

STATE OF SOUTH CAROLINA
In the Supreme Court

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Appeal from Greenwood County
Court of Common Pleas
Brian M. Gibbons, Circuit Court Judge

S.C. SUPREME COURT

Opinion No. 6030 (S.C. Ct. App. filed October 25, 2023)

Appellate Case No. 2023-001933

JAMES L. CARRIER,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF THE ISSUE

Did the Court of Appeals err by reversing the PCR court's grant of Petitioner's application for post-conviction relief when the PCR court correctly determined (1) trial counsel performed deficiently by failing to present irrefutable and undisputed evidence in support of his motion to quash, which would have shown that the witness listed on the indictments never testified before the grand jury, and (2) that either Petitioner suffered prejudice as a result of counsel's deficient performance because his motion to quash would have been granted or prejudice was presumed due to the structural error resulting from the State's abuse of the grand jury process?

RESPONDENT'S COUNTER-STATEMENT OF THE ISSUE

The court of appeals correctly reversed the circuit court's grant of Petitioner's application for post-conviction relief.

- a. The court of appeals correctly held the erroneous listing of a witness on the indictment was not a "structural error."
- b. The court of appeals correctly held Petitioner failed to prove actual prejudice.
 - i. The indictment was legally sufficient despite the minor error in form.
 - ii. The trial court could have amended the indictment rather than quashing it.
 - iii. The State would likely have obtained another indictment even if the trial court had granted the motion to quash.
 - iv. The resulting trial and jury verdict rendered any error in the grand jury proceeding harmless.

STATEMENT OF THE CASE

Petitioner 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 Petitioner for lewd act (2012-GS-24-1166). Eighth Circuit Public Defender E. Charles Grose (“Counsel”) represented Petitioner.

On June 18, 2012, Petitioner proceeded to trial before the Honorable D. Garrison Hill, circuit court judge. Prior to jury selection, Counsel moved to quash the indictment, asserting that the witness named on the indictment, Christopher Haden, was not present at the time the indictment was presented to the grand jury. However, Counsel did not produce any evidence to substantiate this assertion, and the trial court denied the motion. On June 19, 2012, the jury found Petitioner guilty as indicted. Judge Hill sentenced Petitioner to imprisonment for fifteen years.

A notice of appeal was filed on Petitioner’s behalf and an appeal perfected by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense. The issue on appeal was whether the trial court erred in denying the motion to quash the indictment. The South Carolina Supreme Court affirmed Petitioner’s conviction and sentence, holding “where a motion to quash an indictment is unsupported by evidence, ‘it cannot be held to have been denied erroneously.’” State v. Carrier, Op. No. 2014-MO-043 (S.C. Sup. Ct. filed October 22, 2014) (quoting State v. Brownfield, 60 S.C. 509, 515, 39 S.E. 2, 4 (1901)). The Remittitur was issued on November 7, 2014.

Petitioner 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, Petitioner, 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 Petitioner proceeded on the allegation in his amended application. At that hearing, Petitioner produced evidence that Christopher Haden was not employed by the Greenwood County Sheriff's Office at the time the indictment was presented to the grand jury and did not participate as a witness during the presentment, despite being listed as a witness on the indictment sheet.

On May 6, 2019, the post-conviction relief court signed Petitioner's proposed order granting post-conviction relief, finding Counsel was deficient for failing to produce evidence to prove his assertion that the witness listed on the indictment was not present during the grand jury proceeding. The court further found that Petitioner was prejudiced by Counsel's deficiency and that the error with Petitioner's indictment was a structural error. This order was filed by the Greenwood Clerk of Court on May 8, 2019.

Respondent filed a motion to alter or amend the order, which was denied. Thereafter, on July 17, 2019, Respondent filed a notice of appeal. The court of appeals reversed the decision of the post-conviction relief court. Carrier v. State, 441 S.C. 547, 895 S.E.2d 679 (Ct. App. 679). Petitioner filed a petition for rehearing, which was denied. Petitioner then filed a petition for a writ of certiorari to review the decision of the court of appeals. This Return follows.

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), SCRCPP; 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. 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." Id. 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 court of appeals correctly reversed the circuit court’s grant of Petitioner’s application for post-conviction relief.

A. The court of appeals correctly held the erroneous listing of a witness on the indictment was not a “structural error.”

