STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County

Honorable Daniel D. Hall, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GEORGE ROBERT LEACH,

APPELLANT

APPELLATE CASE NO. 2020-001579

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF ISSUES ON APPEAL

1. Whether the plea court erred when it refused to allow Appellant to withdraw his guilty plea where Appellant moved to withdraw his guilty plea multiple times during the hearing before Appellant was notified that his plea was accepted as freely and voluntarily made, and where the plea colloquy did not adequately advise Appellant of the rights he was waiving?

2. Whether the lower court erred when it allowed Appellant to proceed *pro se* on his Chester County charges without having a Faretta hearing to ensure Appellant understood the rights he was waiving by proceeding *pro se*?

STATEMENT OF THE CASE

During the June 2020 term, the York County Grand Jury indicted Appellant for two counts of failure to stop for a blue light and possession of heroin, third offense. R.*. During the June 2020 term, the Chester County Grand Jury indicted[1] Appellant for habitual traffic offender and failure to stop for a blue light. R. *.

In York County,[2] on November 19th, 2020, Appellant pled guilty before the Honorable Daniel Dewitt Hall. Tr. 1. The state was represented by Misty Sheldon and Jay Johnson. Id. Appellant was represented by Mark McKinnon on his York county charges and proceeded *pro se* on his Chester county charges. Id.; Tr. 6, ll. 17 – 24. Appellant proceeded *pro se* without receiving the required Faretta[3] warnings from the plea court regarding the rights he was waiving by, and the dangers of, proceeding *pro se*. Tr. 6, ll. 17 – 24. Moreover, the plea court was not provided with any evidence that showed Appellant had already went through a Faretta colloquy in an earlier hearing[4] such that there was no reason for the plea court to assume that Appellant understood the rights waived and the risks involved in representing himself.

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[1] Appellant was also charged with other crimes but those were being dismissed as part of the guilty plea. Tr, l. 3 – 4, l. 3. The state dismissed York county charges of possession of cocaine, third offense, and leaving the scene of an accident. Id. The state dismissed Chester county charges of domestic violence, second degree; use of a vehicle without permission; receiving stolen goods; shop lifting under $2,000; and resisting arrest. Id.

[2] Appellant waived presentment and had his Chester county charges resolved in York county. Tr. 11, l. 23 – 12, l. 7.

[3] Faretta v. California, 422 U.S. 806 (1975).

[4] As far as undersigned counsel is aware, no hearing took place to relieve Appellant's Chester county attorney. The Chester county public records index show William Frick was Appellant's appointed attorney in Chester county, but does not show that a hearing took place to relieve him.

The state explained there was a negotiated sentence of eight years' imprisonment, suspended upon four years of service and two years' probation. Tr. 4, ll. 4 – 7. The court began formulating Appellant's sentence and inquired as to whether it was necessary to impose consecutive sentences to effectuate the negotiated sentence because the failure to stop for a blue light charges all carried a maximum sentence of five years' imprisonment. Tr. 13, ll. 18 – 23.

The state replied that Appellant's York county charge for possession of heroin, third offense, carried a maximum of ten years' imprisonment so the plea court could impose the negotiated sentence for that charge and run sentences for the rest of his charges concurrently. Tr. 13, l. 24 – 14, l. 11. However, upon further investigation the court pointed out that the solicitor was incorrect about the maximum sentence for possession of heroin, third offense, it only carried a maximum sentence of five years' imprisonment. Tr. 15, l. 25 – 16, l. 22.

After Appellant heard from the plea court that his possession of heroin, third offense, charge carried only a maximum sentence of five years' imprisonment rather than the ten years' imprisonment that the solicitor stated, he attempted to withdraw his guilty plea. Tr. 16, l. 23. He repeated his request two more times. Tr. 17, l. 3; Tr. 17, ll. 12 – 21. However, the court denied Appellant's motion to withdraw his guilty plea because Appellant had "already entered his guilty plea". Tr. 17, ll. 4 – 11; 18, ll. 2 – 8. Notably, the court never told Appellant that it accepted his guilty plea as knowingly and voluntarily made such that Appellant made his motions to withdraw before being notified that his guilty plea was accepted.

As a result, Appellant's guilty plea hearing proceeded and for his Chester county charges he was sentenced to four years' imprisonment for failure to stop for a blue light and time served for habitual traffic offender, to run concurrent to his other[5] charges. Tr. 16, ll. 13 – 21.

This appeal follows.

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[5] On his York county charges, Appellant was sentenced to four years' imprisonment provided upon four years of service the balance suspended on two years' probation for possession of heroin, third offense. He was also sentenced to four years' imprisonment suspended on two years' probation for failure to stop for a blue light, to run consecutively. According to the plea court, that way Appellant would have a four-year active sentence with four years "hanging over his head" as contemplated by the initial negotiated sentence of eight years' imprisonment, provided upon the service of four years with the balance suspended on two years' probation. Tr. 15, l. 25 – 16, l. 1.

