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Disposition of UTTs/Warrants and The Right to Counsel

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Right to Counsel

Origin

Right to Counsel

U.S. Constitution: Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Made applicable to the states by the 14th Amendment

S.C. Constitution: Article I, Section 14

The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury; to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both.

S.C. Code §17-23-60

Every person accused shall, at his trial, be allowed to be heard by counsel, may defend himself and shall have a right to produce witnesses and proofs in his favor and to meet the witnesses produced against him face to face.

Rule 602, SCACR: Defense of Indigents

(a) Every person arrested for the commission of a crime within the jurisdiction of the Court of General Sessions, every juvenile to be brought before any court on any charge for which he may be imprisoned, and every person charged with the violation of a probationary sentence shall be taken as soon as practicable before the Clerk of the Court of General Sessions in the county where the charges are preferred, or such other officer or officers as may be designated by the resident judge of the circuit, for the purpose of securing to the accused the right to counsel.

In cases involving criminal charges within the jurisdiction of magistrates' courts, municipal courts, or other courts with like jurisdiction, if a prison sentence is likely to be imposed following any conviction, the presiding judge of the court in which the matter is to be determined shall inform the accused as provided in Rule 2 when the case is called for disposition. The procedures concerning juveniles, as provided in Rule 1 and Rule 2 hereof, shall continue to be followed.

Rule 602, SCACR: Defense of Indigents

(b) The officer before whom the arrested person is taken shall:

- (1) Inform the accused of the charges against him and of the nature of the charges.
- (2) Advise the accused of his right to counsel and of his right to the appointment of counsel by the court, if the accused is financially unable to employ counsel.
- (3) If the accused represents that he is financially unable to employ counsel, take his application for the appointment of counsel or for the services of the Public Defender where the latter is available in the county.

Rule 602, SCACR: Defense of Indigents

Upon examination of a completed Affidavit of Indigency (Form II), the officer designated to make a determination of indigency shall determine if the accused is indigent. If that officer is unable to make this determination, the final determination whether the accused is indigent shall be made by a judge of the court in which the matter is to be heard.

Rule 602, SCACR: Defense of Indigents

For purposes of this rule, a person is indigent if that person is financially unable to employ counsel. In making a determination whether a person is indigent, all factors concerning the person's financial condition should be considered including income, debts, assets and family situation. A presumption that the person is indigent shall be created if the person's net family income is less than or equal to the Poverty Guidelines established and revised annually by the United States Department of Health and Human Services and published in the Federal Register. Net income shall mean gross income minus deductions required by law.

Case Law

Right to Counsel

Argersinger v. Hamlin, 407 U.S. 25 (1972)

No person may be imprisoned for any offense unless he was represented by counsel at trial or waived the right to counsel

Scott v. Illinois, 440 U.S. 367 (1979)

Under the 6th and 14th amendments to the U.S. Constitution, an indigent defendant cannot be sentenced to term of imprisonment unless State has afforded him right to appointed counsel

Alabama v. Shelton, 535 U.S. 654 (2002)

- Defendant given suspended or probated sentence has constitutional right to counsel
- A suspended sentence that may end up in actual deprivation of a person's liberty may not be imposed unless the defendant was accorded the guiding hand of counsel in the prosecution for the crime charged.

Waiver

Right to Counsel

By affirmative verbal request

Requires Faretta v. California, 422 U.S. 806 (1975) warnings (or a record demonstrating the defendant was aware of disadvantages of proceeding pro se) and a finding by the judge that the waiver was knowing and intelligent. E.g., State v. Thompson, 355 S.C. 255, 584 S.E.2d 131 (Ct. App. 2003)

Faretta addresses the right to self-representation when the defendant has voluntarily and intelligently waived his right to counsel.

Must be given in order for summary court convictions to be used in the future for enhancement purposes.

Forfeiture

Requires Faretta v. California, 422 U.S. 806 (1975) warnings (or a record demonstrating the defendant was aware of disadvantages of proceeding pro se) and a finding by the judge that the waiver was knowing and intelligent. E.g., State v. Thompson, 355 S.C. 255, 584 S.E.2d 131 (Ct. App. 2003)

Conduct

Waiver of right to counsel may be inferred from the defendant's conduct. State v. Roberson, 382 S.C. 185, 675 S.E.2d 732 (2009).

Roberson makes clear Faretta is irrelevant to waiver by conduct.

