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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

On Writ of Certiorari to Greenwood County
Brian M. Gibbons, Post-Conviction Relief Judge
D. Garrison Hill, Trial Court Judge

Appellate Case No. 2019-001090

JAMES CARRIER,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

REPLY BRIEF OF PETITIONER

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
Assistant Attorney General
S.C. Bar No. 104174

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

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ARGUMENT

In his amended application for post-conviction relief, Respondent did not challenge the factual sufficiency of the indictment; his only allegation related to the failure to list the correct witness on the indictment form. (App.pp.521–22). Both parties agree that Officer Haden was incorrectly listed as a witness on the indictment.[1] Due to this error, the witness listed on the indictment was not the witness who actually testified before the grand jury, contrary to the requirement of S.C. Code Ann. § 14-7-1550. The PCR court appears to believe that this error was so serious that Respondent's motion to quash the indictment would have succeeded but for Trial Counsel's failure to put up evidence in support of the motion. The PCR court granted Respondent a new trial solely on this claim regarding Trial Counsel's failure to properly challenge the indictment; the fairness of the actual trial at which Respondent was convicted is not in dispute.

Contrary to the reasoning of the PCR court, the minor defect in Respondent's indictments would not have supported a motion to quash even if Trial Counsel had put up sufficient evidence to prove the error to the trial court's satisfaction. In *Evans v. State*, the South Carolina Supreme Court drew a distinction between errors in the "selection or makeup" of the grand jury, which implicate the legality of the grand jury itself, and "minor irregularit[ies] in the functioning or processes of the grand jury." *Evans v. State*, 363 S.C. 495, 512–13, 611 S.E.2d 510, 519 (2005). The Supreme Court held a "circuit court ordinarily should not quash an indictment when a defendant . . . asserts a truly minor irregularity in the grand jury process." *Id.* at 513, 611 S.E.2 at 520. Our appellate courts have rejected challenges to indictments based on minor, technical

[1] The facts of this case are not in dispute; only the legal significance of those facts is at issue. This Court reviews questions of law *de novo*, with no deference to the PCR court. *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018) (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)).

statutory violations. *See, e.g.*, *State v. Orrs*, 189 S.C. 1, 199 S.E. 865 (1938) (holding that a discrepancy in the appearance of jurors' ballots, allegedly in violation of the relevant statute, was an immaterial irregularity that did not justify quashing the indictment). The error complained of in Respondent's indictment is precisely the kind of inconsequential technical error that our appellate courts have rejected as a ground for quashing an indictment.

"[A]n indictment is a notice document. The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, i.e., to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." *Edwards v. State*, 372 S.C. 493, 496, 642 S.E.2d 738, 739 (2007). Neither Respondent, nor the PCR court, have offered any explanation as to how the error in Respondent's indictments frustrated these "primary purposes." It is not disputed that Respondent's indictment adequately informed him of the elements of the offense, allowed him to determine whether the plead guilty or to stand trial, and enabled the circuit court to pronounce an appropriate judgment, notwithstanding the erroneous identification of Officer Haden as the witness.

An indictment may properly be based on evidence that would not be admissible at trial, including hearsay. *See State v. Williams*, 263 S.C 290, 295–96, 210 S.E.2d 298, 301 (1974) ("An indictment based upon hearsay testimony violates no right of the appellant under . . . the South Carolina Constitution.");[2] *United States v. Calandra*, 414 U.S. 338, 349 (1974) ("Because the

[2] Respondent discusses, at length, the solo dissent of Chief Justice Lewis in *State v. Capps*, 276 S.C. 59, 62–68, 275 S.E.2d 872, 873–76 (1981) (Lewis, J., dissenting), in which he claims it was "never our intention" in *Williams* to allow the "routine practice of one individual appearing before the proceeding to give his 'third hand' capsule version of facts [of] which he has no direct knowledge . . . ." Of course, Chief Justice Lewis expressed this view in a *dissenting opinion*, joined by no other Justice. It is telling that Respondent can find no binding precedent deprecating the common practice of using hearsay testimony before the grand jury.

grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial."). The Greenwood County Sheriff's Office policy of sending one representative to give evidence before the grand jury does not violate any substantive right of the accused. Respondent appears to concede that, if the indictments had been amended to correctly identify the actual officer who testified before the grand jury, there would have been no ground for quashing the indictment; the challenged error is *solely* the misidentification of Officer Haden as the testifying witness. However, since *any* witness could have given hearsay testimony before the grand jury, the identity of the witness who testified before the grand jury in this case is not actually material to the propriety of the grand jury's decision. The mere misidentification of a witness on the indictment form, where the identity of the witness is not important, does not require a trial court to quash an otherwise proper indictment.

Finally, a trial judge has the power to amend a defective indictment, as long as the amendment does not alter the nature of the charged offense. S.C. Code Ann. § 17-19-100 ("If . . . there be any defect in form in any indictments . . . , the court before which the trial shall be had may amend the indictment . . . if such amendment does not change the nature of the offense charged."). As the error complained of in this case was merely a defect in form, the trial court could trivially have amended the indictment to list the correct witness had Trial Counsel made the proper showing. The result would be that the trial would proceed as if there had never been any error in the indictment. *See id.* ("After such amendment the trial shall proceed in all respects and with the same consequences as if the indictment had originally been returned as so amended."). Even if the erroneous listing of Officer Haden on the indictment would have justified granting a motion to quash, there is no reason to believe the trial court would have resorted to such an extreme

remedy when a simple amendment under section 17-19-100 would have been sufficient to cure the error.

