THE STATE OF SOUTH CAROLINA
In The Supreme Court

Travis Hines, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2022-000341

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
The Honorable R. Lawton McIntosh, PCR Judge

Opinion No. 28205
Submitted December 15, 2023 – Filed May 29, 2024

AFFIRMED

Elizabeth Anne Franklin-Best, of Elizabeth Franklin-Best, P.C., of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Zachary William Jones, both of Columbia, for Respondent.

JUSTICE HILL: Travis Hines brought this post-conviction relief (PCR) action, seeking to set aside his guilty plea to distribution of heroin because he claims he was not adequately warned of the dangers of representing himself. He also claims the State violated discovery rules by refusing to let him watch a video police made of a confidential informant buying heroin from him. The PCR court dismissed Hines' petition, a ruling the court of appeals affirmed. The court of appeals held that the warnings Hines received about representing himself satisfied the Sixth Amendment to the United States Constitution. It further held there was no discovery violation.

We granted Hines' petition for a writ of certiorari to address his argument that the court of appeals erred in finding his waiver of counsel and ensuing guilty plea voluntary. We denied the writ as to the discovery issues.

I. FACTS

The court of appeals well canvassed the facts. *Hines v. State*, 435 S.C. 476, 481–86, 868 S.E.2d 387, 389–92 (Ct. App. 2021). The relevant backdrop for our purposes unfolds on May 21, 2014, when Hines sold heroin to someone who proved to be a confidential informant for the State. Hines was indicted for distribution of heroin in December 2014. He was appointed a public defender, and soon the State offered to let Hines plead guilty in exchange for a ten-year sentence. Hines discharged his public defender and hired Christopher Wellborn of the private bar. Mr. Wellborn filed a Rule 5, SCRCrimP discovery motion and a *Brady* motion. The State responded in part to these motions by sending Wellborn still photographs taken from the video of the heroin buy.

In August 2015, the State advised Wellborn that it was withdrawing the ten-year plea offer and replacing it with one for eighteen years. The State further noted that, due to Hines' criminal record, he could face a sentence of life without parole (LWOP).

Mr. Wellborn pressed the State to turn over the video of the heroin buy. The State responded that because the buy involved a confidential informant, its policy was to not produce the video for the defendant's inspection unless the defendant rejected the State's plea offer and was proceeding to trial.

The case beat on. The State at last permitted Wellborn (but not Hines) to view the video. After the screening, Wellborn concluded the video was incriminating enough to persuade a jury to convict Hines. The State reduced its offer to fifteen years, a deal Wellborn advised Hines to accept.

The parties were scheduled to appear before Judge Hall on December 3, 2015, to enter the plea, but this never occurred. Instead, Hines began having doubts about Wellborn's representation. On December 15, 2015, Judge Hall formally relieved Wellborn as Hines' counsel of record. The State simultaneously served Hines with notice of its intent to seek an LWOP sentence should Hines be convicted and announced a January 11, 2016 trial date. It also advised Hines the fifteen-year offer would expire at the end of the week.

Judge Hall asked Hines if he intended to represent himself. Hines replied he was planning to hire new counsel. Judge Hall advised Hines that "whoever your lawyer is, they are going to have to be prepared and ready for trial on January the 11th." Noting Hines had now relieved both appointed and retained counsel, Judge Hall explained, "the court would not appoint you any more lawyers." Judge Hall further stated that "at some point if you don't have an attorney, I will have to go through and warn you in detail about representing yourself . . . ." To that end, Judge Hall ordered that, if Hines had not hired a lawyer by January 4, he would need to appear in court at 10:00 a.m. on that day, "and we'll go over and make sure [you] understand your rights about representing yourself." Hines replied, "okay."