Examples where waiver was found

- Failed to appear at trial despite being advised of date at bond hearing, signing a form there containing the date, two Notices sent to last known address, familiarity with criminal court system. State v. Roberson, *supra*.
- Non-indigent defendant found to have waived after urged several times by judge to retain attorney, given additional time and access to a phone, case continued once, and on day of trial said brother was bringing a lawyer but did not name him nor make clear that one had been retained. State v. Jacobs, 271 S.C. 126, 245 S.E.2d 606 (1978).

Examples where waiver was found

- Defendant was released on bond requiring his appearance at next call of General Sessions and at every term until case disposed of, appeared at preliminary hearing with his attorney, knew as did his attorney that case was coming up, knew he had a duty to stay in contact with his attorney and the court but failed to do so. State v. Cain, 277 S.C. 210, 284 S.E.2d 779 (1981).

Examples where waiver was found

- Defendant appeared at first day of term at which he was to be tried with a private attorney who withdrew when PD was appointed. Defendant missed two meetings with the PD, who then sent letter stating trial date and need to speak. Defendant scheduled third meeting with PD but failed, without explanation, to appear. When finally met, told PD he was again represented by private attorney, but per phone call with PD private attorney's office said did not represent. Defendant did not appear for trial and private lawyer's office again told solicitor he did not represent defendant, PD relieved after trial judge found defendant waived his right to counsel by his conduct. State v. Pride, 2007-UP-544 (Ct. App. filed Dec. 7, 2007)(original published opinion cited in State v. Fairey, 374 S.C. 92, 646 S.E.2d 445 (Ct. App. 2007).

Examples where waiver was found

- Defendant was originally represented by retained counsel and had ample opportunities to meet with him until disagreement over payment, strategies, and "fundamental representation" led defendant to sign a consent to attorney's withdrawal indicating he wished to proceed pro se. He was aware of his duties and responsibilities, maintained contact with the court and the solicitor, filed a number of motions including two requests to produce, and his statements and conduct during preliminary proceedings showed familiarity with the legal system and with his options. However, defendant also engaged in dilatory tactics and necessitated continuances, etc., and ultimately did not appear for trial. State v. Fairey, *supra*.

Examples where waiver was not found

- Defendant was found not to have validly waived his right to counsel by conduct where his appointed counsel was relieved after defendant verbally threatened the lawyer and physically threatened him at the detention center until restrained by guards but defendant had not been warned of the consequences of his actions nor of the dangers of self-representation. State v. Boykin, 324 S.C. 552, 478 S.E.2d 689 (Ct. App. 1996) *overruled in part by implication by* State v. Roberson, *supra*.

Examples where waiver was not found

Defendant who appeared for four or five roll calls and sought the appointment of counsel but was deemed not indigent despite claiming to be repaying a child support arrearage, was the subject of two Bench Warrants but was not picked up, whose family was given only 14 hours notice of the trial date, and who was never queried on the record regarding his rights, waiver, or given *Faretta* warnings and lacked a criminal past did not waive right to counsel when he failed to appear for trial. State v. Thompson, 355 S.C. 255, 584 S.E.2d 131 (Ct. App. 2003).

Examples where waiver was not found

Counsel was relieved when defendant failed to appear at trial and he was convicted *in absentia*. Defendant appeared pro se next day for opening of sealed sentence, and trial court made no finding whether there had been a valid waiver of right to counsel. Remanded for determination whether there had been a knowing and voluntary waiver of right to counsel. State v. White, 305 S.C. 455, 409 S.E.2d 397 (1991).

Municipal Courts

§14-25-5: Establishment of Municipal Courts

- (a) The council of each municipality in this State may, by ordinance, establish a municipal court, which shall be a part of the unified judicial system of this State, for the trial and determination of all cases within its jurisdiction. The ordinance shall provide for the appointment of one or more full-time or part-time judges and the appointment of a clerk.
- (b) Any municipality establishing a municipal court pursuant to the provisions of this chapter shall provide facilities for the use of judicial officers in conducting trials and hearings and shall provide sufficient clerical and nonjudicial support personnel to assist the municipal judge.
- (c) Any municipality may prosecute any of its cases in any magistrate court in the county in which such municipality is situate upon approval by the governing body of the county.

Municipalities and Indigent Defense

Budget Proviso 61.12: If a municipality has or elects to have an optional municipal court system, it must provide adequate funds for representation of indigents. No public defender shall be appointed in any such court unless the municipality and the office of the circuit public defender have reached an agreement for indigent representation and no funds allocated to the commission shall be used to provide compensation for appointed counsel in municipal courts.