This case concerns the “prejudice” prong of Strickland.¹ The post-conviction relief court found the erroneous listing of Christopher Haden as the witness before the grand jury on the indictment amounted to a “structural error,” such that “prejudice must be presumed.” The court of appeals reversed, holding the error was not structural. The court of appeals’ holding was correct.

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 650–51, 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)). “[E]rrors 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. The mere fact that an error implicates a substantial constitutional right does not render an error structural, if “the error did not seriously affect the fairness, integrity or public reputation of judicial proceedings.” United States v. Cotton, 535 U.S.

¹ Respondent did not contest on appeal the PCR court’s finding that trial counsel’s performance was deficient or that the listing of Officer Haden on the indictment was a violation of S.C. Code Ann. section 14-7-1550.

625, 632–33 (2002) (holding an error in an indictment did not fall within the “limited class” of structural errors).

The United States Supreme Court, in Weaver v. Massachusetts, 582 U.S. 286 (2017), has articulated three categories of structural errors: (1) violations of rights designed to protect some interest of the defendant other than his interest against erroneous convictions; (2) errors with unmeasurable effects; and (3) errors that necessarily result in fundamental unfairness. 582 U.S. at 295–96.

The court of appeals thoroughly examined the Weaver categories and held that the error complained of in this case did not fall into any of them. First, the court of appeals held “the right to an indictment, as well as the right to a grand jury, *are* rights designed to protect against erroneous convictions.” Carrier, 441 S.C. at 559, 895 S.E.2d at 686. This holding is correct because the purpose of the indictment requirement is to subject 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; both of these functions are obviously designed to prevent erroneous convictions, rather than to protect some other interest of the defendant.

Second, the court of appeals held “the effects of this error are not fatally difficult to measure,” because, had the error been timely and appropriately challenged, the trial would have proceeded in the same fashion as it did. Id. at 559–60, 895 S.E.2d at 686.² This holding is also correct, because the error could have been corrected by the trial court amending the indictment or by the State simply obtaining another indictment.

² Petitioner now argues that the effect of the error was impossible to measure because, without knowing who presented the indictment to the grand jury, there is no way of knowing whether the charges against Petitioner were properly founded upon probable cause. The fact that Petitioner was found guilty beyond a reasonable doubt by a unanimous verdict of the trial jury suffices to refute this argument. This point is discussed further in Section (B)(iv) of this Return, *infra*.

Third, the court of appeals held “[t]he wrong name of a presenting witness listed on the indictment did not create any fundamental unfairness” toward Petitioner. Id. at 560, 895 S.E.2d at 686. The court noted that Petitioner had not challenged any aspect of his trial process as unfair or improper, except for the indictment issue.

For all these reasons, the court of appeals correctly held the error on the indictment did not fall into any of the three categories of structural errors articulated in Weaver. Therefore, the court of appeals held Petitioner was not entitled to a presumption of prejudice but was required to meet the ordinary burden of proving actual prejudice under Strickland.

B. The court of appeals correctly held Petitioner failed to prove actual prejudice.

Although the post-conviction relief court found Petitioner was entitled to a presumption of prejudice, it nevertheless made a separate finding that Petitioner had also proven actual prejudice from the erroneous listing of Haden as the witness before the grand jury on the indictment. The court of appeals reversed, correctly holding the error was not prejudicial for multiple reasons. Each of the following reasons individually suffices to defeat a finding of prejudice; together, they overwhelmingly demonstrate that Petitioner was not deprived “of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687.

i. The indictment was legally sufficient despite the minor error in form.

The court of appeals correctly held the mere fact that the indictment incorrectly listed Haden as the witness did not render it legally insufficient, because the error was only a minor irregularity in form and did not implicate the notice function of the indictment or the legality of the grand jury process in Petitioner’s case.

The minor defect in Petitioner’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 “truly 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 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 Petitioner’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 Petitioner, nor the PCR court, have offered any explanation as to how the error in Petitioner’s indictments frustrated these “primary purposes.” It is not disputed that Petitioner’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.”);³ United States v. Calandra, 414 U.S. 338, 349 (1974) (“Because the 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. Petitioner 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.

As Counsel’s motion to quash the indictment likely would not have succeeded even if he had properly produced evidence in support of his claim, Petitioner cannot have been prejudiced by

³ Petitioner 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 Petitioner can find no binding precedent deprecating the common practice of using hearsay testimony before the grand jury.

