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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

CERTIORARI TO YORK COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2017-002632

Travis Hines, ... **Petitioner,**

vs.

State of South Carolina .... **Respondent.**

OPENING BRIEF OF PETITIONER

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C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
Bar # 06188

(864) 229-5010

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Questions Presented

Did the Post Conviction Relief Judge err in failing to find that the sentencing judge failed to establish that Travis Hines was adequately informed of the dangers of self representation and the advantages of having an attorney represent him at the time of the plea hearing when the record established that such issues were only dealt with in a *pro forma* fashion?

Did the Post Conviction Relief Judge err in failing to find the State committed misconduct when Travis Hines was required to plea without having the opportunity to review the video and did not obtain from the plea judge a waiver to his right to review the video?

STATEMENT OF THE CASE

Procedural History

Travis Hines entered a pro se plea to distribution of heroin on December 17, 2015. Judge John C. Hayes sentenced him to 14 years in prison. On December 9, 2016, Mr. Hines filed his Post Conviction Relief Petition. App. at 69. The State filed its Return on May 22, 2017. App. at 75. A hearing on the Post Conviction Relief hearing was held on July 31, 2017 before the Honorable R. Lawton McIntosh. By Order dated November 14, 2017, his Post Conviction Relief petition was denied. Mr. Hines filed his Notice of Appeal on December 28, 2017.

Factual History

Travis Hines was arrested on December 26, 2014, on a charge of distribution of heroin that allegedly occurred on May 21, 2014. App. at 84. He was originally appointed by Mike McKinnon of the office of the York County Public Defenders Office to represent him. Discovery in this case was sent to Mr. McKinnon, but it did not include the drug report or the video of the alleged buy. App. at 58. The State, while Mr. McKinnon was representing Mr. Hines, offered a 10 year sentence for a guilty plea. Some time before July 7, 2015, Mr. Hines retained the services of Christopher Welborn as his attorney. Mr. Welborn sent the State his Rule 5 discovery request and his *Brady* motion. Mr. Welborn also originally received a 10 year plea offer. App. at 33, ll12-13. The State advised Mr. Welborn that the plea offer was based upon Mr. Hines not viewing the video tape of the alleged buy. App. at 35, ll 3-5. Mr. Welborn advised Mr. Hines that the proposal by the State to withhold the discovery unless the plea offer was rejected was "legally suspect." App. at 35, ll 15-18. Mr. Welborn further testified that Mr. Hines in fact knew

who the informant was without looking at the video tape. App. at 35, l 12-13.

Without Mr. Hines formally rejecting the 10 year plea offer, the state increased the offer to 18 years. App. at 35, l23 to 36, l 7. Subsequently, the offer to Mr. Welborn was reduced to 15 years. Mr. Welborn further testified that as of August 12, 2015, Mr. Hines did not want to take the offer especially as he had not seen the video tape of the alleged buy. App. 37, ll 4-15. As Mr. Welborn stated "[P]ressure, sort of extortive process by which you give up your right to discovery and take the 18." App. 37, ll 10-12.

Mr. Welborn further testified that he received the drug report on October 23, 2015. App. at 37, l 25. As of November 4, 2015, the offer was still 18 years. Mr. Welborn still had not seen the video. As he stated, "I was not recommending that to my client at that time that he plead guilty without looking at the video." App. at 38, ll 6-7. On November 13, 2016, Mr. Welborn received an email from the solicitor stating that Mr. Welborn could view the portion of the video that the state determined to be relevant, but Mr. Welborn would have to sign a protective order. Mr. Welborn was able to review the portion of the video the State deemed relevant on November 17, 2015. App. 39, ll 5-20.

Assistant Solicitor Ryan Robert Newkirk confirmed the testimony of Mr. Welborn as to the policy of not showing the video to the defendant in a criminal case until the plea offer has been rejected and the case is going to trial. App. 56. ll 7-20. He acknowledged that it took from July until November 17 for Mr. Welborn, but not Mr. Hines, to be able to view the portion of the video the State deemed relevant. He testified that he did provide Mr. Welborn some stills from the video. Mr. Newkirk acknowledged that some defendants plea without ever looking at the video. He testified:

> I know that certainly defendants have - - can and have plead waiving the drug report and waiving the right to see the video. I know that has happened. I wouldn't say that is an uncommon practice. App. at 59, ll 5-8.