STANDARD OF REVIEW

In a criminal case, it is axiomatic that prior to a judge's acceptance of a guilty plea, the judge must determine that the plea is being made voluntarily, knowingly, and intelligently. See Page v. State, 364 S.C. 632, 615 S.E.2d 740 (2005), Porter v. State, 368 S.C. 378, 629 S.E.2d 353 (2006), Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). "'The withdrawal of a guilty plea is generally within the sound discretion of the trial judge.'" State v. Rikard, 371 S.C. 295, 301, 638 S.E.2d 72, 75 (Ct. App. 2006) (quoting State v. Riddle, 278 S.C. 148, 150, 292 S.E.2d 795, 796 (1982)). "An abuse of discretion occurs when a trial judge's decision is unsupported by the evidence or controlled by an error of law." Id. (citing State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002)). "A determination the plea was voluntarily entered 'will normally show the trial judge did not abuse his discretion.'" Id. (quoting Riddle, 278 S.C. at 150, 292 S.E.2d at 796). See also State v. Cantrell, 250 S.C. 376, 378, 158 S.E.2d 189, 191 (1967) ("A motion to withdraw a plea of guilty, and to be allowed to enter a plea of not guilty, addresses itself to the discretion of the trial judge before whom the plea is entered, and, in the absence of a clear abuse of discretion, this court will not interfere.").

ARGUMENT

The plea court erred when it refused to allow Appellant to withdraw his guilty plea where Appellant moved to withdraw his guilty plea multiple times during the hearing before Appellant was notified that his plea was accepted as freely and voluntarily made, and where the plea colloquy did not adequately advise Appellant of the rights he was waiving.

Relevant Facts

On March 6th, 2020, a Chester County Sheriff's Office deputy saw a "black Humvee or hummer" with no license plate lights and attempted to pull the car over. Tr. 11, ll. 5 – 21. The officer turned on his blue light and siren, but the car "showed no sign of pulling over." Id. A car chase ensued and eventually the car stopped, "rolled into a tree," and the driver fled on foot. Id. The officer chased the driver on foot "yelling commands to stop and get on the ground." Id. The driver disobeyed and had to be "forcibly placed on the ground." Id.

At the guilty plea hearing, the state explained this was a "global resolution plea" that resolved Appellant's charges in both Chester and York counties. Tr. 3, l. 16 – 4, l. 3. The state also informed the plea court that the negotiated sentence for Appellant's charges[6] in both counties was eight years' imprisonment, suspended on four years' service and two years' probation. Tr. 4, ll. 4 – 7.

When the plea court began the colloquy for Appellant's Chester county charges it explained, "You do not have a lawyer. It appears that - - what I was informed when Mr. McKinnon came up and the two solicitors - - that you had a lawyer, an appointed public

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[6] The state also mentioned that there were still four separate charges pending in York county that "will remain pending until [Appellant] satisfies an unrelated obligation to these charges." Tr. 3, ll. 11 – 14.

defender, in Chester, on those charges; however, the Court relieved them, and you represented yourself on those charges." Tr. 6, ll. 17 – 23. Appellant responded affirmatively. Tr. 6, l. 24. The state reiterated the fact that Appellant was proceeding *pro se* on his Chester county charges and his York county public defender, McKinnon, was *not* representing him on the charges from Chester county. Tr. 8, ll. 23 – 25.

During the guilty plea hearing, the plea colloquy also did not advise Appellant that he was waiving important trial rights by pleading guilty. Tr. 4, l. 25 – 12, l. 7. The colloquy failed to advise Appellant that by pleading guilty he was waiving his privilege against compulsory self-incrimination and he was waiving the right to confront his accusers. However, the colloquy did advise Appellant that he was waiving his right to a jury trial and asked if he was pleading guilty of his own free will. Tr. 8, ll. 8 – 10.

As the plea court was fashioning Appellant's sentence the plea judge asked the solicitors how the sentence should be formed. The negotiated sentence was for eight years' imprisonment, suspended upon four years' service and two years' probation, so the court asked "Am I supposed to give [Appellant] consecutive sentences to get him up to the eight. Because all of these failure to stop for a blue lights [have a maximum sentence of five years' imprisonment]." Tr. 13, ll. 18 – 23.

