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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Saluda County
Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 2021-UP-429 (S.C. Ct. App. Filed December 8, 2021)

Lower Court Case No. 2018-GS-41-00370

THE STATE,

RESPONDENT,

V.

JEFFERY JAMES WILLIAMS,

PETITIONER

APPELLATE CASE NO. 2019-001481

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 7, 2022.

QUESTION PRESENTED

Whether the Court of Appeals erred in finding that the record reflected that petitioner had sufficient background to understand the disadvantages of self-representation and that petitioner was advised of his right to counsel where the court concluded that petitioner knowingly, intelligently, and voluntarily waived his right to counsel?

STATEMENT OF THE CASE

On November 19, 2018, a Saluda County grand jury indicted petitioner for threatening a public official. R. 329. On May 21, 2019, a hearing was held on petitioner's motion for continuance before the Honorable Walton J. McLeod. Dietrich Lake represented petitioner and Douglas Fender, assistant solicitor, represented the state. R. 1. On August 6, 2019, defense counsel's motion to be relieved and a *Faretta*[1] hearing were held before the Honorable Frank R. Addy. R. 20.

On August 26, 2019, petitioner was tried before Judge Addy, and a jury. R. 46. Petitioner proceeded to trial *pro se* with Bennett Casto as stand-by counsel. R. 46. Douglas Fender, assistant solicitor, represented the state. R. 46.

On August 28, 2019, the jury found petitioner guilty as indicted. R. 311, ll. 14-16. Judge Addy sentenced petitioner to five years' imprisonment. R. 326, ll. 6-8.

The Court of Appeals affirmed petitioner's convictions in *State v. Williams*, 2021-UP-429 (S.C. Ct. App. filed December 8, 2021). Petitioner sought rehearing which was denied on February 7, 2022.

This petition for a writ of certiorari follows.

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1 *Faretta v. California*, 422 U.S. 806 (1975).

ARGUMENT

The Court of Appeals erred in finding that the record reflected petitioner had sufficient background to understand the disadvantages of self-representation and petitioner was advised of his right to counsel where the court concluded petitioner knowingly, intelligently, and voluntarily waived his right to counsel.

Relevant facts

The state alleged that on August 10, 2018, petitioner called the Saluda County Magistrate's Office and made threats of a sexual nature against Judge Joyce Schults. R. 28, ll. 20-24. When questioned, petitioner told police he called the magistrate's office and that he was upset. R. 193, ll. 13-19. The same day, police arrested petitioner and charged him with threatening a public official. R. 200, ll. 10-11.

On May 21, 2019, a motion for continuance was held before the Honorable Walton J. McLeod, IV. R. 1. Dietrich Lake represented petitioner, and Douglas Fender, assistant solicitor, represented the state. R. 1. At the hearing, Judge McLeod asked petitioner if he wanted to represent himself and petitioner responded unequivocally that he did not want to represent himself but that he was no longer satisfied with Counsel Lake's representation and would like to hire another attorney. R. 4, l. 13-5, l. 20.

The state objected to the continuance, arguing that petitioner had previously filed a motion for speedy-trial and that the state was prepared to try the case. R. 8, ll. 1-7. Defense Counsel Lake told the court that he was "concerned" about petitioner's mental health and whether petitioner was able to assist in his own defense, and he requested petitioner be evaluated to determine his competency to stand trial. R. 8, l. 20-9, l. 12. Lake and the solicitor referred to a prior incident involving an "involuntary commitment" during the time that petitioner was being treated by the

Department of Veterans Affairs. R. 10, ll. 3-8; 13, ll. 1-25; 17, ll. 4-14. At the end of the hearing Judge McLeod stated, "there seems to be a reasonable indication that the Department of Veterans Affairs has found [petitioner] incompetent," and he ordered a mental evaluation for petitioner before trial. R. 17, ll. 5-24.