Nevertheless, even if the trial court would have quashed the indictment but for Trial Counsel's failure to put up evidence in support of his motion, Respondent has not established any prejudice resulting from Trial Counsel's omission. Had the indictments been quashed, nothing would have prevented the State from seeking to re-indict Respondent with the correct witness listed on the indictment. The testimony before the PCR court clearly indicated that re-indictment would have been the next step if Respondent's motion to quash had been granted. (App.p.547, lines 1–9; p.570, lines 5–8). Nor is there any reason to believe the State would have been unable to obtain a new and proper indictment if it had sought one; Respondent had already been indicted twice. There is no legal reason, nor is there any indication in the record, why it would not have been trivial for the State to re-indict Respondent for the charge it had already indicted him for twice before. Therefore, any finding of actual prejudice in this case is baseless. The PCR court's order does not even address the State's argument that Respondent would have been re-indicted if his motion to quash had been granted.

The PCR court, however, goes on to say that Respondent did not have to prove prejudice at all because "prejudice must be presumed" due to the "structural error" in the indictment. The court argues that the erroneous listing of Officer Haden on the indictment form amounts to a deprivation of Respondent's constitutional right to be tried only upon an indictment presented by a legal grand jury. The PCR court cites *State v. Rivera*, 402 S.C. 225, 741 S.E.2d 694 (2013), *Arizona v. Fulminante*, 499 U.S. 279 (1991), and *Chapman v. California*, 386 U.S. 18 (1967), for the proposition that some trial errors implicate such fundamental rights that harmless error analysis is inappropriate. The court claims the error in this case "cuts straight to the pillars of our

democracy" such that "even the existence of overwhelming evidence against [Respondent]" cannot render it harmless. According to the PCR court, the mere listing of Office Haden on the indictment created "a trial process that is presumptively unreliable." The PCR court also ruled that "Trial Counsel's failure to elicit the appropriate evidence, which was available at the time . . . constitutes a constructive denial of counsel[3] . . . ." (App.p.593).

The PCR court's expansive view of "structural error" is incorrect. As pointed out in the State's Brief of Petitioner, structural errors are an extremely limited class of errors which violate rights so fundamental that they are not susceptible to harmless error analysis. Most errors, even constitutional errors, can be harmless. *See Fulminante*, 499 U.S. at 306–07 (collecting cases). The procedural statutory requirement that an indictment list the name of the witness who testified before the grand jury does not create a fundamental constitutional right. Nor is that requirement such an integral part of the right to be tried only upon indictment by a grand jury that the erroneous listing of an incorrect witness on the indictment is equivalent to a deprivation of that right.

In addition, under *Weaver v. Massachusetts*. 137 S.Ct. 1899, 1908 (2017), even a structural error does not absolve a defendant from the requirement of proving prejudice in order to prevail on a claim of ineffective assistance. "[T]he burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or . . . to show that the particular . . . violation was so serious as to render his or her trial fundamentally unfair." *Id.* at 1911; *see also id.* at 1912 (explaining the policy reasons why a presumption of prejudice, which is appropriate for reviewing structural error on direct appeal, is not appropriate for reviewing structural error in a post-

[3] This argument appears to generalize to *all* deficiencies of counsel; by this framing, any deficient act or omission of counsel can be characterized as a "constructive denial of counsel" and, therefore, as a structural error carrying with it a presumption of prejudice. Following the PCR court's reasoning to its logical conclusion would totally obviate the *Strickland* requirement that PCR applicants must prove prejudice resulting from counsel's errors.

conviction relief context). The PCR court, by relying on a "presumption of prejudice," erred as a matter of law.

Respondent cites *Weaver* in an attempt to explain how the error complained of in this case amounts to a structural error. *Weaver* sets forth three categories of structural error: first, violations of rights that are not designed to protect the defendant from erroneous conviction but instead protect some other interest; second, errors whose effects are simply too hard to measure; and third, errors that always result in fundamental unfairness. 137 S.Ct. at 1908. Remarkably, Respondent insists the error in this case falls into *all three* categories. (BOR pp.25–26). The opposite is true. First, the purpose of an indictment is to protect defendants from erroneous convictions by subjecting the State's case to a preliminary evaluation by an independent grand jury and, subsequently, to give the defendant sufficient notice of the charges against him that he can prepare a defense. Second, as discussed above, the effect of the error in the present case is easy to measure—it is zero—because even if it had been properly proved before the trial court, the indictment could easily have been amended or the State could have obtained a new indictment without the error. Finally, the error in this case did not result in fundamental unfairness; apart from this one error, Respondent does not challenge any aspect of the criminal proceedings against him as unfair or improper.

CONCLUSION

For all the foregoing reasons, the State requests this Court reverse the post-conviction relief court's decision finding Counsel ineffective and granting relief.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
Assistant Attorney General
S.C. Bar No. 104174

BY: _____
ZACHARY W. JONES

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

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