Solicitor Sheldon stated that the maximum sentence for Appellant's York county possession of heroin, third offense, charge "carrie[d] a maximum sentence of ten years," so the plea court could impose the negotiated sentence of eight years' imprisonment suspended on four years of service and two years' probation for that charge then impose concurrent four years' imprisonment sentences for everything else. Tr. 14, ll. 2 – 4. Notably, plea counsel McKinnon agreed with the solicitor regarding the sentence maximum. Tr. 14, ll. 5 – 6. Initially the court

agreed and began forming Appellant's sentence. However, upon further examination, the plea court discovered the maximum sentence for possession of heroin, third offense, was five years' imprisonment. Tr. 15, l. 25 – 16, l. 21.

After Appellant heard that the maximum sentence for possession of heroin, third offense, was only five years' imprisonment rather than ten years, the plea court asked him, "do you have any questions about that?" Tr. 16, l. 22. Appellant then immediately moved to withdraw his guilty plea. Tr. 16, l. 23. Appellant repeated his request to withdraw his guilty plea two more times and explained in detail why he wanted to withdraw. Tr. 17, l. 3; Tr. 17, l. 12 – 16; Tr. 17, ll. 19 – 21.

Appellant only pled guilty to the Chester county charges because he thought the max sentence he would face if he went to trial was on the possession of heroin, third offense, charge was ten years' imprisonment. Tr. 17, ll. 12 – 16. Ostensibly Appellant adopted that sentencing misconception from the solicitor who mistakenly believed possession of heroin, third offense, had a maximum sentence of ten years' imprisonment. Appellant explained, now that he learned the maximum sentence he could receive if he proceeded to trial on his Chester county charges was five years' imprisonment, he no longer wanted to plead guilty. Id. However, the plea court denied Appellant's motions to withdraw and sentenced him pursuant to the negotiated sentence. Tr. 17, ll. 4 – 11; Tr. 18, ll. 2 – 8.

Discussion

The plea court erred when it denied Appellant's motion to withdraw his guilty plea because Appellant's misconception regarding the sentencing exposure he faced had he proceeded to trial rendered his guilty plea involuntary. Appellant only pled guilty because he believed that he would be facing up to ten years' imprisonment on the possession of heroin, third offense,

charge. Tr. 17, ll. 12 – 16. During the guilty plea hearing, Appellant learned that the maximum sentence for possession of heroin, third offense, was five years' imprisonment when the plea court corrected the solicitor and York County plea counsel McKinnon's misconception. Tr. 13, l. 18 – 14, l. 6; Tr. 15, l. 25 – 16, l. 23.

Appellant explained the basis of his motion to withdraw his guilty plea was that he only entered the guilty plea because he was under the misconception that he risked receiving ten years' imprisonment if he proceeded to trial on his possession of heroin, third offense, charge. Appellant, now being relieved of that misconception, no longer wanted to plead guilty because he would only have to face a maximum of five years' imprisonment if he proceeded to trial on his possession of heroin, third offense, charge. Tr. 17, ll. 12 – 16.

In Boykin v. Alabama, 395 U.S. 238 (1969) the *bare minimum requirements* for a defendant to be properly informed such that he could plead guilty voluntarily were explained. A defendant must be warned, *at a minimum*, that by pleading guilty he was waiving his right to a jury trial, his right to confront his accusers, and his right against compulsory self-incrimination. Boykin, at 243. Our state Supreme Court held that the essence of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure, which dictated the information a court must advise a defendant of before accepting their guilty plea, applicable to the states. See State v. Armstrong, 263 S.C. 594, 597, 211 S.E.2d 889, 890 (1975). Thus, the requirements set forth in Boykin are applicable in South Carolina state criminal cases.

In State v. Patterson, 278 S.C. 319, 295 S.E.2d 264 (1982), Patterson and his three co-defendants were on trial for the armed robbery and murder of a clerk working in a Fast Fare convenience store. Patterson, at 320 – 21, 295 S.E.2d at 265. Our Supreme Court applied the rigors of Boykin to South Carolina's guilty plea jurisprudence and held for a guilty plea to be

voluntary under the due process clause, the three constitutional rights listed in Boykin, must be clearly established by the record. Patterson, at 322, 295 S.E.2d at 265.

On October 29th, 1980, after a jury was impaneled, Patterson pled guilty to murder and armed robbery, conditioned on being sentenced by the jury. Id. at 321, 295 S.E.2d at 265. The solicitor argued "vigorously" that there was no constitutional right to be sentenced by the jury and the statute, 16-3-20(B), does not offer a defendant that option. After the codefendants' trial, the jury found them guilty. Id. The jury recommended the death sentence for Patterson and life sentences for two of his codefendants. Id. The trial judge imposed the sentences. Id.