On August 6, 2019, defense counsel's motion to be relieved and a *Faretta* hearing were held before the Honorable Frank R. Addy. R. 20. Lake told the court that since the last hearing petitioner had been evaluated and found to be competent. R. 24, ll. 19-20. No documents in support of that assertion were presented to the court. Lake moved to be relieved as counsel, telling the court that, although his relationship with petitioner had been difficult for much of his representation, after the May 21, hearing it had deteriorated severely. Petitioner notified the state and the Bar that he wished Lake to be relieved as his counsel, even contacting the Office of Disciplinary Counsel and filing grievances against Lake. R. 24, l. 24-25, l. 12. Lake told the court he was "surprised" at the outcome of the competency evaluation and that he still had concerns regarding petitioner's mental health. Counsel Lake believed petitioner "need[ed] counsel." R. 24, ll. 19-23; 25, ll. 23-25; 26, ll. 12-20.

During the *Faretta* colloquy, petitioner said he wanted Lake relieved as counsel. R. 29, ll. 23-25. Petitioner was forty-nine years old at the time. Regarding his education petitioner said could read and write, he graduated from high school, and he joined the United States Marines, where he served for four years. R. 30, l. 18-31, l. 17. Petitioner also stated he was being treated for post-traumatic stress disorder (PTSD) and took the following medications: Trazodone "for

sleep," Prazosin "for nightmares," and Prozac "for anxiety."[2] R. 33, ll. 14-15; 34, l. 16-35, l. 22. Judge Addy inquired if petitioner had any prior experience with criminal trials, and petitioner responded that he had recently been released after serving eighteen years of a twenty-year sentence for a 1999 conviction. R. 37, ll. 1-23.

When Judge Addy asked petitioner if he wanted to represent himself, petitioner at first agreed that he did wish to represent himself. Then later in the hearing petitioner indicated that his sister was looking for a lawyer to his case pro bono. R. 32, ll. 16-18; 36, ll. 4-10. Judge Addy asked petitioner whether he had the resources to retain another attorney and petitioner responded that he did not. Petitioner also told the court he did not want to have another attorney appointed to him but agreed that Judge Addy could appoint Bennett Casto to "help him" at trial. R. 40, ll. 9-24; 42, l. 23-43, l. 5. Judge Addy stated, "you realize, again, I think it's a good idea that you have a lawyer" and advised petitioner two times that if he decided to represent himself he would be held to the same standard as a lawyer. R. 32, ll. 20-23; 41, ll. 2-8. Ultimately, Judge Addy allowed petitioner to proceed *pro se* at trial with Mr. Casto as stand-by counsel. R. 43, ll. 8-25.

Discussion

The Court of Appeals found that the record reflects petitioner had sufficient background to understand the disadvantages of self-representation and was advised of his right to counsel. *State v. Williams*, 2021-UP-429 (S.C. Ct. App. filed December 8, 2021). The court found petitioner knowingly, intelligently, and voluntarily waived his right to counsel. *Id.* In its opinion the Court cited *State v. Cash*, which states, "Although a specific inquiry by the [trial court] expressly

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2 Trazodone is an antidepressant. Prazosin is used to treat high blood pressure. Prozac is used to treat depression, obsessive-compulsive disorder, bulimia nervosa, premenstrual dysphoric disorder, and panic disorder. All information found at mayoclinic.org.

addressing the disadvantages of a *pro se* defense is preferred, the ultimate test in not the trial [court's] advice but the accused's understanding." 309 S.C. 40, 42, 419 S.E.2d 811, 813 (Ct. App. 1992). The court also cited *State v. Bryant*, which states "[W]hen the trial court fails to expressly make this inquiry, the [appellate] court will examine the record to determine whether the accused had sufficient background or was apprised of his rights by some other source." 383 S.C. 410, 415, 680 S.E.2d 11, 13 (Ct. App. 2009).

