STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

R. Markley Dennis, Jr., Circuit Court Judge

CARL B. CRAINE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213624

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Did the PCR court err in holding that Petitioner's trial counsel adequately objected to the State's amendment of the indictment against Petitioner when the Court of Appeals had already explicitly held that objection was not specific enough for its review?

II. Did the PCR court err in holding that Petitioner was not prejudiced by trial counsel's inadequate objection to the amendment of the first-degree burglary indictment when it swapped the aggravating circumstance alleged from entering in the nighttime to having two previous burglary convictions?

STATEMENT

On October 23, 2007, the day before a jury trial in front of the Honorable Edward W. Miller, the State's attorney, Lucas Marchant, made a final pre-trial motion before recessing for the day: to amend Petitioner Carl Craine's first-degree burglary indictment, which originally alleged that the crime in question took place at nighttime, to include Petitioner's two previous burglary convictions. App. 1; App. 45, l. 18 – App. 47, l. 47. "[T]o support that motion, we point the Court to *State v. Corrals* [sic] that there would be no surprise in this case." App. 45, l. 24 – App. 46, l. 1.

Petitioner and his trial counsel, David Harrison, were prepared to face the original first-degree burglary charge in the indictment in front of a jury. App. 1. In fact, believing the evidence was on their side, Petitioner and trial counsel had specifically considered and rejected a plea offer of fifteen years under which the State would not seek sentence enhancement by attempting to show the burglary occurred at nighttime. App. 244. Trial counsel acknowledged that the State's attorney had brought up the topic of this amendment before, and he continued to resist:

> I would say I do believe that this would prejudice my client. And additionally I would argue that the burglary convictions that they're seeking to allege are burglary seconds. Also, they took place more than 10 years ago. So my argument would be that they are not . . . sufficient statutorily to burglary first in lieu of that nighttime charge. For that reason I would argue that it does create prejudice for the defendant.

App. 46, ll. 11-18.

The State had indicted Petitioner on November 11, 2003 on one count of grand larceny and one count of first-degree burglary,[1] alleging that on the night of June 29 to June 30, 2003, he

[1] S.C. Code Ann. § 16-11-311 ((A) provides:

entered a local residence and stole a number of valuables. App. 272-274. To defeat the entire charge under the statute, Petitioner merely had to neutralize the State's already flimsy evidence that the alleged burglary occurred at nighttime. The State only had a written confession from Petitioner that he explained he filled out after "[being] up from anywhere between six to nine days on methamphetamine," App. 35, ll. 8-9; after having using the drug just "a few hours" before," App. 35, l. 13; and after the police "told me you write this statement right here and we'll talk to Judge about getting you out of here. I wanted out so I told them I'd write the statement," App. 36, ll. 11-14. And the state had questionable testimony from Tonya Tant—who was already incarcerated for participating in the burglary at issue—that Petitioner entered the victim's residence at night, even though she originally told police just days after the alleged burglary that Petitioner did not even participate.[2] App. 124-126.

Responding to trial counsel's argument that the State's motion posed prejudice to Petitioner, the trial court retorted, "Well it sure does. But I'm going to grant the State's motion

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> A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either:
> (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:
> (a) is armed with a deadly weapon or explosive; or
> (b) causes physical injury to a person who is not a participant in the crime; or
> (c) uses or threatens the use of a dangerous instrument; or
> (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
> (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or
> (3) the entering or remaining occurs in the nighttime.

[2] A search of the South Carolina Department of Corrections' Incarcerated Inmate Search webpage on July 5, 2013 did not show Tonya Tant to be incarcerated in South Carolina.

to amend the indictment to include the allegations of the two prior convictions to enhance to bring it up to first." App. 46, ll. 19-22. The last-hour ruling mooted Petitioner's defense regarding the nighttime element of the indictment, as well as his grave decision to pursue trial based on the defense.

The next day, the court entered the State's evidence of Petitioner's prior burglary convictions. App. 161. By the time the State rested its case, it had called six witnesses to convince the jury Petitioner participated in the alleged burglary. App. 2-3. Petitioner's trial counsel was reduced to brief cross-examinations and calling Petitioner and his brother to testify. *Id.* The jury deliberated for around forty minutes before finding Petitioner guilty of burglary in the first degree based on the two prior convictions.[3] App. 209-210. The court sentenced Petitioner to twenty-five years in prison. App. 213.