On appeal, our Supreme Court took up the issue of whether the trial court should have allowed the jury to sentence Patterson *ex mero moto*. Patterson, at 320 – 21, 295 S.E.2d at 264 – 65. The Court held that 16-3-20(B), while imprecisely drafted, states that sentencing "shall be conducted 'before the court' if the trial jury has been waived or if the defendant pled guilty." Id. at 321, 295 S.E.2d at 265. Therefore, the trial court erred in having the jury sentence Patterson. Id.

The Court's analysis began with a recognition that "a guilty plea is more than an admission of conduct; it is a conviction which leaves only the punishment to be determined. A defendant who pleads guilty simultaneously waives *several* constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront his accusers." Patterson, at 322, 295 S.E.2d at 265. (emphasis added) The waiver of those constitutional rights must be an intentional relinquishment or abandonment which is "clearly" established by the record. Id. Therefore, Patterson's guilty plea was vacated because a significant inducement for entering the plea was the condition that the jury sentence him which was "an

impermissible condition under the statutory mandate that the trial judge alone determines the punishment when a defendant pleads guilty to a murder." Id. at 322, 295 S.E.2d at 266.

In the post-conviction relief (PCR) context, our Supreme Court held in Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991) that Alexander suffered Strickland[7] prejudice when he pled guilty due to a misconception about his sentencing exposure had he proceeded to trial. Alexander, at 542 – 43; 402 S.E.2d at 485 – 86. In Alexander, the defendant pled guilty to trafficking cocaine and received a fifteen-year imprisonment sentence. Alexander, at 540, 402 S.E.2d at 484.

Initially, Alexander pled not guilty, and a jury trial began. Alexander, at 541, 402 S.E.2d at 484–85. After the trial began, with the aid of his attorney and an interpreter, Alexander pled guilty to trafficking in more than ten grams of cocaine and was sentenced to fifteen years' imprisonment. Id. Alexander filed an application for PCR raising various allegations of ineffective assistance of trial counsel including that trial counsel was ineffective for providing him with erroneous sentencing advice. Id. Alexander claimed that but for this false sentencing information, he would not have pled guilty. The PCR judge denied Alexander's request for relief. Id.

At his PCR hearing, Alexander argued that trial counsel was deficient for providing him with erroneous sentencing advice. Alexander, at 542, 402 S.E.2d at 485. Trial counsel testified at that he told Alexander if he succeeded in having the charges reduced to two counts, he would face twenty-five years' imprisonment and a fifty thousand dollar fine for each count. Id. While trial counsel denied saying Alexander would spend the rest of his life in prison unless he pled guilty, trial counsel admitted he probably told Alexander he faced one hundred years'

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[7] Strickland v. Washington, 466 U.S. 668 (1984).

imprisonment on the four indictments. Id. Trial counsel later testified that he told Alexander he faced fifty years without question, possibly one hundred if all four indictments stood, which "would have effectively been his life expectancy." Id.

Our Supreme Court determined that Alexander's trial counsel's sentencing advice was "obviously defective." Id. at 542, 402 S.E.2d 485. Had trial counsel properly reviewed the indictments he would have instructed Alexander that his maximum sentencing exposure would have been a "seven to twenty-five-year sentence, with a fifty thousand dollar fine for the fifty grams of cocaine found in his automobile and a twenty-five-year sentence and a fifty thousand dollar fine for the one hundred fifty grams of cocaine found in the motel room." Id. at 542 – 43, 402 S.E.2d at 485. Therefore, Alexander proved his trial counsel provided deficient performance. Id.

As to prejudice, the only evidence on the record was Alexander's own PCR testimony that had trial counsel not misinformed him of the sentencing consequences of proceeding to trial, he would not have pled guilty. Alexander, at 543, 402 S.E.2d at 485 – 86. Our Supreme Court held Alexander's word alone was enough to prove his guilty plea was induced by his defense counsel's improper sentencing advice and vacated his guilty plea. Id. at 543, 402 S.E.2d at 486. That decision by our Supreme Court illustrated it is imperative that a defendant know the sentencing consequences of the charges he faced for his guilty plea to be voluntarily made.

Further federal jurisprudence has developed since Boykin regarding the necessary warnings a plea court must give to a defendant for his guilty plea to be voluntary. Along with warning the defendant of the three enumerated rights from Boykin, a plea court must also inform the defendant of the maximum sentences on the charges he was facing. See U.S. v. Pierce, 893 F.2d 669 (5th Cir. 1990); see also U.S. v. Jaramillo-Suarez, 857 F.2d 1368 (9th Cir.1988).

In U.S. v. Pierce, the Fifth Circuit Court of Appeals stated under Rule 11 of the Federal Rules of Criminal Procedure, which Boykin extended to the states, a defendant must be made aware of the minimum and maximum sentences of the crime to which they are pleading guilty for the guilty plea to be voluntary. Pierce, at 678 – 79. In Pierce, Roy Lee Pierce and James Evans were convicted for drug trafficking charges arising from a conspiracy to ship cocaine from Los Angeles, California for distribution in Tyler, Texas. Pierce, at 672.