Municipalities and Indigent Defense Options

- Contract with the public defender
- Contract with a private attorney
- Do not sentence any defendants to jail time. Absolutely no imposition of jail sentences.
- Close the municipal court and negotiate an agreement with the county to have municipal cases tried in magistrate court.

- If you do not do one of the above options, the municipality is exposing itself to liability.

Chief Justice Beatty's Memo

Re: Sentencing Unrepresented Defendants to Imprisonment

September 15, 2017

Chief Justice Beatty's Memo – Sep. 15, 2017

It has continually come to my attention that defendants, who are neither represented by counsel nor have waived counsel, are being sentenced to imprisonment. This is a clear violation of the Sixth Amendment right to counsel and numerous opinions of the Supreme Court of the United States. All defendants facing criminal charges in your courts that carry the possibility of imprisonment must be informed of their right to counsel and, if indigent, their right to court-appointed counsel prior to proceeding with trial. Absent a waiver of counsel, or the appointment of counsel for an indigent defendant, summary court judges **shall not** impose a sentence of jail time, and are limited to imposing a sentence of a fine only for those defendants, if convicted. When imposing a fine, consideration should be given to a defendant's ability to pay. If a fine is imposed, an unrepresented defendant should be advised of the amount of the fine and when the fine must be paid. This directive would also apply to those defendants who fail to appear at trial and are tried in their absence.

I am mindful of the constraints that you face in your courts, but these principles of due process to all defendants who come before you cannot be abridged.

Main Points/Takeaways

- Defendants cannot be sentenced to jail time without being appointed, or waiving, counsel.
- Incarceration comes at a high cost for both the county/municipality AND the defendant.
- Defendant's ability to pay MUST be considered when imposing a fine.

Regular Traffic Offenses (NRVC Eligible)

If the Defendant fails to appear on his court date

If citation has been paid in full before the court date

- Case is disposed as Forfeit Bond (101 in CMS 01 Ct Admin)
- Case is reported to DMV at the end of the day and reported to SLED at the end of the month

If citation has not been paid before court date

- Trial in absentia
  - REMINDER: State must still prove case. Defendant is not to be automatically found guilty solely because he did not come to court.
- If Defendant is found guilty, case is disposed as TIA Guilty Bench Trial (13 in CMS 02 Ct Admin)
- Case is reported to DMV at the end of the day

If citation has not been paid before court date (cont.)

- Court generated NRVC and mails to Defendant
  - D pays NRVC before court sends the NRVC to DMV
    - Case is reported to SLED at the end of the month
  - If D does not pay, court sends NRVC to DMV and case is reported to SLED at the end of the month.
    - D pays and court gives D copy for DMV
    - D does not pay and DMV suspends license
      - D then pays and court gives D copy for DMV

Field Booking

If the Defendant fails to appear on his court date

Field Booking/Field Arrest

- Defendant is issued ticket and told to come to court on a specific day
- Defendant did not have a bond hearing
- If D does not appear, court can TIA defendant, but the sentence can only be a fine. No jail, no suspended sentence.
  - If court is not willing to do fine only, D MUST be rescheduled for another court date and informed of his right to counsel. No TIA.

Field Booking/Field Arrest Trial in Absentia

- REMINDER: State must still prove case. Defendant is not to be automatically found guilty solely because he did not come to court.
- If D is found guilty, the sentence is a fine only.
- Case is disposed as Ct Admin 10 – TIA. Disposition is sent to DMV and SLED
  - D notified of TIA via court Notice of Trial in Absentia
  - Case appears on public index as TIA – fine amount will be visible on public index
  - D can pay online, in person, mail – case is complete

After Field Booking/Field Arrest TIA

- D can request post-trial hearing on the merits of the case, the amount of the fine, and his right to STP.
- Notice of Trial in Absentia will inform D of these rights.
- D must contact the court to arrange a hearing to establish a payment plan.
- D will not be arrested or required to pay anything at this hearing.

STP – Scheduled Time Payments §17-25-350

In any offense carrying a fine or imprisonment, the judge or magistrate hearing the case **shall**, upon a decision of guilty of the accused being determined and it being established that he is indigent at that time, set up a **reasonable** payment schedule for the payment of such fine, taking into consideration the income, dependents and necessities of life of the individual.