Hines then began negotiating directly with the State. Two days later, on December 17, 2015, Hines appeared before Judge John C. Hayes. The assistant solicitor announced that Hines was prepared to represent himself and enter a guilty plea in exchange for a negotiated sentence of fourteen years. The assistant solicitor twice mistakenly stated Hines had already been advised of his right to counsel. After preliminary inquiry into Hines' education, intelligence, and experience, Judge Hayes advised Hines of his right to counsel and that he would be appointed a lawyer if he could not afford one. Judge Hayes told Hines it would be "dangerous" for him to proceed without a lawyer, and he would benefit from having one. Hines replied he understood, but he still wished to give up his right to counsel.

Judge Hayes later informed Hines of various constitutional rights he would enjoy at trial but that he must waive in order to plead guilty, including his right to a trial by a jury, the presumption of innocence, the requirement that the State prove guilt beyond a reasonable doubt, the right to remain silent, the right to confront witnesses against him, the right to compulsory process, and the right to present a defense. Importantly, Hines also signed a four-page waiver of rights form that explained these same constitutional rights he was giving up. This form also advised Hines of his right to counsel, including advice that having a lawyer would benefit Hines, and he

was in danger if he represented himself. The form concluded with a paragraph wherein Hines acknowledged that any "possible defenses" to the charges had been explained to him. Judge Hayes accepted Hines' plea and imposed the fourteen-year negotiated sentence.

Hines did not appeal, instead bringing this petition for PCR.

II. STANDARD OF REVIEW

Because Hines is attacking his uncounseled plea in a collateral, post-conviction action, he bears the burden of proving he did not competently and intelligently waive his Sixth Amendment right to the assistance of counsel. *Iowa v. Tovar*, 541 U.S. 77, 92 (2004). Whether a waiver is valid is a mixed question of law and fact that we review de novo on direct appeal. *State v. Samuel*, 422 S.C. 596, 602, 813 S.E.2d 487, 490 (2018). Although this is a PCR action, the yardstick is the same as used in *Samuel*.

III. WAIVER OF RIGHT TO COUNSEL

This case finds us once again at the intersection of the conflicting rights contained within the Sixth Amendment of the United States Constitution. The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel; it also guarantees a defendant the right to represent himself. A defendant must necessarily choose between these guarantees. Courts safeguard a defendant's rights by ensuring the choice is knowingly and intelligently made. *Johnson v. Zerbst*, 304 U.S. 458, 468–69 (1938), *overruled on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981). The conflict sharpens when, as here, a defendant collaterally attacks his conviction by claiming that his choice was tainted and his right to the effective assistance of counsel was trampled upon because the trial court did not do enough to protect him from what he now claims was his own folly in pleading guilty to a crime without legal representation.

The Sixth Amendment requires that before a criminal defendant may represent himself, the trial court must hold a hearing to determine the defendant has knowingly and intelligently waived his right to counsel. *Watts v. State*, 347 S.C. 399, 402–03, 556 S.E.2d 368, 370 (2001). To that end, the defendant must be (1) advised of the right to counsel and (2) adequately warned of the dangers of representing himself. *Prince v. State*, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990). The landmark decision in this field simply tells us a defendant wishing to represent himself must

be allowed to do so as long as he is "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 v. California*, 422 U.S. 806, 835 (1975) (quoting *Adams v. United States ex rel McCann*, 317 U.S. 269, 279 (1942)).

Hines claims he did not competently waive his Sixth Amendment right to counsel because Judge Hayes failed to warn him of the specific dangers of proceeding without counsel. He contends a general danger warning was not enough to open his eyes to the risks of self-representation. In sum, he claims the inquiries into his understanding of the right he was abandoning were little more than canned questions to which he gave canned replies. He insists that had Judge Hayes questioned him about the details of his case, he would have discovered Hines' waiver of counsel and ensuing plea were defective and involuntary because they were coerced by the State's withholding of the video and its heavy-handed use of the LWOP notice.

We appreciate Hines' argument that the advice concerning his right to counsel–both the admonitions given by Judge Hayes and those contained on the waiver form–were general. We also agree with Hines that it is his understanding of the right—not the incantations of the trial judge or the words on a printed form—that controls our inquiry into whether the waiver is good. *State v. Brewer*, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997). Because the test is what the defendant understands about the scope of the right he wishes to discard, the United States Supreme Court has not mandated any script or magic words for a *Faretta* colloquy; rather, "[t]he information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend 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." *Tovar*, 541 U.S. at 88.