Both Pierce and Evans proceeded to trial, but during the trial Evans changed his plea to guilty. Pierce, at 672 – 73. Pierce was found guilty by the jury and sentenced to two hundred sixty-two months' imprisonment and three-year term of supervised release. Id. at 673. Evans was sentenced to three hundred sixty months imprisonment and an eight-year term of supervised release. Id.

On appeal, Evans argued, among other grounds, that his guilty plea was not voluntarily entered because the plea court failed to inform him of the possible maximum and mandatory minimum penalties for his offense. Id. at 678. The Fifth Circuit Court of Appeals noted that Rule 11 of the Federal Rules of Criminal Procedure required that the defendant be informed in open court of the mandatory minimum penalty and the possible maximum penalty provided by law before the lower court can accept the guilty plea. Id. at 678 – 79. The state conceded that the lower court "wholly failed" to comply with this provision. Id. However, the state argued that the court's failure was harmless because the indictment informed Evans of the minimum and maximum penalties. Id.

The Fifth Circuit Court of Appeals held that the error was not harmless because informing a defendant about the potential maximum and minimum penalties was a "core requirement" for a guilty plea to be entered voluntarily. Id. That failure by the lower court left

Evans uninformed and unable to understand the direct consequences of his guilty plea. Id. Accordingly, harmless error analysis did not apply, and Evans' conviction was reversed. Id.

Similarly, in the Ninth Circuit Court of Appeals' case U.S. v. Jaramillo-Suarez, the defendant's guilty plea was vacated because the lower court failed to advise him of the maximum sentence he faced prior to accepting his guilty plea. Jaramillo-Suarez, at 1368. Suarez was indicted on charges of conspiracy to possess cocaine with intent to distribute. Id. Suarez initially pled not guilty but withdrew his not guilty plea and entered a plea of guilty. Id. at 1369.

Prior to accepting the guilty plea, the lower court conducted a plea colloquy where it asked Suarez if he discussed the case with his attorney and whether he had been advised of the nature of the charges against him. Id. The lower court also asked him if he knew the constitutional rights he was waiving and about the existence of any possible defenses. Id. The court further asked Suarez if he was satisfied with his attorney's representation, whether the plea was being made voluntarily and without promises of any kind, and whether Suarez understood the possible adverse effects his guilty plea could have on his residency status in the United States. Id. However, the court failed to "mention the maximum possible penalty that Suarez faced upon pleading guilty." Id.

Nearly two months later at his sentencing hearing, Suarez's counsel informed the sentencing court that he had initially been prosecuted in state court, and the maximum sentence he faced was fifteen years' imprisonment. Id. Suarez's counsel asked the court for a sentence of not more than "eight or nine years." Id. Suarez was sentenced to fifteen years' imprisonment. Id.

On appeal Suarez contended his conviction was invalid as a matter of law. Id. The Ninth Circuit Court of Appeals noted Rule 11 of the Federal Rules of Criminal Procedure mandates that before accepting a guilty plea a defendant must understand the maximum possible penalty

provided by law. Id. The state conceded on appeal that the lower court erred in failing to comply with the literal terms of Rule 11(c)(1) "by failing to inform Suarez of the maximum sentence that could be imposed." Id. However, the state contended that the error was harmless. Id.

The government argued that Suarez's silence at the sentencing hearing, when his defense counsel mentioned the maximum sentence of fifteen years' imprisonment, showed that he was aware of the fifteen-year maximum. Id. at 1372. According to the government, "[h]ad [Suarez] been genuinely unaware of the maximum possible sentence he faced, he most certainly would have indicated his ignorance upon hearing his attorney ask the court not to exceed the fifteen years [Suarez] was subject to in state court." Id. The Ninth Circuit determined that whether the government is correct or not in that argument is not the point because a defendant must be aware of the "maximum penalty *before* he pleads guilty, not after." Id. (emphasis in original) Accordingly, Suarez's guilty plea was vacated, and his case was remanded to the lower court to afford Suarez the opportunity to enter a new plea. Suarez, at 1373.

In this case, the plea colloquy was deficient under Boykin and its progeny because the plea court failed to warn Appellant that by pleading guilty he was waiving his right to a confront the witnesses against him and to avoid compulsory self-incrimination. Moreover, it is evident that Appellant pled guilty misunderstanding the potential sentencing exposure he faced should he proceed to trial. Tr. 13, l. 24 – 14, l. 7; Tr. 17, ll. 12 – 16. During the plea hearing, unlike the defendant in Jaramillo-Suarez, Appellant expressly indicated his ignorance of the sentencing exposure he faced after he learned possession of heroin, third offense, carried only a five-year imprisonment maximum sentence. Tr. 16, l. 23; Tr. 17, l. 3; Tr. 17, ll. 12 – 16.