Counsel's failure to do so. Accordingly, the court of appeals correctly reversed the PCR court's grant of relief, and this Court should deny the petition for a writ of certiorari.

ii. The trial court could have amended the indictment rather than quashing it.

The court of appeals correctly held Petitioner was not prejudiced by Counsel's conduct because, even if Counsel had substantiated his claim that Haden was not the witness who presented the indictment to the grand jury, the appropriate action for the trial court to take would have been to simply amend the indictment rather than quashing it.

The court of appeals cited S.C. Code Ann. section 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 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."). The court of appeals cited multiple cases in which section 17-19-100 had been used to amend indictment errors that were virtually indistinguishable from the error complained of in this case: State v. Batson, 261 S.C. 128, 198 S.E.2d 517 (1973); State v. Sweat, 221 S.C. 270, 70 S.E.2d 234 (1952); State v. Jones, 211 S.C. 319, 45 S.E.2d 29 (1947); State v. McGill, 191 S.C. 1, 3 S.E.2d 257 (1939); State v. Richey, 88 S.C. 239, 70 S.E. 729 (1911); State v. May, 45 S.C. 509, 23 S.E. 513 (1896).

Therefore, 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 and allow the trial to proceed. Accordingly, the court of appeals correctly held Petitioner was not prejudiced. This affords another, independent reason for this Court to deny the petition for a writ of certiorari.

iii. The State would likely have obtained another indictment even if the trial court had granted the motion to quash.

The court of appeals also correctly held Petitioner had failed to prove prejudice because “the State likely would have obtained another indictment if the trial court had chosen to quash it.” Had the indictments been quashed, nothing would have prevented the State from seeking to re-indict Petitioner 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 Petitioner’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; Petitioner had already been indicted twice, once in 2009 and once in 2012. 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 Petitioner for the same charge it had already indicted him for twice before. Therefore, the court of appeals correctly held Petitioner failed to prove he was prejudiced by Counsel’s failure to successfully quash his indictment.

iv. The resulting trial and jury verdict rendered any error in the grand jury proceeding harmless.

Finally, this Court should deny the petition for a writ of certiorari because any conceivable impropriety in the grand jury’s determination of probable cause was rendered completely harmless by Petitioner’s subsequent conviction at trial. The United States Supreme Court addressed a very similar case in United States v. Mechanik, 475 U.S. 66 (1986). In that case, two witnesses testified

jointly before the grand jury, in violation of Federal Rule of Criminal Procedure 6(d). The Court of Appeals for the Fourth Circuit vacated the defendant's convictions on the ground that the resulting indictment had been tainted by the violation. The supreme court reversed.

The supreme court held the purpose of the rules governing grand jury indictments was to "protect[] against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty." Id. at 70. However, Mechanik had already been tried and found guilty based on the indictment. The supreme court held the trial jury's verdict of guilty rendered the error in the grand jury proceedings harmless. While the grand jury merely had to find probable cause, the trial jury was required to find Mechanik guilty beyond a reasonable doubt; therefore, *a fortiori*, the trial jury's guilty verdict proved that the charges against Mechanik were supported by probable cause. Accordingly, Mechanik could not have been prejudiced by any error relating to the witnesses who presented the indictment to the grand jury. Id.

The same reasoning applies in the present case. Petitioner was convicted following a jury trial, and he has not alleged any unfairness or impropriety in the conduct of the trial itself. The jury unanimously found Petitioner guilty beyond a reasonable doubt. *A fortiori*, therefore, the charges against Petitioner were also supported by probable cause. Unlike in a grand jury proceeding, Petitioner had the right to be present at his trial, along with his Counsel; Petitioner had the opportunity to cross-examine the State's witnesses or challenge admission of the State's evidence; Petitioner had the opportunity to argue his side of the story and to produce evidence in his defense. Despite all these advantages, Petitioner was convicted. There is no possibility that, in a grand jury proceeding without any of these advantages for the defense, the State would have been unable to meet the much lower standard of showing probable cause. Therefore, any error in the grand jury process in this case was clearly harmless.

Although the court of appeals did not base its decision on this ground, Respondent raises it now as an additional ground for the denial of the petition for a writ of certiorari. See Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”); I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 417–23, 526 S.E.2d 716, 721–25 (2000).

CONCLUSION

For all the foregoing reasons, Respondent asks this Court to deny Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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