Mr. Hines testified he did not understand how the plea offer went from 10 years to 15 years without his, or his lawyer, ever seeing the video. App. 13, ll 1-2. His complaint about Mr. Welborn was that Mr. Welborn had not obtained the video for him to view. App. 13, ll 20-22. On December 15, 2015, he appeared before Judge Daniel Hall to relieve Mr. Welborn as his attorney. At that hearing, Mr. Hines expressed a desire to hire another attorney. When asked by Judge Hall if he was going to represent himself, Mr. Hines responded "no." App. 113, ll 14-19. Thus, at that hearing, the judge had no need to give the warnings pursuant to *Faretta v. California,* 422 U.S. 806 (1975).

At the December 15, 2015 hearing to relieve Mr. Welborn, the state formerly notified Mr. Hines that they would be seeking life without parole. App. 118, ll 4-8. At that hearing, Judge Hall erroneously informed Mr. Hines, "And you understand that regardless who your lawyer is, the solicitor controls the docket . . . ."[1] App. 114, ll 10-12. Mr. Hines expressed a desire to hire another lawyer that day. App. 114, l 17-19.

Two days later, on December 17, 2015, Mr. Hines appeared before Judge John C. Hayes entering his plea without an attorney. At that plea, the solicitor represented to the Court:

> I have no doubt in his intelligence or his understanding of the proceedings. He was advised of his right to counsel by Judge Hall on Tuesday when he relieved Mr. Welborn of his services. App. 101, ll 2-5.
>
> * * *
>
> I tell you all that just to say that he has been advised of this right to

[1] *State v. Langford*, 400 S.C. 421, 735 S.E.2d 471 (2012)

> counsel indicated to me he wishes to proceed on his own, and I have no doubt in his competency.
> App. at 101, ll 13-16.

After inquiring about his educational background, Judge Hayes had the following colloquy with Mr. Hines concerning his right to self representation:

> THE COURT: You have the right to have an attorney represent you in regard to this charge and if you cannot afford one the State would be required to appoint an attorney to represent you within some limits. That is you would be appointed an attorney to represent you if you wish. If you could not afford one the limitation being that you are assigned an attorney and that would be your attorney. Its dangerous for you to proceed without an attorney since you're not one and there is a benefit in having an attorney to represent you.
>
> Do you understand that?
>
> MR. HINES: Yes, sir.
>
> THE COURT: Do you wish to have an attorney in regard to this charge or give up that right?
>
> MR. HINES: I give up that right.
>
> THE COURT: I find Mr. Hines has freely voluntarily knowingly and intelligently understanding the benefits of counsel and the danger of self representation exercises his right to proceed pro-se. App. 102, ll 2-20.

After this discussion, Judge Hayes accepted the plea and sentenced Mr. Hines to 14 years in prison. Mr. Hines still had not seen the video. Judge Hayes did not ask if there were any outstanding discovery issues.

Argument

Question I

Did the Post Conviction Relief Judge err in failing to find that the sentencing judge failed to establish that Travis Hines was adequately informed of the dangers of self representation and the advantages of having an attorney represent him at the time of the plea hearing when the record established that such issues were only dealt with in a *pro forma* fashion?

Standard of Review

The first question to be answered is what is the standard of review in this case. As the waiver of the right to counsel involves at least a mixed question of law and facts, the standard of review should be *de novo.* The Fourth Circuit Court of Appeals acknowledges that the circuit are split as to the proper standard of review. "The proper standard of review when a defendant fails to object to a right-to-counsel waiver1 is a question that has divided our sister circuits." *United States v. Ductan*, 800 F.3d 642, 647 (4th Cir. 2015). As the waiver of a right to counsel is the waiver of a serious right, the proper standard should be *de novo.* As the Ninth Circuit has said, "Our requirements for reviewing the validity of a *Faretta* waiver are predicated on the fact that we do not expect pro se defendants to know the perils of self-representation, and consequently, we cannot expect defendants to recognize that they have not been correctly and fully advised, let alone to point out the court's errors. Accordingly, plain error review would be inappropriate, and we instead perform the simple *de novo* review in which we have customarily engaged." *United States v. Erskine*, 355 F.3d 1161, 1166–67 (9th Cir. 2004); *State v. Watlington*, 216 N.C. App. 388, 716 S.E.2d 671 (2011)(applying a *de novo* standard of review.) Not all states agree.

State v. Watson, 900 A.2d 702, 713 (2006)("Accordingly, we will apply a bifurcated standard of review, reviewing any express or implicit factual findings for clear error, and the legal conclusion to be drawn from those facts *de novo*.")