The record is well-defined. Appellant pled guilty without the proper Boykin warnings and under the misconception of the sentencing exposure he faced. Tr. 13, l. 24 – 14, l. 7; Tr. 16,

l. 23; Tr. 17, ll. 12 – 21. He moved to withdraw his guilty plea on that basis but was denied. Tr. 16, l. 23; Tr. 17, ll. 12 – 21; Tr. 18, ll. 2 – 8. That denial was an error.

Appellant buttressed his motions to withdraw his guilty plea by presenting a valid explanation for withdrawal, namely that he pled guilty while laboring under a misunderstanding of the sentencing consequences of his possession of heroin, third offense, charge if he proceeded to trial. Tr. 17, ll. 12 – 16. Since being informed of the minimum and maximum sentencing exposure of the charges he faced was a "core requirement" for Appellant to voluntarily plead guilty, once Appellant moved to withdraw his guilty plea because he found out the truth about his sentencing exposure, the plea court should have granted his motion to withdraw. Tr. 17, ll. 12 – 16; Pierce, at 678 – 79; Alexander, at 543, 402 S.E.2d at 486.

Notably, the plea court refused Appellant's motion to withdraw his guilty plea because the guilty plea had already been entered, but if that were the case the plea court would be admitting that his guilty plea was final before he understood the minimum and maximum sentences of the charges he faced. Tr. 16, l. 24 – 17, l. 11. Furthermore, it is dubious for the plea court to claim that the guilty plea was already entered where Appellant moved to withdraw his guilty plea before the plea court notified him that his guilty plea was accepted. In fact, the plea court *never* expressly accepted Appellant's guilty plea. Accordingly, the plea court erred when it denied Appellant's motion to withdraw his guilty plea because he pled guilty pursuant to incorrect sentencing advice and because he was not advised of the rights he was waiving such that Appellant's guilty plea should be vacated and his case remanded to the lower court. See Alexander, at 543, 402 S.E.2d at 486; see also Patterson, at 322, 295 S.E.2d at 265.

2. The lower court erred when it allowed Appellant to proceed *pro se* on his Chester County charges without having a Faretta hearing to ensure Appellant understood the rights he was waiving by proceeding *pro se.*

Relevant Facts

In this case Appellant was left representing himself on his Chester County charges. However, there was no evidence Appellant was ever provided a Faretta colloquy to advise him of the rights he was waiving as well as the dangers and disadvantages of self-representation. Accordingly, the plea court erred when it accepted Appellant's guilty plea while he proceeded *pro se* without having a Faretta hearing to ensure Appellant knew the dangers and disadvantages of representing himself. That error violated Appellant's constitutional rights under the Sixth Amendment such that Appellant's guilty plea should be vacated, and his case remanded to the lower court. See Faretta v. California, 422 U.S. 806, 835 (1975)

In Faretta, 422 U.S. 806 (1975), the United States Supreme Court held that before a defendant is allowed to proceed *pro se* he must be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Faretta, at 835 (citing Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)). In 2004, the Court acknowledged that it has not prescribed any formula regarding the information a defendant must possess in order to make an intelligent choice. Iowa v. Tovar, 541 U.S. 77, 88 (2004). According to the Court, determining whether a waiver of counsel was intelligent depends on "a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." Id. A defendant need not be made aware of every possible consequence of self-representation, the waiver of right to counsel will pass constitutional muster

"if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances even though the defendant may not know the specific detailed consequences of invoking it." United States v. Ruiz, 536 U.S. 622, 629 (2002).

The South Carolina Supreme Court has elaborated more specific guidelines. In Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002), our Supreme Court held Gardener's guilty plea was involuntarily made where he represented himself and the lower court failed to advise him of the dangers and disadvantages of self-representation as required under Faretta and Prince.[8] Gardener, at 412 – 13, 570 S.E.2d at 186 – 87. The PCR court found Gardener failed to prove that he did not knowingly and voluntarily waive his right to counsel because he was "of above average intelligence," he was advised at his arraignment that he had a right to a public defender, and he was "completely familiar with the court system." Id. at 411, 570 S.E.2d at 186.

