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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.

BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief court err in finding Respondent met his requisite burden of proof?

- a. Did the post-conviction relief court err in finding Respondent was entitled to post-conviction relief due to Counsel's failure to call a witness during a motion to quash Respondent's indictment, when Respondent's indictment provided him with sufficient notice of his charges and was facially valid?
- b. Did the post-conviction relief court err as a matter of law in finding Respondent's alleged prejudice amounted to a structural error requiring a new trial?

STATEMENT OF THE CASE

Respondent is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. During the June 2012 term, the Greenwood County Grand Jury indicted Respondent for lewd act (2012-GS-24-1166). Eighth Circuit Public Defender E. Charles Grose (Counsel) represented Respondent. Assistant Solicitors Elizabeth P. White Taylor and Andrew Hodges of the Eighth Circuit Solicitor's Office prosecuted the case. On June 18, 2012, Respondent proceeded to trial before the Honorable D. Garrison Hill, circuit court judge. On June 19, 2012, the jury found Respondent guilty as indicted. Judge Hill sentenced Respondent to imprisonment for fifteen years.

A notice of appeal was filed on Respondent's behalf and an appeal perfected by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense. The South Carolina Supreme Court affirmed Respondent's conviction and sentence. State v. Carrier, Op. No. 2014-MO-043 (S.C. Sup. Ct. filed October 22, 2014). The Remittitur was issued on November 7, 2014.

Respondent filed his timely application for post-conviction relief on December 12, 2014, alleging that he was being held unconstitutionally based on the following allegations:

1. "No evidence"
2. "No profe(sic)"
3. "No wittiness(sic)"

Respondent filed its return and partial motion to dismiss for failing to state a cognizable post-conviction relief claim. On October 18, 2018, Respondent, through counsel, filed an amended application alleging:

1. Trial counsel was ineffective for failing to call a witness or witnesses who would establish that indictment number 2012-GS-24-1166 was defective on its face because the witness listed on the indictment was not present for presentment to the grand jury.

A post-conviction relief hearing was convened on February 26, 2019, at the Greenwood

County Courthouse where Respondent proceeded on the allegation in his amended application. On May 6, 2019, the post-conviction relief court signed Respondent's proposed order granting post-conviction relief finding Counsel was ineffective for failing to prove his assertion that the witness listed on the indictment was not present during the grand jury proceeding, which prejudiced Respondent; further, the post-conviction relief court found the error with Respondent's indictment was a structural error. This order was filed by the Greenwood Clerk of Court on May 8, 2019. Petitioner filed a motion to alter or amend the order, which was denied. Thereafter, on July 17, 2019, Petitioner filed a notice of appeal. This Court granted Petitioner's petition for a writ of certiorari.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

The post-conviction relief court erred in finding Respondent met his requisite burden of proof.

- A. The post-conviction relief court erred in finding Respondent was entitled to post-conviction relief due to Counsel's failure to call a witness during a motion to quash Respondent's indictment, because Respondent's indictment provided him with sufficient notice of his charges and was facially valid.**

The post-conviction relief court erred in finding Respondent was entitled to a new trial due to Counsel's failure to call the witness listed on the indictment during his motion to quash because, even if Counsel had successfully quashed Respondent's indictment, the State testified it would have pursued a new indictment against Respondent and proceeded to trial. As such, Respondent failed to establish any resulting prejudice as the State's testimony shows Respondent would have proceeded to trial regardless of whether Counsel was successful in quashing any of Petitioner's indictments, and Respondent failed to show the post-conviction relief court any evidence that indicated the result of his trial would have been different had he proceeded to trial on an indictment that listed a different witness. Further, the indictments obtained against Respondent were facially valid and provided sufficient notice to Respondent regarding his charges. As such, Respondent failed to meet his burden under Strickland to show any resulting prejudice from Counsel's alleged deficiency, and this Court should reverse the grant of post-conviction relief.

"South Carolina courts have held the sufficiency of an indictment must be viewed with a practical eye. All the surrounding circumstances must be weighed before an accurate determination of whether a defendant was or was not prejudiced can be reached." State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (2002) (citations omitted). Here, it is undisputed that Respondent's indictments were presented to the Greenwood County Grand Jury and, although the name of the witness listed on the indictment was not the witness who testified before the grand jury, Respondent has failed to show the testifying witness was an improper witness. As Haden testified

during the PCR hearing, his cases would have been reassigned upon his departure and Respondent's case would have continued to be investigated by the sheriff's office. (App. 546.) Respondent has failed to show that the witness that did testify was not a proper witness with knowledge of Respondent's case.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 300 S.C. 115. The South Carolina Supreme Court held, "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697.

