STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable R. Keith Kelly, Chief Administrative Judge
Seventh Circuit

GENUINE TRUTH BANNER

Petitioner

v.

STATE OF SOUTH CAROLINA

Respondant

APPELLATE CASE No.: 2022-001627

PETITION FOR WRIT OF CERTIORARI

GENUINE TRUTH BANNER
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S.C. SUPREME COURT

INDEX

INDEX . . . . i, iii

ISSUES PRESENTED 1

STATEMENT 2

RELEVANT FACTS 3, 4

Discussion 5

ARGUMENT

The Honorable Judge R. Keith Kelly erred in dismissing Petitioner's PCR application for untimeliness where S.C. Code Ann. § 17-27-45 (c) provides:

> "If the applicant contends there is evidence of material fact not previously presented, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or the date when the facts could have been ascertained by excercise of reasonable diligence."

Along with his 2nd PCR application, Petitioner filed documentation showing that the claimed "newly discovered evidence" (Records showing that no indictments existed at the time of the plea) was received (actually discovered) by applicant|Petitioner on May 4th, 2021 and June 12th, 2021 respectively. Here, Petitioner's 2nd PCR application was filed on January 10th, 2022, within a year of "actual discovery" by applicant|Petitioner.

The Honorable Judge R. Keith Kelly further erred in dismissing Petitioner's PCR application for untimeliness where he claimed that "both pieces of evidence (and the facts contained therein) could have been discovered before the plea and defense arguments concerning those pieces of evidence were waived when entering the plea". Here, Petitioner notes the following:

1. Applicant|Petitioner was represented by trial counsel "before the plea"
2. The Honorable G. Thomas Cooper previously ruled in the 1st PCR that trial counsel was not ineffective for failure to investigate and prepare for trial
3. If "both pieces of evidence could have been discovered before the plea", then the Honorable R. Keith Kelly is ruling de facto that trial counsel was ineffective for failure to investigate and prepare for trial. Such a determination directly conflicts with the Honorable G. Thomas Cooper's prior ruling in the original PCR

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Here both judges's respective rulings/determinations cannot at the same time, be true. Either trial counsel was ineffective for failure to investigate and prepare for trial, or the evidence put forth in the 2nd PCR was in fact, 'newly discovered evidence' that could not have been discovered before the plea. Therefore, in the interest of justice, trial counsel's ineffectiveness would warrant the sentence being overturned or the newly discovered evidence would warrant the conviction being overturned. This is especially true where the evidence definitively shows that the State lacked indictments at the time of the plea. Therefore, the State lacked jurisdiction to even accept an 'As Indicted' plea containing no admission of guilt. See (State V. Grim, 341 S.C. 63 (2000)), (State V. Gill, 355 S.C. 234 (2003)), (Carter V. State, 329 S.C. 355 (1998)), (S.C. Code Ann. § 17-19-10, 17-23-130, 17-23-140), (S.C. Const. Art. 1, § 11.), (State V. Gentry, 363 S.C. 93) which lays forth:

> "Lack of subject matter jurisdiction may not be waived even by consent of the parties and should be taken notice of by the Supreme Court."

The Honorable R. Keith Kelly erred in dismissing Petitioner's 2nd PCR application for successiveness where the application was based on newly discovered evidence of the State's lack of indictments at the time of the plea and where issues related to subject matter jurisdiction may be raised at any time. See (Carter V. State 329 S.C. 355 (1998)), (Eaddy V. Eaddy, 283 S.C. 582 (1984)), (Ex Parte Reichlyn 310 S.C. 495 (1993)), (Lake V. Reeder Constr. Co., 330 S.C. 242 (1997)), (U.S. V. Cotton 535 U.S. 625, 122 S.Ct 1781 (2002)) which laid forth:

> "Defects in subject matter jurisdiction require correction regardless of whether the error was raised [below]."