Our Supreme Court explicated the considerations for determining if an accused has a sufficient background to understand the dangers of self-representation which included: (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether the accused knew the nature of the charge(s) and of the possible penalties; (4) whether the accused was represented by counsel before trial and whether that attorney explained to him the dangers of self-representation; (5) whether the accused was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether the accused knew of legal challenges he could raise in defense to the charge(s) against him; (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and (10) whether the

[8] Prince v. State, 301 S.C. 422, 392 S.E.2d 462 (1990).

accused's waiver resulted from either coercion or mistreatment. Gardner, at 412–13, 570 S.E.2d at 186–87 (citing State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct.App.1992)). The Court held that "while there [was] evidence in the record to indicate [Gardener] was aware of his right to counsel, there [was] insufficient evidence to indicate he was aware of the dangers of self-representation." Id. at 413, 570 S.E.2d at 187.

The Court applied the above-mentioned test. "First, the plea judge did not give [Gardener] any warning about the dangers of proceeding *pro se*. [The plea judge] did not inform him of the nature of the charges or the possible penalties." Id. While Gardener did have a twelfth-grade education and had been represented by counsel on a previous charge to which he pled guilty, "the record [gave] no indication this attorney explained to him the dangers of self-representation." Id. Moreover, the plea judge failed to ask Gardener for an admission of guilt, failed to advise him on the crucial elements of the charged offenses, did not ask questions to ensure Gardener understood the consequences of the guilty plea, and because Gardener was self-represented the defects in the plea court's questioning were not cured. Id. at 414, 570 S.E. 2d at 187. The Court also emphasized the importance of a defendant pleading guilty being advised of, "the privilege against self-incrimination, the right to a jury trial, [and] the right to confront one's accusers." Id. (citing Boykin v. Alabama, 395 U.S. 238 (1969); Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999)).

In Osbey v. State, 425 U.S. 16, 825 S.E.2d 48 (2019), our Supreme Court held that Osbey was not adequately warned of the dangers and disadvantages of self-representation before he pled guilty to two counts of trafficking cocaine base and one count of possession with intent to distribute cocaine base. Osbey, at 621, 825 S.E.2d at 51. The plea court informed Osbey of his right to counsel, and Osbey had earlier been informed by a court official on three separate

occasions that if he wanted to have a public defender appointed, he would have to contact the public defender's office and submit an application. Osbey, at 618, 825 S.E.2d at 49. The plea court explicitly asked, if Osbey knowingly and intelligently made the decision to waive his right to an attorney. Id. Osbey responded that he tried to get a public defender the week prior to the guilty plea hearing but was told it was too late. Id.

The plea court ruled that Osbey waived his right to counsel by virtue of his conduct. Osbey, at 618, 825 S.E.2d at 49 – 50. The plea court determined Osbey waived his right to counsel because he was advised earlier that he could have an appointed attorney, but he had to contact the public defender's office to get one and he failed to do that. Osbey, at 618, 825 S.E.2d at 50. The guilty plea proceeded and Osbey was sentenced to eight years' imprisonment and three years' probation. Id.

Our Supreme Court held that the lower court erred because it did not mention to Osbey the dangers of self-representation. Osbey, at 620, 825 S.E.2d at 51. When this happens, the Court looks to the lower court record to determine if it showed a factual basis for the waiver. Id. (citing Gardener v. State, 351 S.C. 407, 412, 570 S.E.2d 184, 186 (2002) ("In a PCR action, if the record fails to demonstrate [Gardener] made an informed choice to proceed *pro se,* with 'eyes open,' then [Gardener] did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial.'"). Osbey had two prior convictions, violated his probation in 2004, and violated his parole in 2007. There was nothing else in the record to indicate Osbey was aware of the dangers of representing himself. Osbey, at 621, 825 S.E.2d at 51. Simply having a prior record was an insufficient basis on which to find Osbey understood the dangers of self-representation such that the lower court erred in accepting his guilty plea. Osbey, at 620 – 21, 825 S.E.2d 48, 51. Accordingly, the requirement that the defendant be explicitly advised by

the lower court of the dangers of self-representation was a necessary predicate to any waiver of counsel, including "waiver by conduct." Osbey, at 621, 825 S.E.2d at 51 (rev'g State v. Roberson, 382 S.C. 185, 187, 675 S.E.2d 732, 733 (2009)).

In this case, there was no evidence that Appellant was ever advised of the dangers and disadvantages of self-representation before he was allowed to proceed *pro se*. As far as undersigned counsel is aware no hearing ever took place in either York or Chester County where Appellant officially waived his right to counsel or was provided the necessary Faretta warnings. The public record index showed no record of a hearing taking place.

This case was strikingly similar to Gardener. Here, as in Gardener, the plea colloquy failed to advise Appellant of crucial rights that he needed to be aware of prior to pleading guilty and those deficiencies could not be cured because Appellant did not have an attorney. Gardener, at 414, 570 S.E.2d at 187. Specifically, Appellant was not informed he was waiving his right against self-incrimination and his right to confront his accusers. Tr. 7, l. 19 – 9, l. 1.