Tovar held that in Sixth Amendment cases, "[t]he constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." 541 U.S. at 81. There is no dispute Hines understood the nature of the charges and the scope of the punishments he faced, so the only issue remaining is whether his understanding of "his right to be counseled regarding his plea" rose to the level the Sixth Amendment demands (there is no state constitutional claim before us).

We hold it did. *Tovar* does not elaborate upon what one must be told about the right to be counseled regarding a plea, and in fact, nothing in the opinion lets us know how Tovar was advised about his right to be counseled about his plea. All the Supreme Court shared is it was enough that Tovar had not claimed he was "unaware" of his right to be counseled before his plea. *Id*. at 93. But the Supreme Court did tell us that the Sixth Amendment does not require that a defendant appearing for a plea and wishing to represent himself be told that a lawyer will be able to provide an independent opinion about the wisdom of pleading guilty or may know of defenses the defendant has overlooked. *Id*. at 91–93.

As *Tovar* emphasized, an important aspect of the waiver analysis is at what point in the criminal process the warnings are given. *Id*. at 89–91. Where, as in *Faretta*, the defendant is venturing to represent himself at trial, the trial court must rigorously convey specific warnings of the pitfalls of going to trial without a lawyer. *Id*. at 89. By contrast, a waiver of counsel at earlier stages of the proceeding need not be as exacting. *Id*. (noting "at earlier stages of the criminal process, a less searching or formal colloquy may suffice"); *see also Patterson v. Illinois*, 487 U.S. 285, 293 (1988) (*Miranda* warnings, although related to the Fifth Amendment, are sufficient to yield knowing waiver of Sixth Amendment right to counsel at post indictment questioning by police).

The Supreme Court believes it has taken a "pragmatic" approach to the waiver issue that focuses on the usefulness of counsel at a particular stage and the danger of proceeding without counsel. *Patterson*, 487 U.S. at 298. *Tovar* explained that less rigorous warnings were required pretrial, mainly because at that point the risks and disadvantages of acting as one's own lawyer are "less substantial and more obvious to an accused than they are at trial." 541 U.S. at 90 (quoting *Patterson*, 487 U.S. at 299).

We are not sure how pragmatic this approach really is, but we are bound to follow it. Some of the benefits of a lawyer's help in a criminal case do not depend upon whether the defendant is pleading guilty or going to trial. The typical criminal defendant travels down a well-defined road. He may, and often does, end his journey by a plea. The Supreme Court seems satisfied that at the guilty plea stage the defendant's "eyes are open," so long as he is warned that some general, undefined danger lurks ahead. *Id*. at 88, 92. A defendant's waiver of his right to counsel on the eve of trial, however, is good only if he knows of the precise dangers trials pose for the uncounseled. *See generally* La Fave, *Criminal Procedure* § 11.5(c) (listing factors and topics trial court should review with defendant seeking to represent

himself at trial). Judge Hall was mindful of this, which is why he scheduled the January 4 hearing to further address Hines' decision to go it on his own should he decide to push to trial.

Like the court of appeals, we are convinced the information Hines had about his right to counsel far exceeded that found to be enough in *Tovar*. Judge Hayes warned Hines generally of the dangers of representing himself, as did the waiver form. Both Judge Hayes and the form advised Hines of the nature of the charge, the allowable sentences, and the constitutional rights he must shed to enter his plea. Even if that was not sufficient, we may consider the whole picture before us, including Hines' education and experience and whether he had another source of knowledge about the assistance of counsel. *Prince*, 301 S.C. at 424, 392 S.E.2d at 463. The record shows that at the time of his plea, Hines was a twenty-nine-year-old college student who had previous experience in the criminal justice system going back some ten years. It is plain Hines understood the nuances of having legal representation, given he had already had two lawyers in this single case. Further, he had been "counseled regarding his plea," for Mr. Wellborn, an experienced and respected criminal defense lawyer, had advised Hines to plead guilty. We also observe that this was a straightforward, single sale drug case, not a complex prosecution such as a long running fraud or conspiracy.