The Honorable R. Keith Kelly further erred in dismissing Petitioner's PCR on grounds that applicant failed to make a prima facie showing he is entitled to relief where the claims all stemmed from newly discovered evidence that undisputably shows no indictments existed at the time of the 'As Indicted' plea, is itself a showing Petitioner was entitled to relief in light of (State V. Guthrie 352 S.C. 103 (2002)) which lays forth:

> "The acts of a Court in regards to a matter as to which it has no jurisdiction are void."

Also, see (U.S. V. Cotton 535 U.S. 625, 122 S.Ct 1781 (2002)), (S.C. Const. Art. 1, § 11), (S.C. Code Ann. § 17-19-10), (Brady V. U.S., 397 U.S. 742, 748, 90 S.Ct 1463), (Brady V. Maryland 83 S.Ct 1194) which laid forth:

"suppression of evidence which was favorable to an accused by prosecution... violates due process where evidence is material to either guilt or punishment, irrespective of good or bad faith of prosecution."

Brady V. U.S. laid forth:

"Waivers of constitutional rights not only must be voluntary, but must be Knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences.".

Such rulings are highly relevant where the state failed to disclose that no indictments existed at the time of the plea, yet the ALFORD plea was 'As Indicted' and contained no admission of guilt. The plea then was not made with "sufficient awareness of relevant circumstances and likely consequences".

Because the Honorable R. Keith Kelly dismissed Petitioner's 2nd PCR application on those grounds, he did not rule on Petitioner's claims including:

1. Brady Violation by prosecution via its suppression of the state's lack of indictments from trial counsel and petitioner
2. 14th amendment, due process violation by trial judge for accepting an 'As Indicted' plea where no indictments existed at the time of the plea.
3. Inneffective assistance of trial counsel for failure to investigate and prepare for trial, realize state's lack of indictments and therefore motioning for dismissal.
4. Due process violation by trial judge for his errant ruling dismissing pretrial motion to suppress after admitting there was a 4th amendment violation. This claim was raised in Petitioner's 1st PCR but the Honorable G. Thomas Cooper Failed to rule on that claim altogether.

Where evidence that was actually discovered by Petitioner after the plea and 1st PCR was presented, definitively shows that the State did not have indictments pursuant to SCRCrimP Rule 3, sections (c) and (e) during the time of the plea and where the state suppressed that fact, no reasonable person could argue that Petitioner's 'As Indicted' ALFORD plea containing no admission of guilt was knowingly, willingly or intelligently entered. The plea is invalid. Further, the evidence that prompted the 2nd PCR application was actually discovered by applicant/petitioner after the original PCR in May and June 2021 respectively and the 2nd PCR application was then timely filed in January 2022. Also, if indeed that evidence could have been discovered 'before the plea' as claimed, then trial counsel was ineffective 'before the plea'.

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ISSUES PRESENTED

Did the Honorable Judge R. Keith Kelly err in dismissing Petitioner's 2nd PCR application on grounds of untimeliness where the evidence the application stemmed from (the clerk of Courts Full case history and the F.B.I. NCIC report) was actually discovered by petitioner on May 4th, 2021 and June 12th, 2021 respectively and where Petitioner's 2nd PCR application was filed within a year of the dates of actual discovery, (January 10th, 2022)?

Did the Honorable Judge R. Keith Kelly err in dismissing Petitioner's 2nd PCR application for untimeliness where he claimed that "both pieces of evidence (and the facts contained therein) could have been discovered before the plea and defense arguments concerning those pieces of evidence were waived when entering the plea." where such a determination stands in direct conflict with the Honorable G. Thomas Cooper's ruling in the 1st PCR that trial attorney William J. Nowicki was not ineffective for failure to investigate and prepare for trial and where the prosecution, having a duty to fully disclose even materially exculpatory evidence, altogether failed to disclose the state's lack of indictments and in fact falsely claimed otherwise 'before the plea'.

Did the Honorable Judge R. Keith Kelly err in dismissing Petitioners 2nd PCR application for successiveness where the application was based on newly discovered evidence relating to the State's lack of indictments at the time of the plea and therefore its lack of jurisdiction to accept an 'As Indicted' plea containing no admission of guilt and where issues related to subject matter jurisdiction can be raised at any time?