Argument

A defendant under the Constitution of the United States of America has the right of self representation. *Faretta v. California,* 422 U.S. 806 (1975). This is subject to one rule - the court must adequately inform the defendant of the dangers and disadvantages of self representation. Among those dangers is the knowledge that an attorney can be of assistance in handling and investigating the case. The record in this case fails to establish that Travis Hines proceeded to waive his right to counsel with a full understanding of those rights and the consequences of self representation. The warnings required under *Faretta* apply to a guilty plea. *Osbey v. State*, 425 S.C. 615, 825 S.E.2d 48 (2019). They even apply to a re-sentencing hearing. *Wilson v. State*, 947 So. 2d 1225 (Fla. Dist. Ct. App. 2007)

This case should be controlled by *Osbey v. State*, 425 S.C. 615, 825 S.E.2d 48 (2019). At the plea, the assistant solicitor went through the history of the case including that Mr. Hines had relieved his retained counsel the previous week. He did not, however, advise the judge that Mr. Hines had stated at the previous hearing he was going to retain counsel for the case. App. at 113, ll 20-22. The assistant solicitor told the plea judge, "I tell you all that just to say that he has been advised of his right to counsel . . . ." App. at 101, l 13-14. Apparently relying upon that representation, the plea judge conducted a very cursory examination about the dangers of self representation. In *Osbey* the defendant had been before the court on two occasions for a plea, once for a probation violation and once for a parole violation. This knowledge was not sufficient

to find Mr. Osbey knew the dangers of self representation.

The South Carolina Supreme Court in *Watts v. State*, 347 S.C. 399, 556 S.E.2d 368, ___ (2001) said "The judge did not ask Petitioner a single question about why he relieved his counsel or if he wished to have counsel present." The same is true in this case. At the previous hearing to relieve counsel with whom Mr. Hines was not satisfied, Mr. Hines expressed every intent to obtain his own counsel. The judge, accepting his plea, never asked if he had contacted another attorney, why he dismissed his former attorney, whether that attorney had discussed with him the dangers of self representation, or any defenses he may have to the charges. The plea judge never asked Mr. Hines if he had had the opportunity to review the discovery so that he could make an intelligent decision to plea guilty.

In *Gardner v. State*, 351 S.C. 407, 570 S.E.2d 185 (2002) the South Carolina Supreme Court listed ten factors to be considered by the trial judge to determine if the defendant knowingly and intelligently waived his right to Counsel and elected to represent himself. Among those factors is "whether the exchange between the accused and the court consisted of merely *pro forma* answers to *pro forma* question." *Id.* at 413, 570 S.E.2d at 187. Here the questions were in fact mere *pro forma* questions.. When Mr. Hines was asked about the dangers of self representation, it was part of a series of three factors being stated by the plea judge. He simply answered "Yes, sir" to all three without any inquiry by the judge as to whether he understood each factor individually. App. 102, ll 2-13. He was never told what the dangers of self representation were. What Mr. Hines understood to be the dangers of self representation is not known, if he even understood that to be a separate issue from the other two factors.

Mr. Hines did state in the Plea Waiver Form that he understood "[T]here is a danger in

self representation." App. at 87. But this waiver is questionable when the same form also shows Mr. Hines placed his initials beside the first statement that says, "The Solicitor, my lawyer, and I have informed the court that the following contains all of the terms of conditions of my plea." App. at 86. On the next page, Mr. Hines initials are also beside a statement that says, "My lawyer has reviewed with me all the factual and legal issues surrounding my case, including any defenses I may have and he or she has done everything I have asked them to do. I am satisfied with his or her services." App. 87-88. This statement cannot apply to Mr. Welborn as the previous week Mr. Welborn was relieved because he would not, or could not, obtain the video tape of the alleged drug buy. Obviously someone said "Initial here" without fully informing Mr. Hines of the meaning of the statement.[2]

Another factor the judge seeking a waiver of counsel must determine is "whether the accuse's waiver resulted from either coercion of mistreatment." *Id.* Both are present in this case. The plea judge was not told that just two days before, when Mr. Hines relieved his counsel and was going to obtain other counsel, the State gave Mr. Hines their notice to seek life without parole. Notwithstanding these coercive factors, the plea court never asked Mr. Hines if the fact the state was going to seek life without parole was the deciding factor in his determination to plea guilty. Whether the plea judge knew Mr. Hines was facing life without parole is not known. While this was not physical mistreatment, it certainly was coercive in that he was threatened with life without parole. The plea judge was not informed that Mr. Hines had not had the opportunity to review all the discovery. This fact in prevented Mr. Hines from knowing all the facts about

[2] A solicitor could very easily prepare a *Faretta* Waiver Form which would contain all of the requirements of *Faretta.* This form could then be used by the court to determine if a defendant truly understands the dangers of self representation.

his case before he entered his plea. Knowing the facts of one's case would seem to be a requirement for a free and voluntary plea.

