ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Edward W. Miller, Circuit Court Judge

FREDERICK VAN ANDERSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000050

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

Did the PCR court err in finding that the indictments charging Petitioner Anderson with murder, burglary first degree, and discharging a weapon into a home were sufficient to grant jurisdiction to the trial court when the indictments were stamped "true bill" but were not signed by the grand jury foreperson and were not published by the clerk in court according to the procedure as outlined in Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986) which deprived the circuit court of jurisdiction?

STATEMENT

On September 7, 2008, Frederick Van Anderson allegedly entered the home of his former girlfriend, Nicole Cruell, without her consent and armed with a firearm. Steven Gray, who was visiting in the home, was shot and killed by Petitioner Anderson. Based on information from the girlfriend, she was hiding in the closet of the bedroom as Anderson called out for her when he looked for her. App. 89, ll. 15 – 25; App. 157 – App. 164.

Petitioner Anderson then proceeded to the home of his former girlfriend's mother. He then fired several shots into that home but never went inside. The home was occupied by the mother and three juveniles none of whom were struck by the shots. App. 90, ll. 1 – 7.

Anderson then called some of his family members and told them what had happened. With the family's encouragement, law enforcement was called. Anderson turned himself in to law enforcement within hours of the shootings. App. 90, ll. 8 – 14. Anderson did not provide a written statement to law enforcement, but he did have a conversation with them while in the patrol car. Trial counsel reported that Anderson never denied his involvement in the incidents to the police. App. 90, ll. 15 – App. 91, ll. 8; App. 53, ll. 7 – App. 54, ll. 16.

Petitioner Anderson was served with the notice to seek the death penalty by the state. The burglary first degree charge was considered an "aggravator" according to trial counsel. App. 92, ll. 2 – App. 93, ll. 4; App. 88, ll. 12 – App. 89, ll. 5. In June 2010, the state agreed to withdraw the death penalty notice for a guilty plea. App. 92, ll. 18 – App. 93, ll. 4.

On December 22, 2010, Petitioner Anderson appeared before the Honorable Robin Stilwell, and entered a guilty plea to murder, burglary first degree, and discharging a firearm into a dwelling. App. 38, ll. 1 – 14; App. 159 – App. 168. He was represented by John Mauldin and Frank Eppes. App. 8, ll. 12 – 18; App. 80, ll. 20 – app. 81, ll. 6; App. 159. The state was represented by

Solicitor Robert Arial and Betty Strom. App. 47, ll. 15 – App. 48, ll. 8. The plea judge sentenced Anderson to life without parole on the murder charge, thirty years on the burglary first degree, and ten years on discharging a firearm into a dwelling. App. 38, ll. 1 – 14. Petitioner Anderson did not appeal his convictions nor sentences. App. 146.

On December 19, 2011, Petitioner Anderson filed an application for post-conviction relief (PCR). The state filed a return on June 5, 2012 and filed an amended return on April 8, 2015. App. 145. An evidentiary hearing was held on April 23, 2015 before the Honorable Edward W. Miller. Petitioner Anderson was represented by Carolina M. Horlbeck, and the state was represented by Karen C. Ratigan. App. 36.

At the beginning of the hearing, the state's attorney told the court that there was no transcript from the guilty plea. State's attorney explained that she had a letter from Court Administration that the tape provided by the court reporter was blank. This letter was made Court's Exhibit 1. App. 38, ll. 1 – 21; App. 112. The state's attorney recommended that they hold two hearings at that time with one of them being a reconstruction hearing of the guilty plea. She explained that she and the PCR attorney, Ms. Horlbeck, had followed this procedure on another case, and it seemed to work.[1] App. 38, ll. 25 – App. 26, ll. 20.

The PCR judge then questioned Anderson. The judge told Anderson that the plea transcript "was not really necessary as far as the constitutionality of the proceedings." He said that what was essential was that Anderson entered a guilty plea freely, voluntarily, and intelligently. Anderson indicated that he understood. App. 39, ll. 21 – App. 40, ll. 25.

[1] There was no objection from the PCR counsel. App. 39, ll. 1 – 25.

The judge then asked Anderson if the plea judge went over all of his rights with him. Petitioner Anderson said that the judge did go over his rights but Anderson did not understand. App. 41, ll. 1 – 25. The judge then inquired if Anderson told the plea judge that he was giving up those rights to enter a plea. Anderson responded he did. App. 42, ll. 1 – 21. Anderson did not remember if he told the court that he was satisfied with his lawyer's representation. Anderson said that the state did present the facts of the case that they had. App. 42, ll. 22 - App. 44, ll. 15.