§17-25-350 Continued

- Such payments shall be made to the magistrate or clerk of court as the case may be until such fine is paid in full.
- Failure to comply with the payment schedule shall constitute contempt of court; however, imprisonment for contempt may not exceed the amount of time of the original sentence, and where part of the fine has been paid the imprisonment cannot exceed the remaining pro rata portion of the sentence. **NOT APPLICABLE IN THIS SITUATION – THERE IS NO UNDERLYING JAIL TIME.**

§17-25-350 Continued

- No person found to be indigent shall be imprisoned because of inability to pay the fine in full at the time of conviction.
- Entitlement to free counsel shall not be determinative as to defendant's indigency.

Remedy for Nonpayment

- Not imprisonment! No issuance of a bench warrant!
- Refer the matter to the Department of Revenue/Set Off Debt
- Conversion of unpaid criminal fines, surcharges, assessments, costs, fees, and/or restitution to a civil judgment within one year of imposition of sentence -- §17-25-323(C)
  - Applicable for both magistrate and municipal courts
  - Procedure in the memos section of the Bench Book (Memo dated Nov. 18, 2013)

This procedure applies to:

- UTTs where D was not taken into custody and did not have a bond hearing
- Zoning violations
- Animal control
- City/county ordinance summonses
- Courtesy summonses

- If you want to incarcerate a D in one of the above situations, he must be rescheduled and informed of his right to counsel. No TIA unless D has waived counsel by conduct.

Custodial Arrests

If the Defendant fails to appear on his court date

Main Issue

- Defendants cannot be sentenced to jail time without being appointed, or waiving, counsel.
  - This procedure may provide the possibility of the defendant waiving his right to counsel by his conduct.

Bond Hearing

- The bond checklist will be updated
  - After the judge goes through the checklist with the Defendant, he will acknowledge receiving his rights on the checklist (initial/sign).
    - D can refuse to initial/sign, but it would still be considered receiving his right to counsel.
- If indigent, D will be given instructions on how to apply for counsel
- D will be given trial date
- D will be given new form “Information Regarding Your Constitutional Rights”

Trial Date – D Fails to Appear

- Options
  - Reschedule
  - Bench warrant for bond violation (§17-15-40)

Reschedule

- Preferred method
  - Policy underlying the Chief Justice's memo is to keep people out of jail unless their right to counsel is honored or waived
- D is sent the reschedule summons
- The summons informs D of possible TIA and waiver of right to counsel
- Gives D new court date

Bench Warrant for Bond Violation

- To be used in the judge's discretion
  - Consider whether D is danger to the community and/or charge carries mandatory jail sentence.
  - Policy underlying the Chief Justice's memo is to keep people out of jail unless their right to counsel is honored or waived
- Issued for bond violation for failure to appear
- Notify surety if applicable (§38-53-70)
- Bench warrant states D is to be brought before the judge within a reasonable time

Bench Warrants

- BW's sole purpose is to direct law enforcement to bring the D before the issuing court ASAP
- BWs will be amended to no longer contain any disposition/sentence
- BW is not a jail commitment

When D is Picked Up on BW

- If trial court is in session, take D before that judge
  - If not, bring D before bond judge within 24 hours of arrest
- At hearing:
  - Inform D of indigent right to counsel
  - Renew constitutional rights
  - Personally serve D with summons with new trial date
    - Coordinate with trial court to determine trial date – can be done through phone calls or email
  - Release on original bond if possible

Second Failure to Appear

- If D fails to appear a second time, TIA
  - Judge must determine on the record if:
    - D received proper notice of trial's time and place,
    - D was warned trial would proceed in his absence, AND
    - D waived right to counsel by conduct
- REMINDER: State must still prove case. Defendant is not to be automatically found guilty solely because he did not come to court.
- If D is found guilty, seal the sentence
- Case disposed as 11 for Ct Admin – CMS will have a different number. No sentence or money appears on the public index

Sealed Sentence

- Notify D of TIA and sealed sentence by mail. D will have to come in to have sentence unsealed.
  - OR
- Issue BW to have D brought before the court for opening of sealed sentence.

State v. Smith, 276 SC 494, 280 S.E.2d 200 (1981)

- A sealed sentence does not become the judgment of the court until it is opened and read to the defendant.
- The authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion.
- It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.
- The mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised.
  - It should be stated on what basis the discretion was exercised.