Did the Honorable Judge R. Keith Kelly err in dismissing Petitioner's 2nd PCR application for failure to make a prima facie showing that he was entitled to relief where the newly discovered evidence proving no indictments existed at the time of the plea is itself such a showing where the court cannot legally act on matters as to which it has no jurisdiction and if they do, such acts are void and where such evidence proves de facto that the plea was not Knowingly, Willingly or intelligently entered as it was 'As Indicted' though no indictments existed?

Can the State of South Carolina maintain and uphold an 'As Indicted' ALFORD plea containing no admission of guilt, when no indictments existed at the time of the plea? and where that fact was hidden from Petitioner and trial counsel before and during the plea?

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STATEMENT

The state alleges that on October 28th, 2016, Petitioner was indicted by a Spartanburg County Grand Jury on five counts of Kidnapping, two counts of armed robbery and possession of a weapon during the commission of a violent crime, App. 246-53, one day prior to when they allege the crime even happened, App. 147, ll. 13-16; App. 91, l. 7. On January 22nd, 2018 Petitioner pled 'As Indicted' and under (ALFORD V. North Carolina, 400 U.S. 25 (1990)) before Judge J. Mark Hayes Jr. William J. Nowicki represented petitioner and Barry Barnette, solicitor, represented the state. App. 1.

On January 23rd, 2018 Petitioner was sentenced to concurrent terms of: Twenty years imprisonment for each count of Kidnapping, each count of armed robbery, one count of bank robbery and five years imprisonment for the possession of a weapon during a violent crime. App. 116, ll. 18-25.

Defense counsel alleges that on January 25th, 2018 he filed a motion to reconsider sentence, App. 128-129, which was later withdrawn. Petitioner filed a PRO SE notice of appeal on March 27th, 2018 and on April 25th, 2018 the court of appeals issued an order finding Petitioner's notice of appeal untimely. App. 133-134. On April 10th, 2018 Petitioner filed a PCR application. App. 119-127. An evidentiary hearing was held before the Honorable G. Thomas Cooper on October 10th, 2019. App. 144. Susannah Ross represented Petitioner and Jacob Isenberg, assistant A.G. represented the state. App. 144.

On May 4th, 2020, Judge Cooper signed an order denying PCR. App. 225-245. The court found Petitioners ALFORD plea was voluntary, knowingly and intelligently entered. App. 241. The court declined to find defense counsel was ineffective for failure to investigate and prepare for trial. App. 244. The court declined to find the plea invalid in light of defense counsel's failure to fully inform petitioner of the consequences of an ALFORD plea, App. 240, although defense counsel admitted to as much. App. 198, ll. 15-19.

On January 10th, 2022 Petitioner's 2nd PCR application was filed after obtaining newly discovered evidence (the clerk of court's full case history and an F.B.I. NCIC report) proving that no indictments ever existed at the time of the plea. The clerk of court's case history shows that no indictments were ever clocked or filed in the clerks records of the case. The F.B.I. NCIC report shows that only one indictment, out of the four pled to, ever appears in any records whatsoever and it only appeared on January 23rd, 2018, a day after the plea. Exhibits from the state's own records were sent along with the application documenting when that evidence was actually discovered by applicant. On November 2nd, 2022, Judge R. Keith Kelly dismissed the application as untimely, successive and for failure to make a prima facie showing Petitioner is entitled to relief.

This Petition For Writ of Certiorari follows.

RELEVANT FACTS

The State alleges that on October 29th, 2016 (a day after they claim indictments were true billed, App. 246-53) petitioner robbed Spartan Federal Credit Union in Spartanburg County while armed with a shotgun. App. 91, ll. 7-13; App. 147, ll. 14-16. The State claims Petitioner then stole a vehicle from an employee and fled with stolen cash. App. 93, l. 20-94, l. 6.