At the PCR hearing, Hines testified Judge Hayes should have recognized he did not want to proceed pro se, but was being pressured into doing so because Judge Hall told him he would not appoint him another lawyer and the trial date was so close he could not find a lawyer willing to try the case on such short notice. Yet, Judge Hayes and the plea waiver form advised Hines that if he could not afford a lawyer, one would be appointed for him, advice Hines did not further question or challenge at the time. Nor do we find the State's handling of the video or the LWOP notice diluted his intelligent and knowing waiver. Hines has not met his burden of proving his waiver was involuntary.

Our good colleague in dissent argues Hines was not warned adequately about the dangers of self-representation. The dissent maintains that the *Tovar* standard only applies in "garden variety" guilty pleas, and the nature of Hines' case–and his choices regarding his representation–changed utterly when the State served the LWOP notice on him in December after he had successfully released Wellborn, his retained counsel. According to the dissent, this sequence of events exerted great pressure on

Hines, for he "was therefore required to evaluate the significance of the mandatory life notice for the first time and weigh the prospect of mandatory life against the State's fifteen-year-offer–a choice he had never faced before."

We agree with the dissent that the specter of a mandatory life sentence would have caused Hines to do some hard thinking about his future. But this was no "December surprise" to Hines. As we have already mentioned, back in August, the State had told Wellborn, Hines' retained lawyer, that an LWOP notice was on the table. At the PCR hearing, Hines admitted Wellborn warned him about the LWOP possibility, and that he knew about it at least by October. As we have said, Wellborn later advised Hines to accept the fifteen-year negotiated plea.

We disagree that this was not an otherwise "garden variety" case. Drug prosecutions like this based on a single undercover buy captured on video are depressingly common. They are also straightforward, as the facts are few and the law certain. At any rate, *Tovar* does not use the phrase "garden variety," or limit its holding to a certain type of case. Instead, it permits us to consider–as we already have–the specific circumstances of the case, including its complexity and Hines' sophistication, in deciding whether the waiver was good.

The dissent also speculates Hines may have been confused about whether he could be appointed yet another lawyer. We agree that Judge Hayes' advice that he would appoint Hines a lawyer conflicted with Judge Hall's earlier statement. But Hines could have taken Judge Hayes at his word and taken him up on the offer to appoint him counsel; at the very least, he could have sought clarification.

The dissent tells us that Hines' waiver of counsel would have been voluntary had Judge Hayes told Hines he would benefit from having a lawyer because a lawyer could have advised him as to whether to take the plea. But Hines had already been told by Wellborn to take the fifteen-year deal, knowing the LWOP sword was hanging over him. The evidence had not changed. Deciding whether to take a negotiated plea for fourteen years did not require additional legal advice; it only required Hines to do the math.

We add three quick things. First, trial judges are free to engage in a more detailed *Faretta* dialogue at the plea stage than what this case and *Tovar* require. In many cases, a more expansive inquiry may better serve justice, and prevent future battles over whether the waiver was intelligently and voluntarily made.

Second, although we declined the writ as to the issue concerning the State's withholding of the drug buy video and we appreciate the sensitivity surrounding disclosure of evidence involving confidential informants, we caution prosecutors that using such evidence in crude carrot and stick routines that exceed the bounds of settled authority and due process do so at their peril. *See Hyman v. State*, 397 S.C. 35, 45–47, 723 S.E.2d 375, 380–81 (2012), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *Roviaro v. United States*, 353 U.S. 53, 62–65 (1957).