Here there was not a valid waiver of petitioner's right to counsel where the trial court did not adequately warn petitioner of the disadvantages of self-representation. *See Wroten v. State*, 301 S.C. 293, 391 S.E.2d 575 (1990) (A specific inquiry by the judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but the accused's understanding). However, "[i]n the absence of an inquiry by the judge, courts look to the record to determine if the accused had sufficient background to understand the disadvantages of self-representation." *State v. Cash*, 309 S.C. 40, 42, 419 S.E.2d 811, 813 (Ct. App. 1992).

Cash provides ten factors courts have considered in determining whether the accused had sufficient background to understand the disadvantages of self-representation including:

> (1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether he knew of the nature of the charge and of the possible penalties; (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case; (5) whether he 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 he knew of legal challenges he could raise in defense to the charges 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 accused's waiver resulted from either coercion or mistreatment. *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065–1067 (11th Cir.1986); *see also Strozier v. Newsome*, 926 F.2d 1100 (11th Cir.1991) (restating the factors noted in *Fitzpatrick*), cert. denied, 502 U.S. 930, 112 S.Ct. 350, 116 L.Ed.2d 289 (1991).

Cash at 43, 419 S.E.2d at 813.

There is little evidence in the record that petitioner had sufficient background to understand the risks of proceeding *pro se*. Petitioner was forty-nine years old and had a high school education. Petitioner told the court he had PTSD and took medication for anxiety and depression. Likewise, before he was relieved, Mr. Lake expressed serious concern regarding petitioner's mental health and about his ability to assist in his own defense, much less represent himself at trial. Judge McLeod's order that petitioner be evaluated for competency demonstrates the court was concerned about petitioner's ability to assist in his own defense. While it is true that petitioner had been convicted of a crime, in 1999, there is nothing in the record that demonstrated that he had enough experience with the criminal justice system to qualify him to represent himself at trial.

The exchange between petitioner and the trial court was perfunctory. While petitioner never indicated verbally to the court that he did not understand the nature of the charges against him or the possibly penalty, the record reflected he and defense counsel Lake had great difficulty communicating. Therefore, it was unlikely Lake was able to convey to petitioner the nature of the charges against him, the possibly penalty, or the dangers of self-representation in his case.

Furthermore, after representing petitioner for over a year, Lake told the court he thought petitioner needed to be represented by counsel. The court appointed Mr. Casto as stand-by counsel for petitioner but failed to inquire whether petitioner was aware of trial procedures. The court did tell petitioner that he would be held to the same standard as a lawyer. Respectfully, this statement without any further explanation was meaningless. Without being told explicitly petitioner could not have known what standard a lawyer is held to or that he would be required to comply with certain procedural and evidentiary rules. Accordingly, petitioner could not have understood the gravity of this decision or the extreme disadvantages of self-representation.

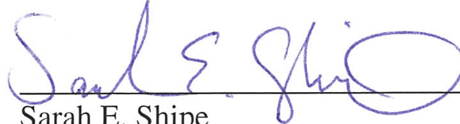
Additionally, the record does not demonstrate that petitioner unequivocally asserted his right to represent himself. During the May 21, 2019, hearing before Judge McLeod, petitioner stated that he did not wish to represent himself, and in the August 6, 2019, hearing, although he first responded "yes" when Judge Addy asked him if he wanted to represent himself, he later said his sister was trying to find him another attorney. Petitioner never insisted on representing himself. The record shows that petitioner was dissatisfied with Mr. Lake, the attorney he had retained, and because he could not afford to retain another attorney and his other option was a court appointed attorney, petitioner felt he had no other choice.

Petitioner's waiver of his right to counsel was not knowing or voluntary because he was not sufficiently warned about the dangers inherent in self-representation by the court, or otherwise, and he did not have sufficient background to understand the dangers of self-representation. During the *Faretta* colloquy, the court advised petitioner that he believed it would be a good idea for him to have an attorney and told him he would be held to the same standard as a lawyer at trial. The court's suggestion was not adequate to warn petitioner of the danger of self-representation under *Faretta*.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on these issues.

Respectfully Submitted,



Sarah E. Shipe
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ATTORNEY FOR PETITIONER

This 9th day of March, 2022.