Here, Respondent has failed to meet his burden to prove prejudice under the Strickland analysis as he failed to show that the State would not have been able to obtain a valid indictment against him for the charged offense. At the PCR hearing, former Assistant Solicitor Taylor (Taylor) testified, had Counsel been successful in quashing either of Respondent's indictments, she would have obtained another indictment on Respondent and proceeded to trial. (App. 570.) Former Sheriff Deputy Christopher Haden (Haden)¹ who was the lead investigator in Respondent's case and the witness named on both of Respondent's indictments also testified at the

¹ Former Deputy Christopher Haden is the witness listed on the indictment. Haden was the lead investigator in Respondent's case prior to leaving the sheriff's office. At the PCR hearing, Haden testified he did not present Respondent's case to the grand jury for either indictment obtained by the State against Respondent. (App. 545-546.)

PCR hearing. During the PCR hearing, Haden testified that Respondent most likely would have been re-indicted had Counsel been successful in quashing either of Respondent's indictments. (App. 570.) Haden testified upon his departure from the sheriff's office his active cases would have been reassigned to another investigator. (App. 546.)

Although Haden's testimony shows an irregularity in Respondent's indictment, Respondent has failed to show how that irregularity impacted the grand jury's decision to issue the indictment in Respondent's case. Respondent has also failed to establish that the presentation of the evidence against Respondent during the grand jury process was not fairly or properly presented. See Commonwealth v. Silva, 455 Mass. 503, 512, 918 N.E2d 65, 77 (2009) ("The Commonwealth's presentation was sloppy in parts, but that sloppiness does not appear to have been designed to secure indictments, and the presentation to the grand jury appears to have been generally fair and balanced. In addition, the subjects of the defendant's claim of impairment probably had no impact or would have had no impact, on the decision to indict.")

In State v. Smith, 200 S.C. 188, 20 S.E.2d 726 (1942), the South Carolina Supreme Court addressed whether a jury panel should be quashed based upon Smith's contention that the venire had been illegally drawn. In their holding the Court stated, "The defendant has not shown, or attempted to show, that he was prejudiced. . . . The drawing apparently was a public one, held at the proper time and place, and regularly conducted by the proper officers. Any irregularity has not affected the right of the defendant to a trial by a fair and impartial jury, nor prejudiced him in any way." Id. at 196-197, 20 S.E.2d 730. In Respondent's case, the indictment provided Respondent with sufficient notice of his lewd act charge, was true billed, and signed by the jury foreman. Respondent proceeded to a jury trial, which he has not alleged was unfair, on the same information that would have been presented to any subsequent grand jury had Counsel been

successful in quashing either of his previous indictments. Respondent has not shown how the irregularity would have impacted the grand jury's decision, or the State's ability to obtain a future indictment as he has not established that improper information was presented or that a knowledgeable witness did not testify before the grand jury.

Additionally, Respondent failed to show any actual abuse of the grand jury proceeding, which would have resulted in either of his indictments being quashed. "When a defendant timely moves to quash an indictment . . . , the [trial] court must determine whether the defendant[']s constitutional right to have the criminal allegations against him weighed by a properly constituted grand jury has been violated." State v. Shands, 424 S.C. 106, 119, 817 S.E.2d 524, 531 (2018) (quoting Evans v. State, 363 S.C. 495, 510, 611 S.E.2d 510, 518 (2005)). "Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary." Shands, 424 S.C. at 120-121, 817 S.E.2d at 532 (quoting State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991)). "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment." Id. at 502, 409 S.E.2d at 424.

Here, it is uncontested that Respondent's indictments were presented to the grand jury, true billed, and signed by the foreman. Respondent has only been able to establish the witness named on the indictment was not the witness who presented before the grand jury; Respondent has failed to show that the witness who did present to the grand jury was unknowledgeable about the facts of the case or in any way incapable of presenting the grand jury with the necessary information for making its probable cause determination. Based on Haden's testimony, he was not the only person who would have been able to properly present this case before a grand jury and, although Respondent speculates that his indictment was obtained through the abuse of the grand jury

process, he has failed to show that an improper witness presented his case to the grand jury. As such, Respondent has failed to meet his burden as set forth in Strickland, and this Court should reverse the decision of the post-conviction relief court.

B. The post-conviction relief court erred as a matter of law in finding Respondent's alleged prejudice amounted to a structural error requiring a new trial.

The post-conviction relief court erred as a matter of law in finding the error in Respondent's indictment was a structural error and finding that prejudice is presumed in Respondent's allegation.