If the plea judge had asked Mr. Hines, "Have you had the opportunity to review all the discovery?" and Mr. Hines had said, "no," the plea judge would not have taken the plea without a further waiver of the right of Mr. Hines to review the evidence against him. Had the plea judge conducted a basic inquiry as to why Mr. Hines relieved his previous counsel, the discovery issue would have been revealed.

"In a PCR action, if the record fails to demonstrate the petitioner made an informed choice to proceed pro se with 'eyes open,' then the petitioner did not make a knowing and voluntary waiver of counsel, and the case should be remanded for a new trial." *Gardner* at 402-403, 556 S.E.2d at ___. The record in this case does not demonstrate that Mr. Hines proceeded with his "eyes open." Further demonstrating this is the fact that while the plea judge informed Mr. Hines of his rights, he did so in a group so that the record is not clear as to whether Mr. Hines understood each individual right. In *Gardner,* the South Carolina Supreme Court took note of the failure of the plea judge to inform the defendant of her rights under *Boykin v. Alabama*, 395 U.S. 238 (1969). The Court said:

> [A]lthough the guilty plea proceedings did not consist merely of *pro forma* questions and answers, the transcript on its face poses several other problems which would indicate the plea itself was not knowing and voluntary. This Court and the United States Supreme Court have held that before a court can accept a guilty plea, a defendant must be advised of the federal and state constitutional rights he or she is waiving. *Id.* at 413, 570 S.E.2d at ___.

The record in this case establishes both that the waiver of counsel and the dangers of self representation were mere *pro forma* and did not fully inform Mr. Hines of the rights he was

waiving. The South Carolina Supreme Court has since 2014 mandated that a "Faretta Warning" form be signed by every defendant proceeding pro se in magistrate's court. *See* Form SCCA 684. The rights on that form are more substantial than the rights read to Mr. Hines in this case. A defendant facing 14 years in prison should be informed of the dangers of self representation on a level at least equal to one facing 30 days in jail. The record in this case as a matter of law is inadequate to establish Travis Hines was properly informed of the dangers of self representation. He should be granted a new trial.

This Court should establish a proper procedure of trial judges when confronted with a defendant desiring to represent himself. The Ninth Circuit Court of Appeals has suggested the following language:

> The court will now tell you about some of the dangers and disadvantages of representing yourself. You will have to abide by the same rules in court as lawyers do. Even if you make mistakes, you will be given no special privileges or benefits, and the judge will not help you. The government is represented by a trained, skilled prosecutor who is experienced in criminal law and court procedures. Unlike the prosecutor you will face in this case, you will be exposed to the dangers and disadvantages of not knowing the complexities of jury selection, what constitutes a permissible opening statement to the jury, what is admissible evidence, what is appropriate direct and cross examination of witnesses, what motions you must make and when to make them during the trial to permit you to make post-trial motions and protect your rights on appeal, and what constitutes appropriate closing argument to the jury.
> *United States v. Hayes*, 231 F.3d 1132, 1138–39 (9th Cir. 2000)

Even this suggestion should be further broken down into individual questions. The *Faretta* warnings should be like this:

The court will now tell you about some of the dangers and disadvantages of representing

yourself.

1. You will have to abide by the same rules in court as lawyers do. Even if you make mistakes, you will be given no special privileges or benefits, and the judge will not help you. Do you understand?

2. The government is represented by a trained, skilled prosecutor who is experienced in criminal law and court procedures. Do you understand?

3. Unlike the prosecutor you will face in this case, you will be exposed to the dangers and disadvantages of not knowing the complexities of jury selection, what constitutes a permissible opening statement to the jury, what is admissible evidence, what is appropriate direct and cross examination of witnesses, what motions you must make and when to make them during the trial to permit you to make post-trial motions and protect your rights on appeal, and what constitutes appropriate closing argument to the jury. Do you understand?

4. If you fail to make a proper objection at the proper time, you may forfeit that issue on appeal in the event of a guilty verdict. Do you understand?

These question, in addition to making a determination as to the intellectual capabilities of a defendant would clearly and unequivocally explain to a defendant seeking to represent themselves the pitfalls of self-representation. In the Benchbook for U.S. District Court Judges, (Federal Judicial Center March 2013) 6th Ed. § 1.02 Assignment of counsel or pro se representation at 6-7, fourteen question are suggested to be asked. While some apply to federal court only, a modification for state court would not be difficult.