Petitioner timely appealed, arguing that the trial court erred in allowing the State to amend the indictment because swapping the aggravating circumstance alleged changed the nature of the offense he was called to face. App. 215. On November 10, 2010, the Court of Appeals affirmed Petitioner's conviction on grounds that trial counsel's objection and argument were not sufficient to preserve the issue for review. *Id.*

On January 18, 2011, Petitioner filed an Application for Post-Conviction Relief claiming he received ineffective assistance of trial counsel. App. 217-224. The State filed a return on May 26, 2011. App. 226-229. An evidentiary hearing was held before the Honorable R. Markley Dennis on October 29, 2012, in which Petitioner was represented by Caroline Horlbeck, and the State was represented by Karen Ratigan. App. 231.

[3] The jury found Petitioner not guilty of grand larceny. App. 210.

At the PCR hearing, the court seriously questioned both how amending the indictment at the last minute improperly prejudiced Petitioner and how trial counsel did not preserve that issue for review:

> **The court:** [H]ow in the world does changing the different aggravating circumstances change the nature of the offense?
>
> **Ms. Horlbeck:** Judge, that's a fair question. I think what Mr. Craine's issue that he was relying on the night time –
>
> **The court:** I understand that but he doesn't control what the Court is going to do. His lawyer objected to it saying he would be prejudiced. First of all the objection does preserve it for review. I find it interesting that they don't use it sometimes but they use it sometimes because they said if there are other reasons to sustain the appeal, they'll affirm it.
>
> . . .
>
> The next thing is he went to trial. Isn't there an aspect of this ineffective assistance that the outcome would be changed? How is the outcome changed? It goes back to square one. They either re-indict him or they'll move and they'll amend it and they'll try him for multiple burglaries. He's not said anything other than the fact that the amendment was improper. Well, that doesn't change the outcome. We got back and he's tried and he gets the same result.

App. 250, l. 11 – App. 252, l. 7. On November 8, 2012, the PCR court issued an order of dismissal, ruling that Petitioner failed to prove ineffective assistance of trial counsel. App. 266-271. The order stated that trial counsel made a proper objection to the State's motion to amend the indictment. App. 270. The order also stated that no prejudice could have resulted from an insufficient objection because the amendment was legally permissible and because trial counsel testified that the denial of the objection did not impact his defense strategy. *Id.*

This petition for writ of certiorari follows.

ARGUMENT

STANDARD OF REVIEW

"This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and will reverse the decision of the PCR court when it is controlled by an error of law." *Lomax v. State,* 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

DISCUSSION

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *Strickland v. Washington,* 466 U.S. 668 (1984). The United States Supreme Court has created a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland,* 466 U.S. at 687. "The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

I. The PCR court committed a legal error in holding that Petitioner's trial counsel adequately objected to the State's motion to amend the indictment because the Court of Appeals had already ruled that the objection was not specific enough to preserve the argument for appellate review.

The PCR court committed a legal error in holding that Petitioner's trial counsel adequately objected to the State's motion to amend the indictment because the Court of Appeals had already ruled that the objection was not specific enough to preserve the argument for appellate review. "An appellate court cannot address an issue unless first raised by appellant and

ruled on by the trial judge." *Thomasko v. Poole*, 349 S.C. 7, 10, 561 S.E.2d 597, 598 (2002). "Under the law of the case doctrine, 'a party is precluded from re-litigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.'" *Sloan Const. Co. v. Southco Grassing, Inc.*, 395 S. C. 164, 169-70, 717 S.E.2d 603, 606 (2011) (quoting *Judy v. Martin*, 381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009)). "'The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case.'" *Id.* (quoting *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957)).