Third, this case presents a prime example of the persistent problem that confronts busy circuit court judges almost every day: the reality that, when the State calls a case for plea or trial, there is, as Justice James has well put it, "typically no clear way to verify whether *Faretta* warnings have ever been given to the unrepresented defendant." *Osbey v. State*, 425 S.C. 615, 622, 825 S.E.2d 48, 52 (2019) (James, J., dissenting). Verification was even more elusive here as the assistant solicitor mistakenly told Judge Hayes that Judge Hall had already covered the "right to counsel" ground. *See generally* General Sessions Docket Management Order, S.C. Sup. Ct. Order dated May 24, 2023 at 5, 8 (providing "*Faretta* warnings shall be given to a defendant who desires to represent himself" at the initial appearance if a circuit court judge is presiding; if a circuit court judge does not preside at the initial appearance, *Faretta* warnings will be given at the second appearance).

To sum up, we hold only that, under the specific circumstances of Hines' case, his waiver of his Sixth Amendment right to counsel at the plea stage was valid. Accordingly, the decision of the court of appeals is

AFFIRMED.

BEATTY, C.J., KITTREDGE and JAMES, JJ., concur. FEW, J. dissenting in a separate opinion.

JUSTICE FEW: I respectfully dissent. Given the particular facts and circumstances in this case, it is clear to me Hines's choice to waive his Sixth Amendment right to counsel was not "made with eyes open." *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 582 (1975). I would hold the plea court erred by failing to ensure Hines understood the dangers of self-representation before allowing him to plead guilty without an attorney.

This Court has consistently enforced the federal constitutional requirement that a criminal defendant who wishes to represent himself must be "adequately warned of the dangers of self-representation." *Prince v. State*, 301 S.C. 422, 424, 392 S.E.2d 462, 463 (1990) (citing *Faretta*, 422 U.S. at 835, 95 S. Ct. at 2541, 45 L. Ed. 2d at 582); *see also State v. Dial*, 429 S.C. 128, 133, 838 S.E.2d 501, 504 (2020) ("For a knowing and intelligent waiver to occur, the defendant must be '(1) advised of his right to counsel; and (2) adequately warned of the dangers of self-representation.'" (quoting *Prince*, 301 S.C. at 424, 392 S.E.2d at 463). The pivotal word in this requirement is "adequately." Whether a trial court's warning of the dangers of self-representation was "adequate" depends on the facts and circumstances of that individual case.

The majority—as did the court of appeals—relies on *Iowa v. Tovar*, 541 U.S. 77, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004). In *Tovar*, the Supreme Court addressed the "narrow[] question" whether—in a garden-variety guilty plea—"the Sixth Amendment require[s] a court to give a rigid and detailed admonishment to a *pro se* defendant pleading guilty of the usefulness of an attorney, that an attorney may provide an independent opinion whether it is wise to plead guilty and that without an attorney the defendant risks overlooking a defense." 541 U.S. at 91, 124 S. Ct. at 1389, 158 L. Ed. 2d at 222. The case before us now is not a garden-variety case, and *Tovar* should not be read as broadly as the majority suggests. The majority writes—citing *Tovar*—"The Supreme Court seems satisfied that at the guilty plea stage the defendant's 'eyes are open,' so long as he is warned that some general, undefined danger lurks ahead." In this statement, the majority overlooks the *Tovar* Court's instruction that "the information a defendant must have to waive counsel intelligently will 'depend, in each case, upon the particular facts and circumstances surrounding that case[.]'" 541 U.S. at 92, 124 S. Ct. at 1390, 158 L. Ed. 2d at 223 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938)). The necessity of this fact-specific inquiry is where the majority misses the import of *Tovar*.