While a guilty plea might not require such an extensive examination, at the very least the defendant should be informed that without the assistance of counsel he may be waiving defenses

that he does not know about because he is representing himself. He should be informed that if he enters a plea any valid defense he has, even if he does not know about it, will be waived. No such basic information was given to Mr. Hines. The waiver of counsel in this case does not comply with the requirements of *Faretta.*

Question II

Did the Post Conviction Relief Judge err in failing to find the State committed misconduct when Travis Hines was required to plea without having the opportunity to review the video and did not obtain from the plea judge a waiver to his right to review the video?

The testimony in this case establishes that while Christopher Welborn had the opportunity to review the portion of the video that the State deemed relevant, Mr. Hines never had the opportunity to do more than review a couple of still pictures. The testimony shows that Mr. Hines wanted to review the video and that Mr. Welborn agreed that he should have the opportunity.

Over ten years before this case arose, then Chief Justice Jean H. Toal issued a Memorandum dated March 1, 2004 saying the it was a violation of Rule3.4, RLDE, Rule 407, SCACR to make a plea agreement contingent upon the defendant not viewing all the discovery. As Chief Justice Toal warned in the Memorandum "This practice is going to have adverse consequences in the future with claims of ineffective assistance of counsel based on the claim that the plea was not voluntary because the applicant did not have access to the solicitors file." The future is now here. Assistant Solicitor Ryan Robert Newkirk confirmed that the practice of making the plea contingent up not reviewing the discovery continues as of the date of the

hearing notwithstanding the Memorandum issued by Chief Justice Toal over ten years earlier. App. at 59, ll 5-8.

The lower court found "Mr. Newkirk provided credible testimony that he turned over all evidence as he received it." App. 134 to 125. There is simply no basis in the record to reach this determination. As noted above, Mr. Newkirk testified it is the policy of his office in some cases, and this being one, not to turn over all the relevant evidence unless the defendant rejects the plea offer. There truly can be no more difficult a decision than to be forced to either accept a plea offer of 14 years and not review all the discovery, or view the discovery and run the risk of life without parole. No defendant should be forced to make this decision.

Of course a defendant may waive the right to view the discovery if he believes it is in his best interest to do so. But that did not happen in this case. The State knew Mr. Hines had not seen the discovery. While Mr. Welborn, after viewing the relevant portion of the video, might conclude that Mr. Hines was involved in drugs in the video, it is not Mr. Welborn's call. App. at 40, ll 12-24. The final decision of a client to enter a plea is that of the client, but a client who has not seen all the discovery that is available, truly cannot make an informed decision. While Mr. Welborn may draw one conclusion from the video, Mr. Hines could have as easily pointed out why Mr. Welborn was wrong, if he had had the opportunity to view the view the video.

Utah has a very specific Rule that requires the discovery be given to the defendant before he signs a plea agreement. The Rule provides, "(b) Timing of prosecutor's disclosures. The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead." Utah R. Crim. P. 16

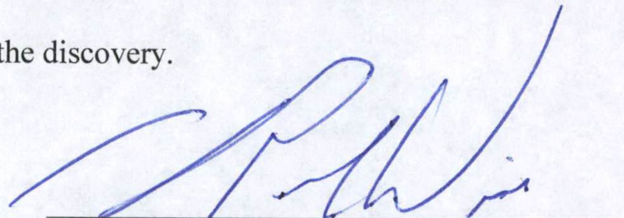
Thus, as Travis Hines notwithstanding his desire to view the video of the alleged buy, had

not seen the video, his plea of guilty was, as a matter of law, not freely and voluntarily given and should be set aside. If this Court does not reverse the order of the Post Conviction Relief judge, the only thing that can be guaranteed is that more defendants will be entering pleas without having viewed all the discovery. In some cases the result may indeed be proper. In some cases it will not be proper. No one will know unless the defendant actually views the video or knowingly and intelligently waives that right.

This Court should reverse the order of the lower court and grant Travis Hines a new trial.

CONCLUSION

For the foregoing reasons this Court should reverse the lower court and hold that the record in which Travis Hines waived his right to counsel and elected to represent himself fails to establish that the waiver was knowingly and intelligently given and remand this case to the lower court for a new trial. This Court should further hold that a solicitor cannot make a plea offer contingent upon the defendant not reviewing all the discovery.



July 30th 2019

C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar № 06188

Attorney for Travis Hines