The judge then questioned John Mauldin, Anderson's plea counsel. Counsel Mauldin agreed that the plea judge advised Anderson of his constitutional rights. According to Mauldin, Anderson told the plea court that he was voluntarily giving up those rights to plead guilty. Counsel said the state presented the facts of the case and that Anderson said he was satisfied with counsel. App. 44, ll. 23 – App. 46, ll. 25.

The judge then questioned Betty Strom who was the deputy solicitor on the case. She testified that Solicitor Robert Arial did this guilty plea, but that she prepared a typed summary for him to recite. The judge questioned admitting that summary into the record. The state's attorney said that it was not necessary as the purpose of the hearing was "just for completeness for the purposes of the record." The judge did not admit the solicitor's summary of the facts. App. 47, ll. 15 – App. 48, ll. 25.

Attorney Frank Eppes was then questioned by the PCR court. He agreed with the testimony presented by Counsel Mauldin. App. 49, ll. 14 – 25.

Duane Anderson, brother of Petitioner Anderson, told the PCR court that his step-father, James Drummond, spoke to the plea court. Mr. Drummond was present at the PCR hearing. He testified that he did address the plea court at Anderson's guilty plea. He remembered saying that Petitioner Anderson was "afraid about the children." The children's mother "instigated a whole lot

of this, and it never came out in court." He said that she "instigated one man against the other." App. 50, ll. 1 – App. 51, ll. 7.

The P CR judge then asked the state if anything else was necessary, and she responded no. The judge then asked PCR counsel if she had anything. PCR counsel stated: "No, Your Honor." App. 51, ll. 7 – 13. The judge then said:

> Okay. All right. Well, I think that satisfies reconstruction of the record. Now we're ready to proceed on the post-conviction relief.

App. 51, ll. 4 – 18. [2]

PCR counsel then called Petitioner Anderson to testify for the PCR hearing. Anderson testified that he had wanted a trial from the very beginning. But it seemed to him that Attorney Mauldin just wanted him to plead guilty and get the case done. Anderson did not want to "do a plea." App. 52, ll. 5 – 25; App. 57, ll. 1 – 25. Anderson continued to say that Attorney Mauldin kept pushing him to plead guilty. Finally, Anderson said that Attorney Mauldin told him: "Well, you've got to think about this...Now, if you take this thing to trial, you know what's going to happen." Anderson said that Mauldin told him that the "solicitor and the state wanted him dead." App. 58, ll. 1 – 24.

According to Anderson, Attorney Mauldin later came to him and said that they have an opportunity to plead. Anderson said he decided to plead guilty when Mauldin told him: "Well, the judge is looking to a 30 to 35 year sentence... We've got to take it." Although he thought that was the sentence he would get, he did say that his attorneys did not promise him that sentence. App. 59, ll. 1 – App. 60, ll. 5.

[2] There was no objection to the sufficiency of the reconstruction record by the PCR counsel.

Anderson then alleged that his indictments were "false" because they were not signed by the grand jury foreman. The judge checked the indictments and acknowledged that they were stamped but not signed. He asked to see the originals to "check out that allegation." App. 67, ll. 4 – App. 70, ll. 12.

Frank Eppes testified that Anderson always wanted a trial. The attorneys explained to him that if he pled guilty the sentence could be between thirty years and life. If he went to trial, the sentence would be life or death. However, Anderson still wanted people to hear his side of the story because he believed they would then understand and realize that he was not the only party at fault. He believed that he was being deprived of seeing his children and he had been used unfairly. App. 80, ll. 24 – App. 83, ll. 18. Attorney Eppes said that the evidence against Anderson was "overwhelming." App. 84, ll. 2 - 14.

Plea counsel Mauldin testified and provided the facts of the case to the court as he remembered them.[3] Counsel acknowledged that the case was seven years earlier and his "recollection was thin." App. 88, ll. 14 – App. 90, ll. 25. He stated that Anderson never denied his involvement in the incidents to either him or the police. It was clear to counsel Mauldin that Anderson was insisting on a trial which counsel believed was unwise. App. 91, ll. 1 – 23. Although counsel knew that Anderson wanted to tell his side of the story, counsel believed that Anderson's story "did not equate to any chance of innocence." App. 93, ll. 1 – 25.

On cross examination, counsel reviewed the sentencing sheets at PCR counsel's request. Counsel Mauldin admitted that the sentencing sheet provided that the charge had been indicted. The box for a waiver of grand jury rights had not been checked, and he did not remember the judge mentioning grand jury rights to Anderson. Counsel admitted that he would not have looked at the

[3] These facts are included at the beginning of the Statement of this petition on page 3.

back side of the indictment which he agreed did not have a signature. Counsel did say that the cases he handled almost never involved a waiver of grand jury rights. App. 98, ll. 1 – App. 100, ll. 18.

The PCR judge asked plea counsel if he had gone to trial, and after the jury had been sworn, and he realized that the indictment was not signed, what would his jurisdictional objection have accomplished. Counsel responded that he could not imagine going through a capital jury selection without someone recognizing that there was a "flaw on the indictment." But if it had, he would have said to the judge: "Judge, we can't go forward." App. 101, ll. 18 – App. 102, ll. 8.

The judge then reviewed the grand jury report that was signed and was usually presented to the chief administrative judge for General Sessions court along with the stack of indictments. The PCR judge was the chief administrative judge for that General Sessions court when Anderson's indictments were presented. The grand jury report was signed by the judge which he made a court's exhibit for the PCR. The judge stated that there were three hundred thirty eight true billed indictments and one no-billed indictment. The report showed three indictments for Anderson were true billed. App. 103, ll. 1 – 25.

The state then handed to the judge the case of Pringle v. State, 287 S.C. 409, 339 S.E. 2d 127 (1986). PCR counsel argued to the court that the case of Pringle v. State, id., held that it was preferable for the grand jury foreperson to sign the true bill indictment but it was not essential to the validity of the indictment if the indictment was in writing and published by the clerk. Counsel argued that there was no evidence that Anderson's indictments were published by the clerk. Counsel continued that Pringle provided that the regular procedure was to have the clerk publish the indictment after the grand jury returned a true bill. Counsel argued that procedure was not followed in Anderson's case. App. 104, ll. 1 – App. 105, ll. 7.

Counsel told the judge that the function of the indictment was two fold. It was a notice document to notify the accused to the specifics of the charge he faced. It was also to transfer jurisdiction. Because the same procedures described in Pringle were not followed in Anderson's case, jurisdiction was not transferred. She asked the court to overturn Anderson's convictions and grant his petition. App. 105, ll. 8 – 17.

The judge then stated that he had received the original indictments from the clerk's office. None of Anderson's indictments were signed by the foreperson but they were stamped "true bill." The judge then said: "This is an extremely serious case." App. 105, ll. 18 – 25.

The judge related from the Pringle case that the grand jury foreman testified there the regular procedure was to have the clerk publish the indictment in open court after the grand jury returned a true bill. The judge said that was "not the practice in Greenville County." He said he did not know where this Pringle case came from. Then he realized that it occurred in Richland County. App. 106, ll. 1 – 18.

The judge said that he was "conflicted." He then held that the record would remain open, and he asked the two parties to brief the issue. And asked them to contact the grand jury foreperson and have her provide an affidavit that would constitute written testimony that this case was considered and indicted. Then the judge said that this was "sort of a novel issue." App. 106, ll. 19 – App. 107, ll. 25.

A Memorandum of Law was submitted by PCR counsel and filed on July 21, 2015. App. 125-App. 138. A Memorandum of Law was submitted by the state on July 21, 2015. App. 139 – App. 144. Attached to the state's Memorandum was the affidavit of Shannon Nicole West who wrote that she was the foreperson of the grand jury that indicted Anderson's three indictments in July 2009. She wrote in her affidavit that she stamped the indictments at midday during a break

after they were true billed. All of the indictments for a single defendant were presented together. She did not know if the indictments were ever published as she did not know what happened to any of the indictments after they were stamped. She wrote that she had no recollection of the facts of Anderson's case and did not know why her signature was not on these indictments. App. 144.

The PCR judge issued an order on December 8, 2015 denying Anderson's PCR and dismissing it with prejudice. App. 145 – App. 155. In Footnote 2, the judge wrote that he had reviewed the affidavit from the grand jury foreperson, the memoranda from the parties, and the Grand Jury Report from July 2009. He noted that Anderson's indictments were true billed. App. 152, Footnote 2.

The judge held in his order that Anderson failed to meet his burden of proving there were irregularities with the Grand Jury procedure that invalidated his indictments. The order provided that the foreperson indicated that all of the indictments for one person were reviewed at the same time. She would set the true billed indictments to one side and later stamp and sign those indictments. She did not know why Anderson's indictments were not stamped with her signature stamp. App. 152 – App. 153. The judge wrote that the foreperson "detailed the usual indictment procedure in her affidavit." The only deviation was that she did not stamp Petitioner's indictments with her signature stamp. App. 153. The order provided that the indictments were true billed and "clearly sufficient to put applicant on notice of the charges he was facing." Petitioner failed to prove that his indictments were defective or that the plea judge did not have jurisdiction of his case. App. 153.

Petitioner Anderson's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The PCR court erred in finding that the indictments charging Petitioner Anderson with murder, burglary first degree, and discharging a weapon into a home were sufficient to grant jurisdiction to the trial court when the indictments were stamped "true bill" but were not signed by the grand jury foreperson and were not published by the clerk in court according to the procedure as outlined in Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986) which deprived the circuit court of jurisdiction.