In the matter at hand, the law of the case doctrine establishes that trial counsel did not adequately object to the State's amendment of the indictment. Petitioner appealed to the Court of Appeals the propriety of the amendment to the indictment, arguing that the trial court erred in allowing the State to amend the indictment because swapping the aggravating circumstance alleged changed the nature of the offense he was called to face. Implicit in that appeal was Petitioner's contention that his trial counsel properly raised this specific argument to the court below and obtained a ruling thereon from the trial judge. Naturally, the Court of Appeals was obligated to determine whether that issue was in fact so preserved. It explicitly held in its opinion of November 10, 2010 that trial counsel's objection and argument were not sufficient to preserve the issue for review. Therefore, the PCR court was bound by this ruling both as the law of the case and as the ruling of a superior court. The PCR court could not hear independent arguments or make an independent decision as to the adequacy of trial counsel's objection. Thus, trial counsel did not adequately object and his performance was deficient as a matter of law. *Accord Foye v. State*, 335 S.C. 586, 590, 518 S.E.2d 265, 267 (1999) ("Petitioner's counsel testified at the PCR hearing that he asked the trial judge at a bench conference to question the

jurors to determine whether any of the seated jurors had seen petitioner in chains. The trial judge denied the request. However, because this request was not on the record, the Court of Appeals refused to address this issue. Thus, counsel was deficient because he failed to adequately preserve this issue for review.").

II. The PCR court committed a legal error in holding that Petitioner did not suffer prejudice because had trial counsel adequately objected to the amendment of the indictment, the Court of Appeals would have reversed Petitioner's conviction.

The PCR court committed a legal error in holding that Petitioner did not suffer prejudice because had trial counsel adequately objected to the amendment of the indictment, the Court of Appeals would have reversed Petitioner's conviction. A criminal defendant "has a constitutional and statutory right to demand that a properly constituted grand jury consider his case and decide whether to issue a sufficient indictment." *State v. Means*, 367 S.C. 374, 383, 626 S.E. 2d 348, 353 (2006).

> 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.

Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005). After presentment, the State may amend an indictment if either the amendment does not change the nature of the offense, the amended charge is a lesser included offense, or the defendant waives presentment of the amended indictment and pleads guilty. *State v. Means* at 385-86, 348 S.E. 2d at 355 (citing *State v. Myers*, 313 S.C. 391, 438 S.E.2d 236 (1993); S.C. Code Ann. § 17-19-100 (2003)). A defendant must make any objection to the sufficiency of an indictment before the jury is sworn, *Id.* at 384, 348 S.E.2d at 354.

In *State v. Lynch*, 344 S.C. 635, 545 S.E.2d 511 (2001), *overruled on other grounds*, *State v. Gentry*, 363 S.C. 93, 610 S.E2d 494 (2005), the South Carolina Supreme Court held that the State's swapping the aggravating circumstance in an indictment charging first degree burglary from entering in the nighttime to causing physical damage changed the nature of the offense because the proof required for each circumstance was materially different and therefore changed what the defendant was called upon to answer.[4]

In the matter at hand, the PCR court committed an error of law when it held that amending the indictment was legally permissible. The State originally called Petitioner to answer its accusation that he committed burglary at nighttime, and based on this accusation and the supporting evidence, Petitioner decided to stand trial. Thereafter, under *State v. Lynch* the State could not amend the indictment by swapping the aggravating circumstance unless Petitioner waived presentment and pled guilty. Had trial counsel adequately objected and preserved the issue for review, the Court of Appeals would have reversed Petitioner's conviction in his subsequent appeal.

Notably, prejudice would still result if the State later indicted Petitioner on the amended grounds because in such a case Petitioner would have another opportunity to plea bargain for a reduced sentence. *See Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in

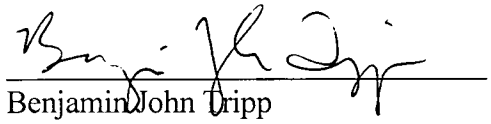
[4] The Supreme Court restated this holding from *Lynch* in *State v. Means*, 367 S.C. at 386-87, 348 S.E. 2d at 355.

the criminal process at critical stages. . . . In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." (citations omitted)); *Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012) ("'The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain.'" (quoting Stephanos Bibas, *Regulating the Plea–Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L.Rev. 1117, 1138 (2011))).

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner Carl Craine's petition for writ of certiorari to allow full briefing on the issue.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of July, 2013.

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of July, 2013.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 8th day
of July, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.