant prior to trial." State v. Fuller, 337 S.C. 236, 241, 523 S.E.2d 168, 170 (1999). Appellant clearly asserted his right to self-representation prior to trial. "At bottom, the Faretta[4] right to self-representation is not absolute, and 'the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.' " United States v. Bush, 404 F.3d 263, 271 (4th Cir. 2005) (quoting Frazier-El, 204 F.3d 553, 560 (4th Cir. 2000)). " 'A trial court must be permitted to distinguish between a manipulative effort to present particular arguments and a sincere desire to dispense with the benefits of counsel.' " Id. (quoting Frazier–El, 204 F.3d at 560).

In the present case there is no evidence that Appellant was attempting to manipulate the system by asserting the right to self-representation in order to make impermissible arguments or raise invalid defenses. While the trial judge found that Appellant's motion to represent himself was pretextual, as the South Carolina Supreme Court noted in State v. Samuel, 422 S.C. 596, 606, 813 S.E.2d 487, 493 (2018), "The only instance of manipulation the circuit judge cited was the disparate testimony from Samuel and Grant regarding their relationship. However, even if Samuel's testimony was misleading, this Court indicated in Barnes that a defendant's improper motive or unethical conduct is not enough to preclude him from exercising his right to self-representation. See Barnes, 413 S.C. at 3 n.1, 774 S.E.2d at 455 n.1." While Appellant's motive in seeking self-representation may have been to obtain the glasses he needed in order to see, this is not an improper motive and should not serve to deny Appellant the constitutional right to represent himself.

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4 Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

3. **The trial judge erred in sentencing Appellant to five years for possession of a weapon during the commission of a violent crime after sentencing him to life without parole for murder and armed robbery.**

After the judge sentenced Appellant's co-defendant and brother to life in prison for armed robbery, fifteen years for accessory after the fact to murder and five years for possession of a weapon during the commission of a violent crime, trial counsel for the co-defendant objected to the five-year sentence imposed on the weapon charge because the statute provides that the sentence shall not be imposed when the defendant is also sentenced to life without parole. (R. p. 635, lines 7-8). The judge overruled the objection and stated:

> I've read the statute and I read the relevant case law that y'all gave to me. And it – and under most circumstances, a five-year sentence for the commission of a -- for possession of a weapon during the commission of a violent crime is compulsory.
> The statute says that it's not compulsory when and if there is either a life or death sentence in a suit. The -- I believe that in the -- in the case that you sent me, the holding of the majority was that it was appropriate. A dissent said they didn't think it was appropriate under the statute because the statute says that you don't have to do it. I read that as a -- as a -- just, essentially, a common sense conclusion by the legislature that it was entirely academic to sentence someone to five years if you had already sentenced them to either life or death.

(R. p. 635, lines 9-24).

Prior to Appellant's sentencing, trial counsel also objected to the five-year sentence for possession of a weapon during the commission of a violent crime stating, "I would respectfully disagree with not only the Court of Appeals interpretation, but your interpretation of 16-23-490. And, as you stated before, it's purely academic. But the statute, I think, is clear where it says the mandatory five-year sentence for possession of a firearm during the commission of a violent crime shall not be imposed when the Defendant is sentenced to death or life without parole for the violent crime." (R. p. 651, line 25 – p. 652, lines 1-7). The trial judge overruled the

objection stating, "I'm comfortable in that regard. The ruling that I set forth yesterday stands." (R. p. 652, lines 13-14). The judge sentenced Appellant to life without parole for murder and armed robbery and five years for possession of a weapon during the commission of a violent crime. (R. p. 653, line 14 – p. 698, lines 1-16). The trial judge erred.

S.C. Code Ann. § 16-23-490(A) provides:

> If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. This five-year sentence does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime.

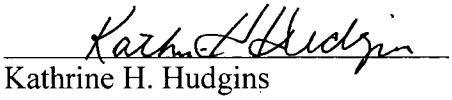
In State v. Palmer, 415 S.C. 502, 525, 783 S.E.2d 823, 835 (Ct. App. 2016), the South Carolina Court of Appeals wrote:

> Palmer was found guilty of murder and possession of a weapon during the commission of a violent crime. The court sentenced Palmer to five years' imprisonment on the possession of a weapon during the commission of a violent crime after sentencing him to life without parole on the murder. Palmer objected to the sentence. Palmer argues this was in error because S.C.Code Ann. § 16–23–490(A) (2015) provides the five-year sentence is inapplicable when a court imposes a life without parole sentence.
>
> The State concedes this was in error, and we agree. Therefore, Palmer's sentence for possession of a weapon during the commission of a violent crime should be vacated. See State v. Owens, 346 S.C. 637, 666, 552 S.E.2d 745, 760 (2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

The trial judge erred in sentencing Appellant to five years for possession of a weapon during the commission of a violent crime when he was sentenced to life without parole for murder and armed robbery. The five-year sentence should be vacated.

CONCLUSION

Based on arguments presented by issues one and two, this Court should reverse the convictions and remand for a new trial. Based on the argument presented in issue three, this Court should vacate the five-year sentence for possession of a weapon during the commission of a violent crime.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of September, 2019.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability with Rule 211 (b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,

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This 27th day of September, 2019.