The United States Supreme Court has distinguished between trial errors and structural defects in the trial mechanism itself. State v. Jenkins, 412 S.C. 643, 773 S.E.2d 906 (2015). "Structural defects 'affect the entire conduct of the trial from beginning to end[.]'" Id. at 650-651, 773 S.E.2d at 909, (quoting Arizona v. Fulminante, 499 U.S. 279 (1991)). The United States Supreme Court has, "characterized . . . 'structural' [error] to 'a very limited class of errors' that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole." United States v. Davila, 569 U.S. 597, 611, (2013) (quoting United States v. Marcus, 560 U.S. 258, (2010)). The Court goes on to hold, "errors of this kind include denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt." Id. at 611. In United States v. Cotton, 535 U.S. 625 (2002), the United States Supreme Court found **an error in an indictment did not fall within the "limited class" of structural errors.** Cotton, 535 at 633 (emphasis added). The Court held, ". . . even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity or public reputation of judicial proceedings." Id. at 632-633.

The post-conviction relief court held, "The Fifth Amendment to the United States Constitution states in part that 'no person shall be held to answer for a capital, or otherwise

infamous crime, unless on a presentment or indictment of a grand jury...” (App. 592.) However, the Fifth Amendment Indictment Clause does not apply to state criminal trials. Hurtado v. California, 110 U.S. 516, 538 (1884) (Fifth Amendment grand jury requirement is not binding on the states); Alexander v. Louisiana, 405 U.S. 625, 633) (1972).

The post-conviction relief court also cites to Article I, Section 11 of the South Carolina Constitution as evidence that the error in Respondent’s indictment was structural. As quoted in the order, the highlighted section of the South Carolina Constitution states, “No person may be held to answer for any crime the jurisdiction over which is not within the magistrate’s court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed.” (App. 593.)

Here, as the order concedes, Respondent’s indictments were presented to the Greenwood County Grand Jury. As Counsel testified during the PCR hearing, Respondent’s indictments appeared to be facially valid; they were true billed and signed by the foreman, which would show the regularity of the grand jury process at the time Respondent’s indictments were issued. (App. 565.) “In the absence of evidence to the contrary, regularity of the proceedings of a court of general jurisdiction will be assumed.” Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). Although the incorrect witness was listed on the indictment, the indictment was issued with all of the indications of a regular proceeding. Respondent has not shown that the witness who did testify before the grand jury was improper, or that the State would be in some way precluded from obtaining another indictment against Respondent for lewd act. Respondent has only established a technical error on the indictment as he has failed to show that no witness or an improper witness testified, or that he was not properly indicted by the grand jury. “Structural defects ‘affect the entire conduct of the trial from beginning to end’. . . Differentiating between structural and trial

errors serves to ‘enforce procedural safeguards while ensuring that inconsequential, technical errors do not result in a new trial.’” State v. Jenkins, 412 S.C. 643, 650-51, 773 S.E.2d 906, 909 (2015) (quoting State v. Chavis, 412 S.C. 101, 115, 771 S.E.2d 336, 343 (2015)).

Additionally, the indictment in Respondent’s case could have been amended prior to trial had the name of the testifying witness been known. “An indictment may be amended provided such amendment does not change the nature of the offense charged.” State v. Guthrie, 352 S.C. 103, 572 S.E.2d 309 (2002) (citations omitted). The limited class of structural errors set forth by the United States Supreme Court would not be able to be corrected by a simple amendment; the nature of those errors can only be addressed by initiating a new proceeding. Here, Respondent’s proceeding would have been exactly the same except for the witness named on the indictment. The information contained in the indictment, counsel for Respondent, the evidence presented against Respondent, and the jury instructions in Respondent’s case would have all remained the same. As the holding in Cotton established, an error in the indictment is not the kind of pervasive error the United State Supreme Court has identified in the narrowly tailored class of structural errors. Therefore, the post-conviction relief court improperly found the error in Respondent’s indictment qualified as a structural error and therefore presumed Respondent proved he was prejudiced thereby meeting the requisite burden of proof set forth in Strickland. As such, this Court should reverse the decision of the post-conviction relief court.

CONCLUSION

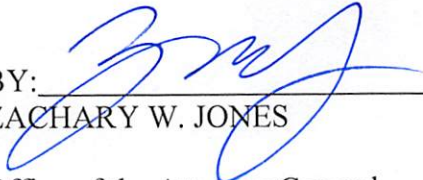
For all the foregoing reasons, the State requests this Court reverse the post-conviction relief court's decision finding Counsel ineffective and granting relief.

Respectfully submitted,

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