The State alleges that earlier that day, Officer Noteboom ran the license plate on a grey BMW parked in an abandoned lot near the bank and that it came back as uninsured prompting Noteboom to remove the tag. App. 94, l. 13-95, l. 6. The bank employee's vehicle was allegedly found in the same abandoned lot. App. 95, l. 24-96, l. 2.

Later that day, Petitioner called the sherriff's department reporting his vehicle's license plate stolen. App. 95, ll. 14-16. The call was cleared but later officers including Noteboom responded to the address given on the call. When Noteboom arrived, he saw a BMW from the street but couldn't readily identify it as the same one he saw earlier. To check, he stepped onto private property, went around the vehicle and curtilage, looked inside the vehicle and got the VIN number on direction of investigators "to see if that was the same vehicle". App. 38, ll. 9-25 - 41, ll. 1-14. He then called and requested a search warrant based on what he'd just found. The search warrant was then executed on the vehicle and residence revealing: a shotgun, shotgun shells, masks, gloves a stocking cap and a bag with fifteen thousand dollars inside. App. 96-99.

Petitioner's case was called to trial on January 22nd, 2018. During pretrial motions, defense counsel moved to suppress the evidence found in the search of the vehicle and residence as fruit of the poisionous tree. App. 12, ll. 6-7. Noteboom testified that his reason for going to the residence was to investigate the robbery. App. 43, ll. 5-6. Therefore, defense counsel argued, Noteboom should have obtained a warrant before going to the property. Defense counsel asserted that Petitioners 4th amendment right to privacy was violated the moment Noteboom, without a warrant, stepped onto private property to look into petitioner's vehicle. App. 67-72.

The State argued that the vehicle was in plain view from the street and that Noteboom's walking onto the property to look inside did not constitute a search pursuant to the automobile exception and that if it did, it was just a minimal violation/invasion of privacy. App. 72-76. The State made (Collins V. Commonwealth of Virginia, 138 S. Ct 1663) an exhibit on the record in defense of their argument. App. 72, ll. 16-18. That case was decided 8-1 in Petitioner's favor on May 29th, 2018. App. 208-223.

RELEVANT FACTS

The trial court denied defense's motion to suppress. The court found that the vehicle was in plain view from the road. The court found that Petitioner's privacy 'was violated' as it relates to the 4th amendment, but that it was only 'very minimal'. App. 79, ll. 19-25; 80, ll. 1-6. After the court's denial of Petitioner's motion to suppress, petitioner accepted an 'As Indicted' ALFORD plea containing no admission of guilt, App. 82, l. 20-84, l. 5 as Solicitor Barry Barnette maintained that the state had valid, true billed indictments. App. 83, ll. 1-25, App. 11, ll. 1-11.

At the PCR hearing Petitioner testified that he did not fully understand the consequences of the ALFORD plea and believed he could appeal the denial of the motion to suppress. App. 158, ll. 9-13, App. 163, ll. 14-19. Defense counsel testified that no discussions were had informing petitioner that the plea would waive his right to appeal the motion to suppress. App. 198 ll. [redacted] 15-19. Petitioner testified that his due process rights had been violated when trial judge agreed that the 4th amendment 'was violated', but still denied the motion to suppress. App. 155, ll. 19-25, App. 156, ll. 1-3, App. 163, ll. 2-9. Defense counsel testified that he 'couldn't quite understand' the ruling on the motion to suppress because even if the governmental invasion of privacy was 'minimal', it was still an invasion of privacy. App. 188, ll. 19-25, App. 189, ll. 1-2, 18-23. The application was denied and Judge G. Thomas Cooper failed to rule trial counsel was inneffective and altogether failed to rule on the due process violation claims.

On January 10th, 2022 Petitioner filed a 2nd PCR application based on newly discovered evidence that the state never had indictments at the time of the plea. Such evidence meant that the court violated due process and overstepped its jurisdiction in accepting an 'As Indicted' plea, Solicitor Barry Barnette violated Brady V. Maryland where he suppressed the state's lack of indictments, trial counsel was inneffective for failure to investigate and prepare for trial and for his failure to notice the state's lack of indictments, and the evidence meant that the plea could not have been knowingly, willingly or intelligently entered.