Appellant and Gardener also had the same educational level and had experience with the courts from earlier guilty pleas. Gardener, at 413, 570 S.E.2d at 187; Tr. 4, ll. 20 – 21. Similar to Gardener, Appellant may have been aware he had a right to an attorney based on his past experiences with the courts; however, that does not mean Appellant was aware of the dangers and disadvantages of proceeding *pro se*. Id.; Gardener, 413, 570 S.E.2d at 187.

Applying the factors set forth in Gardener to determine if a defendant was aware of the dangers and disadvantages of self-representation, it is evident that Appellant was woefully unaware of the responsibilities of proceeding *pro se*. Gardener, at 412 – 13, 570 S.E.2d at 186 – 87. Appellant had no experience in prior criminal trials because all of his past experience with the courts came from earlier guilty pleas. Tr. 7, l. 23 – 8, l. 2. While the plea court informed

Appellant of the sentencing consequences of the crimes he was charged with, Appellant initially pled guilty under a misunderstanding of the penalties because he was under the misguided impression that possession of heroin, third offense, carried a ten-year maximum prison sentence when it actually had a five-year maximum prison sentence. Tr. 13, l. 18 – 14. l. 7; Tr. 17, ll. 12 – 16. Immediately after learning the correct sentencing consequences Appellant attempted to withdraw his guilty plea. Tr. 16, l. 23; Tr. 17, l. 3.

Appellant was represented before the guilty plea hearing; however, there was no record that his prior attorney for his Chester County charges or McKinnon, his attorney on his York County charges, ever explained to him the dangers and disadvantages of self-representation. Appellant's withdrawal was not an attempt to delay the case because he only moved to withdraw his guilty plea after he learned of the correct sentencing penalties to possession of heroin, third offense. Tr. 16, l. 23 – 17, l. 3. Appellant explained that he was told possession of heroin, third offense, carried a ten-year maximum sentence, as evinced by both the solicitor and McKinnon mistakenly saying that possession of heroin, third offense, carried a ten-year maximum sentence during the guilty plea hearing. Tr. 13, l. 18 – 14, l. 6; Tr. 17, ll. 12 – 21.

While Appellant had counsel for his York County charges, he was not appointed stand-by counsel for his Chester County charges and there was no evidence McKinnon ever advised Appellant about the dangers and disadvantages of self-representation. Furthermore, there was no evidence in the record that showed Appellant was advised about complying with the rules of procedure at trial or of defenses to the charges against him. Given Appellant's educational level it was unlikely that he was aware those crucial factors on his own. Tr. 4, ll. 20 – 21.

The colloquy that occurred between Appellant and the plea court consisted of pro forma questions and answers that were boilerplate to guilty pleas in South Carolina; however, there was

a glaring irregularity in the colloquy in that Appellant was not advised of crucial rights he was waiving such as the right against self-incrimination and right to confront accusers. Tr. 7, l. 19 – 9, l. 1. Lastly, Appellant never explicitly waived his right to counsel in any proceeding, he simply appeared at the plea hearing and the plea court assumed a prior hearing occurred where he relieved his Chester County appointed attorney and assumed he was advised of the dangers and disadvantages of self-representation as required by Faretta. Tr. 6, ll. 17 – 24.

In this case the plea court was never provided an order from another court nor transcript of an earlier hearing where Appellant's motion to proceed *pro se* was heard and where he was given the required Faretta colloquy. Tr. 6, ll. 17 – 24. The plea court here also did not conduct the Faretta colloquy itself. Instead, the guilty plea proceeded with Appellant representing himself unaware of the rights he was waiving and the risks he faced representing himself.

Since the decision is Osbey, waiver by conduct no longer exists in South Carolina such that Appellant did not implicitly waive right to counsel simply through his conduct representing himself at the guilty plea hearing. Osbey, at 621, 825 S.E.2d at 51; See Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (holding "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that 'we do not presume acquiescence in the loss of fundamental rights.'") Appellant needed to be explicitly warned about the dangers and disadvantages of self-representation before he could represent himself and before his guilty could be accepted. Accordingly, Appellant's guilty plea should be vacated, and his case remanded to the lower court for a hearing to determine if he understands dangers and disadvantages of self-representation before he is allowed to proceed to *pro se* and to determine if he still desires to plead guilty.

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests this Court vacate Appellant's convictions and remand his case to the lower court.

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of December, 2021.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County

Honorable Daniel D. Hall, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GEORGE ROBERT LEACH,

APPELLANT

APPELLATE CASE NO. 2020-001579

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on George Robert Leach, #271937, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 22nd day of December, 2021.

Victor R. Seeger

Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT