

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas
Post Conviction Relief

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S.C. SUPREME COURT

John C.Hayes,III Circuit Court Judge

C.A. No.: 2014-CP-46-0620

Willie E.Gordon,Jr.,.....Petitioner,

VS.

State of South Carolina.,.....Respondent,

EXPLANATION PURSUANT TO RULE 243 (C), SCACR

This matter is now before the Court pursuant to the Petitioner's Notice of Intent to Appeal, which were submitted to this Court on June 29,2015.

On March 5,2014, the Petitioner filed an Application for Post Conviction Relief, which addressed Indictment No.: 2000-GS-46-3180. There was no evidentiary hearing held in this matter. The Post Conviction Relief Court the Honorable John C.Hayes issued an order of Dismissal on April 9,2015.

PROCEDURAL HISTORY

On January 16,1997, the Petitioner was indicted by the York County Grand Jury for trafficking in more than 400 grams of crack cocaine between April 1996 to October 1996, Indictment Number 97-GS-46-0266. On February 20,1997, the Petitioner was indicted by the York County Grand Jury for three counts of possession of crack cocaine within proximity of a school Indictment Number 97-GS-46-0414, 97-GS-46-0415 and 97-GS-46-0416. On April 17,1997, the Petitioner was indicted on a seven count supercede federal style indictment for conspiracy to trafficking more than 400 grams of cocaine from May of 1995 until the date of the indictment. Indictment number 97-GS-46-1286, which encompassed the offense dates of the previous indictments.

On May 5,1997 the State called original indictment number 97-GS-46-1286 the seven count indictment initially, the State moved forward on counts 1 and 7. Count 1 alleged that Mr. Willie Gordon, along with eight other individuals from May of 1995 until the date of the indictment, April 17,1997 did knowingly conspire by various means to traffic 400 grams or more of cocaine. Count 7 alleged that Mr. Gordon, Spencer Gordon and Renee Leach did on or about September 27,1996 knowingly conspire by various means to traffic more than 10 grams but less than 28 grams of cocaine. In addition, the State proceeded on an additional indictment charging the Petitioner with possession of crack cocaine with intent to distribute within proximity of a half mile of a school on September 27,1996.

The Petitioner was represented by Leland B.Greely, unlike State V Gentry 610 S.E 2d 494 Counsel made a Motion to quash indictment number 97-GS-46-1286 according to S.C. Code Ann §17-19-90, because the indictment was too broad and because the indictment had cocaine instead of crack cocaine in response, indictment number 97-GS-46-1286 was quashed.

In order to move forward with the case on May 5,1997 and to place the Petitioner on notice of the crime charged and avoid having to produce a bill of particulars with indictment number 97-GS-46-1286 By agreement of all three Parties the original 400 grams in indictment number 97-GS-46-0266 was scratched completely out and the Honorable Judge Rushing wrote in the Indictment 10 to 28 grams sell and or/delivery on "September 23,1996 only" this was agreed on by the Honorable Judge Rushing and Solicitor Kevin Brackett and Counsel Leland B.Greely. Indictment number 97-GS-46-0414 was amended to distribution on September 23,1996.

Over trial counsel's objection and request for a continuance, the case was called to trial on May 5, 1997, before the Honorable Don S. Rushing on Indictment number 97-GS-46-0266. On May 6,1997, the State's informant, Tommy James Rhinehart, testified regarding a drug transaction three days prior to September 23,1996. As a result, the defense requested and was granted a mistrial based upon State V. Carter. Although the mistrial was granted, Jeopardy was still attached to Indictment number 97-GS-46-0266, I believe jeopardy remains with indictment 97-GS-46-0266. I do not believe the State can narrow the 400 grams down in indictment number 97-GS-46-0266 to 10 to 28 grams

swear the Jury in on this indictment 97-GS-46-0266 then have a mistrial then go back and get the 400 grams in indictment number 97-GS-46-1286 and go back to the York County Grand Jury and amend count five of the indictment from September 21 through September 23 1996. 28 to 100 Grams just to get around the order of the Honorable Judge Rushing.

On September 12,1997 the original indictment number 97-GS-46-0266 was dismissed.

In The opinion of The Supreme Court, Opinion# 25737 In The State of South Carolina vs. Willie Edward Gordon. Jr., a/k/a Jr.Gordon, They Stated that count 7 was nol prossed with the right to restore. Count 7 was not nol prossed because it was also narrowed down to 10 to 28 grams in Indictment Number 97-GS-46-0266.