Notification of Sealed Sentence by Mail

- D calls and sets up date for sentencing hearing
- State and V must be notified of date of hearing
- Judge that opens the sentence is the sentencing judge under the law.
- Sentence is opened/unsealed

When D is Picked Up on BW for Sentencing

- If trial court is in session, take D before that judge
  - If not, bring D before bond judge within 24 hours of arrest -- opening of sentence may be delayed a reasonable amount of time to notify state and allow V to attend court
- Open/unseal sentence
- IMPORTANT: If there is a victim in the case, victims' rights statutes must be complied with. V must be notified and has a right to be present.

§22-3-800 Suspension of Imposition or Execution of Sentence in Certain Cases

- Notwithstanding the limitations of §17-25-100 and §24-21-410, after a conviction or plea for an offense within a magistrate's jurisdiction the magistrate at the time of sentence may suspend the imposition or execution of a sentence upon terms and conditions the magistrate considers appropriate, including imposing or suspending up to 100 hours of community service, except where the amount of community service is established otherwise. (Littering/DUI)

§22-3-800 Suspension of Imposition or Execution of Sentence in Certain Cases

- The magistrate shall not order community service in lieu of a sentence for offenses under Title 50, for offenses under Section 34-11-90, or for an offense of driving under suspension pursuant to Section 56-1-460 when the person's driver's license was suspended pursuant to the provisions of Section 56-5-2990.
- The magistrate must keep records on the community service hours ordered and served for each sentence.

§22-3-800 Suspension of Imposition or Execution of Sentence in Certain Cases

- However, after a conviction or plea for drawing and uttering a fraudulent check or other instrument in violation of §34-11-60 within the magistrate's jurisdiction, at the time of sentence the magistrate may suspend the imposition or execution of a sentence only upon a showing of satisfactory proof of restitution.
- When a minimum sentence is provided for by statute, except in §34-11-90, the magistrate may not suspend that sentence below the minimum sentence provided, and penalties under Title 50 may not be suspended to an amount less than $25 unless the minimum penalty is a fine of less than that amount.

§22-3-800 Suspension of Imposition or Execution of Sentence in Certain Cases

- Nothing in this section may be construed to authorize or empower a magistrate to suspend a specific suspension of a right or privilege imposed under a statutory administrative penalty.
- Nothing in this section may be construed to give a magistrate the right to place a person on probation.

§14-25-75 Judge May Suspend Sentences

- Any municipal judge may suspend sentences imposed by him upon such terms and conditions as he deems proper including, without limitation, restitution or public service employment.

After Sentencing

- If after trial, D has a jail sentence suspended upon payment of fine and D does not pay fine, court must perform Bearden v. Georgia, 431 U.S. 660 (1973) analysis.

Bearden v. Georgia, 431 U.S. 660 (1973)

- Courts may not ordinarily incarcerate an individual for nonpayment of a court-ordered legal financial obligation **unless** the court:
  - Holds a hearing;
  - Makes a finding that the failure to pay was willful and not due to an inability to pay; and
  - Considers alternative measures other than imprisonment.
- We recommend issuing a Rule to Show Cause (RTSC must be personally served) to have the defendant brought before the court. At the hearing, the defendant must be given a meaningful opportunity to explain:
  - Whether the amount allegedly owed is incorrect;
  - The reason(s) for any nonpayment, including an inability to pay.

Bearden v. Georgia, 431 U.S. 660 (1973)

- In determining whether the individual has shown an inability to pay, you should consider not only whether his net income is at or below the current Federal Poverty Guidelines, but also whether any of his income is derived from needs-based, means-tested public assistance, whether he has dependents, and the necessities of life of the individual.
- Consideration should also be given to whether the individual is homeless, incarcerated, or resides in a mental health facility, whether there are permanent or temporary limitations on the individual's ability to earn more money, and whether the person owes other court-ordered legal financial obligations.
- Be sensitive to the fact that the individual may have a constitutional right to counsel if a deferred sentence is likely to be imposed or the inability to pay defense is difficult to develop or present.

Bearden v. Georgia, 431 U.S. 660 (1973)

- After hearing the evidence, you should make findings on the record that the individual received adequate prior notice of: the hearing date/time; that failure to pay fines and assessments was the issue; the defense of inability to pay; the opportunity to bring documents and other evidence of inability to pay; and that there was a meaningful opportunity to explain the failure to pay.
- **If** you determine that incarceration must be imposed, you should make findings regarding:
  - The financial resources relied upon to conclude the nonpayment was willful; and/or
  - Why alternative measures are not adequate to meet the State's interest in punishment and deterrence under the particular circumstances.

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