Documentation was sent to the court as exhibits proving that the clerks records|case history had been requested to no avail for years and was only sent to petitioner on May 4th, 2021 and that petitioner received the F.B.I. NCIC report on June 12th, 2021. Both pieces of evidence showed that no indictments existed at the time of the plea. One showed that petitioner was falsely charged with 'failure to appear' which negatively affected his ability to get a bond. The application also noted that where Solicitor claimed petitioner's blood was found on evidence of the crime, no blood test was ever taken. The application was dismissed for untimeliness, successiveness and failure to make a prima facie showing petitioner was entitled to relief. The court also ruled that the evidence could have been discovered 'before the plea'.

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DISCUSSION

"Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by error of law." See (Smalls V. State, 422 S.C. 180-181 (2018)), (Goins V. State, 397 S.C. 568 (2012))

"Issues related to subject matter jurisdiction can be raised at any time". See (Carter V. State, 329 S.C. 355 (1998)), (Eaddy V. Eaddy, 283 S.C. 582 (1984)), (U.S. V. Cotton, 535 U.S. 625, 122 S.Ct 1781 (2002)), (Lake V. Reeder Constr. Co., 330 S.C. 242 (1997))

"The acts of a court in regards to a matter as to which it has no jurisdiction are void". See (State V. Guthrie, 352 S.C 103 (2002)).

"No person shall be held to answer for any crime, the jurisdiction of which is not within magistrate court unless upon an indictment of a grand jury" -(S.C. Const. Art. 1. § 11.)

"No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury...". -(S.C. Code Ann. § 17-19-10, see also 17-23-130 and 17-23-140.)

"Within 90 days after receipt of arrest warrant from the clerk of court, the solicitor shall take action on the warrant by (1) preparing an indictment for presentment to a grand jury, which indictment shall be filed with the clerk of court, assigned a criminal case number and presented to the grand jury..." - See (SCRCrimP Rule 3, section (c))

"Any action taken pursuant to paragraphs (a), (b) and (c) above shall be entered into the records of the clerk of court pursuant to procedures hereafter promulgated by the S.C. court administration.". - See (SCRCrimP Rule 3, section (e))

"If the applicant contends there is evidence of material fact not previously presented, the PCR application must be filed within one year after the date of actual discovery by the applicant or the date when the facts could have been ascertained by excercise of reasonable diligence." See (S.C. Code Ann. § 17-27-45 (c))

Here, Petitioner filed a 2nd PCR within a year of actual discovery of the F.B.I. NCIC report and the clerk of courts case history which both undisputably show that NO INDICTMENTS EXISTED at the time of the 'As Indicted' ALFORD plea containing no admission of guilt. The solicitor suppressed the state's lack of indictments, trial counsel was ineffective for his failure to realize this 'before the plea' and therefore, the plea could not have been valid, knowingly, willingly or intelligently entered where due to the lack of indictments at the time of the plea, the court lacked jurisdiction to even accept an 'As Indicted' plea containing no admission of guilt. See (State V. Guthrie, 352 S.C. 103 (2002) holding: Lack of subject matter jurisdiction may not be waived even by consent of the parties. See also (U.S. V. Cotton, 535 U.S. 625, 122 S.Ct 1781 (2002)), (State V. Gentry, 363 S.C. 93). Also see (Hill V. Lockhart, 474 U.S. 52, 56; 106 S.Ct 366 (1985)).

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CONCLUSION

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

Genuine Truth Banner
Pro Se
Kirkland Correctional - MSU-6
4344 Broad River Rd
Columbia, SC 29210

On this 5th day of December, 2022

A copy of this Petition for Writ of Certiorari has been served on the following by depositing the same in the U.S. mail, postage prepaid:

The Honorable Chelsey F. Marto
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211

The Supreme Court of South Carolina
Attn: Mrs. Patricia A. Howard, Clerk
P.O. Box 11330
Columbia, SC 29211