Please note the same 400 grams in Indictment number 97-GS-46-0266 is also the same 400 grams thats in Indictment number 97-GS-46-1286, count 1,2,3,4,5,6 and 7. is the same. However, On October 19,2000 the State re-indicted the Petitioner for trafficking in crack cocaine by going back to the York County Grand Jury turning indictment number 97-GS-46-1286 (count 6 and 7) into indictment number 2000-GS-46-3180 which was also indictment number 97-GS-46-0266. Its important for the court to know after The Honorable Judge Rushings order on Indictment 97-GS-46-1286, the court agreed to narrow down the original 400 grams in indictment 97-GS-46-0266 to 10 to 28 grams since that time Solicitor Kevin Brackett has continued to increase the amount back up by going back to the York County Grand Jury with indictment number 97-GS-46-1286 and amended in count 5 from 28 to 100 grams also by going back to The Grand Jury with indictment number 2000-GS-46-3180 and amended from 10 to 28. In reality He has increased the amount from 10 to 28 from 28 to and 100 from 100 to 200.

The Petitioner is not claiming that the trial Court lacked subject matter jurisdiction due to defects in his indictment. Petitioner respectfully submitted to the court that Judge Hayes misconstrued the jurisdiction issue in the Order of Dismissal. The essence of the Petitioner's argument was the York County Grand Jury and the Circuit Court is without jurisdiction over indictment number 97-GS-46-1286 and indictment number 2000-GS-46-3180 because of the following reason,

1. Counsel made a Motion to quash Indictment number 97-GS-46-1286 before the Honorable Judge Rushing on May 5, 1997, according to S.C. Code Ann §17-19-90, the indictment had been quashed.

2. The Order of the Honorable Judge Rushing is the law of the case, by agreement of all three Parties the original 400 grams in indictment 97-GS-46-0266 was scratched completely out and the Judge wrote in the Indictment 10 to 28 grams sell and or/delivery on "September 23, 1996 only" this was agreed on, once the agreement was made the State lost jurisdiction over all other crack cocaine.

3. Jeopardy was attached to Indictment number 97-GS-46-0266, I believe jeopardy remains with indictment number 97-GS-46-0266.

4. The State was Estoppel on all other indictments when Judge Rushing amended indictment number 97-GS-46-0266 down to 10 to 28 grams and jeopardy was attached to that indictment number 97-GS-46-0266. The State could not go back to the Grand Jury with indictment number number 97-GS-46-1286 or indictment number 2000-GS-46-3180 once indictment number 97-GS-46-0266 was amended to 10 to 28 grams and jeopardy was attached the State was stuck with indictment number 97-GS-46-0266 so anything that came from indictment number 97-GS-46-1286 is Collateral Estoppel and the Circuit Court and the York County Grand Jury is without jurisdiction over indictment number 2000-GS-46-3180 and Res Judicata do not applies to this situation. The issue of lack of jurisdiction of the Circuit Court and the York County Grand Jury has not been raised and ruled upon thus it is clear beyond refute that Petitioner is entitled to an evidentiary hearing with regards to the facts also the jurisdiction of a court over the subject matter of a proceeding is fundamental. Anderson V. Anderson, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). "Lack of Subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court." Id. It is well-settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal in this Court. Carter V. State, 329 S.C. 355, 495 S.E. 2d 773 (1998); State V. Funderburk, 259 S.C. 256, 191 S.E. 2d 520 (1972). Furthermore, "[t]he acts of a court with respect to a matter as to which it has no jurisdiction are void." Funderburk, 259 S.C. at 261, 191 S.E. 2d at 522.

The State is claiming that Petitioner is arguing the defects in his indictment. However, Petitioner is arguing the jurisdiction of the York County Grand Jury and the Circuit Court and in a PCR action, the doctrine of res judicata does not apply to issues of subject matter jurisdiction. Accord State V. Parham, 2000 WL 1176529, *2(Ohio Ct. App. Aug. 17,2000) ("A petitioner for post conviction relief is not precluded by res judicata where the claim is that the conviction is void for lack of subject matter jurisdiction.") (citing State v. Wilson, 73 Ohio St. 3d 40, 652 N.E. 2d 196, 200 n. 6 (1995).)

Petitioner submits that the Circuit Court and the York County Grand Jury is without jurisdiction because indictment number 97-GS-46-1286 and indictment number 2000-GS-46-3180 is void Therefore, he would respectfully request that this Court find that res judicata does not apply to issues of subject matter jurisdiction and allow for this error to be properly addressed.

CONCLUSION

Based upon the forgoing, the Petitioner would urge this Court to find that the lower court's finding that the action is barred as to res judicata was in error. Furthermore, the Petitioner would respectfully request that this Court find this explanation sufficient and allow the Petitioner to submit a Petition for Writ of Certiorari.

Willie E. Gordon