In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), the Supreme Court held that a defendant may for the first time on appeal raise the issue of the trial court's jurisdiction to try the class of case of which the defendant was convicted. The Court also held that lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by the Supreme Court.

South Carolina Code Section 17-27-20 describes persons who may institute a post-conviction relief proceeding. Section 17-27-20 (A) (2) provides that a person who claims that the court was without jurisdiction to impose the sentence may institute a PCR.

In Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986), the Supreme Court held that the grand jury foreperson's signature was not essential to the validity of the indictment which was in writing and published by the clerk. In that case, the foreperson testified that the regular procedure was to have the clerk publish the indictment in open court after the grand jury returned it true bill. The Court ruled that in the absence of evidence to the contrary, the regularity of the proceedings of the court of general jurisdiction will be assumed. Pringle claimed in his PCR application that he had never been indicted because the grand jury foreperson's signature did not appear on the indictment.

Therefore, the trial court lacked jurisdiction to try his case. The Supreme Court affirmed the denial of Pringle's PCR.

In State v. Grim, 341 S.C. 63, 533 S.E.2d 329 (2000), the Supreme Court held that the circuit court did not have subject matter jurisdiction to hear a guilty plea unless the defendant has been indicted by a grand jury or has waived presentment. In Grim's case, the indictment for armed robbery had the signature of the grand jury foreperson but had not been stamped "true bill." The trial judge stated that he looked at the grand jury report and every indictment submitted to it was true billed. However, there was no actual evidence of that in the record. Grim's other indictments for murder, conspiracy, pointing a firearm, and possession of a firearm during the commission of a violent crime were indicted and stamped.

In State v. Bultron, 318 S.C. 323, 457 S.E.2d 58 (Ct. App. 1995), the Court of Appeals found that the indictment was filed and was valid even though it was not stamped "true bill" because the lack of the stamp was a scrivener's error. However, in Bultron, which was a Greenville County, South Carolina case, the investigator who served as the docket coordinator for the grand jury and so was present for every meeting, testified at the hearing to quash the indictment. It was his testimony that the grand jury's regular procedure was to deliberate on the indictments and then publish their findings in open court. The court reporter, who was present when the clerk published the findings of the grand jury, testified at the hearing this was done.

Anderson's case was heard in Greenville County also. Therefore, the reasonable presumption was that the regular procedure at the time of Anderson's indictment was to publish the grand jury findings in open court although the PCR judge was not aware of this procedure in Greenville County. No evidence was presented of a "regular procedure" followed by the grand jury

as the foreperson, in her affidavit, stated she did not know what happened to the indictments after she stamped them. She did not describe a regular procedure that was followed. App. 144.

Anderson's case is distinguished from State v. Grim, *supra,* because only one of Grim's five indictments was not stamped true bill. Therefore, the reasonable conclusion was that the other four indictments were heard but the one indictment not stamped was not heard. This is not the situation in Anderson's case as none of his three indictments were stamped with the foreperson's signature. Therefore, it was not just a scrivener's error. This fact increases the probability that none of Anderson's indictments were heard by the grand jury. Three hundred thirty-eight indictments were true billed and one was stamped "no bill." App. 103, ll. 1 – 13. This large number of indictments increases the likelihood of a mistake occurring or an indictments being overlooked or put in the wrong stack. The foreperson had no recollection of Anderson's case.

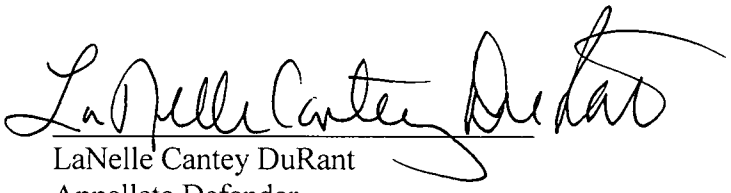
The regular procedure for the grand jury in Bultron in 1995 in Greenville County, and for the grand jury in Richland County in 1986 as described in Pringle, was for the clerk to publish the grand jury findings in open court. The PCR judge, who was the chief administrative judge at the time of Anderson's case, only said that he signed the grand jury report.

This was a death penalty case up until the guilty plea. There needed to be no question about the indictments. Without the foreperson's signature on any of the indictments, and without evidence that the regular procedure of publishing the indictments in open court was done, a question remained if the indictments were truly heard and if the plea court had jurisdiction to hear the case and to sentence Anderson.

CONCLUSION

Based on the above, certiorari should be granted, the order of the PCR court reversed, and the case remanded.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of April, 2016.

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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 the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Frederick Van Anderson, #344239, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 26th day of April, 2016.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of April, 2016.

Christian Ford (L.S.)
Notary Public for South Carolina
My Commission Expires: March 1, 2026.