Here, given the specific facts and circumstances preceding and surrounding Hines's guilty plea, a more extensive warning was required than the brief colloquy conducted by the plea court. When Hines appeared before Judge Hall on December 15 for the hearing on his motion to relieve counsel, Judge Hall asked Hines if he planned to represent himself. Hines answered "no" and indicated he would hire attorney Jack Swerling to represent him. Judge Hall then relieved Hines's lawyer. During the hearing, the State notified Judge Hall it intended to call the case for trial in less than a month—January 11, 2016—and notified Hines for the first time it intended to seek a mandatory sentence of life without parole. Judge Hall informed Hines, "The court would not appoint you any more lawyers." Presumably because Hines told the judge he did not plan to proceed without a lawyer, but instead would "hire Mr. Swerling," Judge Hall said almost nothing about any risk to Hines of representing himself. In fact, Judge Hall stated, "At some point if you don't have an attorney I will have to go through and warn you in detail about representing yourself because that will be what you are left with." He then told Hines "you need to be here at ten o'clock on January the fourth and we'll go over and make sure you understand your right about representing yourself." Judge Hall clearly believed he did not need to warn Hines on December 15 of the dangers of self-representation, so he did not.[1]

Hines apparently contacted Swerling on December 15, but was told Swerling would not represent him because the trial was set for January 11, which would not give him time to prepare. Two days later—December 17, 2015—Hines appeared before Judge Hayes to plead guilty without an attorney. The assistant solicitor began the hearing by representing to Judge Hayes "he has been advised of his right to counsel." The assistant solicitor certainly did not intend to mislead Judge Hayes, but if his statement was not flatly incorrect, it was misleading. As we have held many times, the Sixth Amendment requires that a defendant who wishes to proceed without a lawyer must be both "advised of his right to counsel" *and* "adequately warned of the dangers of self-representation." *Dial*, 429 S.C. at 133, 838 S.E.2d at 504 (quoting *Prince*, 301 S.C. at 424, 392 S.E.2d at 463). The assistant solicitor's statement to Judge Hayes incorrectly implied Judge Hall did both. Judge Hayes then told Hines

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[1] The judge should not have hesitated. *See Osbey v. State*, 425 S.C. 615, 622, 825 S.E.2d 48, 52 (2019) (James, J., concurring) ("Perhaps the ideal time for giving *Faretta* warnings to the unrepresented defendant would be during either the defendant's first appearance or second appearance."). Certainly, whenever a criminal defendant raises the prospect of representing himself he should be immediately warned of the dangers of self-representation.

"if you cannot afford one . . . you would be appointed an attorney to represent you if you wish." This statement is in in direct contradiction to Judge Hall's statement two days earlier that the court "would not appoint you any more lawyers."

The obvious question that hangs over the December 2015 sequence of events is why Hines told Judge Hall he did not want to represent himself and intended to hire an attorney, yet two days later he appeared before Judge Hayes—representing himself—to plead guilty. A brief inquiry into that question by Judge Hayes would have revealed a true "danger of self-representation" Hines faced that would not be present in the garden-variety guilty plea the Supreme Court addressed in *Tovar*. The danger was that on December 15—immediately after Judge Hall relieved Hines's lawyer—the State informed Hines for the first time that he faced a mandatory life sentence if convicted. The State had given Hines until the end of the week to accept its plea offer of fifteen years. Hines was therefore required to evaluate the significance of the mandatory life notice for the first time and weigh the prospect of mandatory life against the State's fifteen-year offer—a choice he had never faced before. And he had to do so between Tuesday December 15 and Friday December 18, without a lawyer.

In addition, the conflicting information Hines received regarding whether he could have an attorney appointed for him created a strong possibility of confusion about whether an attorney could be made available to help him make this choice. This is important in understanding the pressure Hines was facing to quickly decide whether to take a plea deal without an attorney. The simple inquiry whether he understood that a lawyer could help him understand and make this difficult choice would have rendered his decision to proceed without a lawyer voluntary. But on the record before us, we have no idea whether Hines understood the difficult choice he faced, and he never had a lawyer to consult about it. Judge Hayes's summary statement, "Its dangerous for you to proceed without an attorney since you're not one and there is a benefit in having an attorney represent you," simply did not meet the Sixth Amendment standard.

The specific facts and circumstances of Hines's case distinguish it from *Tovar* and required the plea judge to do more than just recite that Hines had the right to counsel and that "some general, undefined danger lurks ahead." I would reverse the court of appeals.