

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM UNION COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Case No. 2014-CP-44-502

Tony Moore, Jr., #188313

Petitioner,

v.

State of South Carolina,

Respondents.

SCACR 243(c) EXPLANATION

The Petitioner, Tony Moore, Jr., appeals from a dismissal of a post-conviction relief action as successive and outside of the statute of limitations. Pursuant to Rule 243 of the South Carolina Appellate Court Rules, Petitioner offers this explanation as support for why this appeal should be heard.

INTRODUCTION

Petitioner Moore is currently serving a life sentence for a murder conviction in Union County on March 23, 1995. The circuit court which convicted and sentenced Moore lacked subject matter jurisdiction for failure to insure compliance with S.C. Code §19-19-40. Because this mandatory statute was not followed, Applicant's conviction is invalid and should be vacated by the Court. None of the State's arguments in support of a conditional order of dismissal are sufficient to grant such an order.

PROCEDURAL HISTORY

Moore was indicted by a Union County grand jury on January 16, 1995, for one count of murder. The specific allegations of the indictment alleged a shooting with a pistol.

On March 22, 1995, the case was called to trial in the Union County Court of General Sessions, in front of the Honorable Costa Pleicones and a jury. The jury found Moore guilty of murder on March 23, 1995 and he was sentenced to life in prison. There was an additional allegation of pointing a firearm. Moore was acquitted on that count.

Moore appealed his conviction to the South Carolina Supreme Court. During the pendency of his appeal, he filed a petition alleging the discovery of new evidence in his case. The Supreme Court suspended his direct appeal and allowed Moore to make a motion for a new trial in the circuit court.

After a waiver of venue, Moore's motion was heard in Richland County on February 9, 1996. The case continued on March 15, 1996 and Judge Pleicones orally denied Moore's motion. A written order was entered on March 28, 1996. After resuming his appeal on the initial issues and the issues stemming from the motion for a new trial, the Supreme Court affirmed Moore's conviction and sentence on October 29, 1997.

Moore filed a post-conviction relief application on November 14, 1997. The application was dismissed on February 27, 2000, with a written order served on Moore and his counsel on March 27, 2000. Both Moore and the State filed cross petitions for writs of certiorari after the dismissal. All petitions were denied by the Supreme Court on August 23, 2001.

Moore filed a pro se petition for habeas corpus relief in the United States District Court on June 19, 2002. The district court granted summary judgment to the State on August 25, 2003. Moore applied for a certificate of appealability and appealed this decision to the United States Court of Appeals for the Fourth Circuit on September 2, 2003. The Fourth Circuit denied the request for the certificate and dismissed the appeal on March 5, 2004. An application to the Court of Appeals for permission to file a successive petition for habeas corpus was denied on July 21, 2006.

Moore has filed several other post-conviction applications to this Court that were also dismissed.

CURRENT APPLICATION

Moore has engaged in extensive litigation since his conviction and recognizes he carries a great burden in gaining relief at this late stage of his sentencing. However, counsel and Moore have extensively reviewed his current argument and counsel believes this matter has great merit.

The question presented in this application goes to the heart of the Court's relationship with the legislative branch of South Carolina. He alleges the Court which entered his conviction lacked jurisdiction to do so based on the failure of the State to follow clear South Carolina law.

The State has raised the statute of limitations and successiveness as grounds for dismissal

in this matter. The State further alleges subject matter jurisdiction does not apply to this case and cannot be used to defeat time or procedural limitations.

LEGAL ARGUMENT

S.C. Code §17-19-40

South Carolina law requires specific allegations in a case involving a shooting. S.C. Code §17-19-40 states:

“In every indictment for murder, manslaughter, assault and assault and battery of a high and aggravated nature and assault and assault and battery with intent to kill and in every case when the crime charged is to have been committed with a deadly weapon of the character specified in Section 16-23-460, there shall be a special count in the indictment for carrying concealed weapons and the jury shall be required to find a verdict on such special count. All cases embraced in this section, including the carrying of weapons, shall be in the exclusive jurisdiction of the court of general sessions, except in other cases where other courts have been given concurrent jurisdiction.”

S.C. Code §17-19-40. The statute is clear. In all crimes involving a shooting, the jury must be presented with an indictment alleging the carrying of a concealed weapon and must make a finding on that allegation. The language of the statute is mandatory and unambiguous. While the entire section containing this law has been reviewed and amended on numerous occasions, the statute has never been repealed and remains good law to this day.

It has been over a century since this statute has been addressed by South Carolina appellate courts. In 1907, the Supreme Court of South Carolina considered this argument in *State v. Hasty*, 76 S.C. 105 (1907). The statute at issue in this case existed in identical form in 1907, requiring the specific allegation of a concealed weapon in an indictment for murder. *Id.* at 113. The Supreme Court looked to an earlier case in analyzing this issue.

In *State v. Norton*, the Supreme Court considered a similar argument. *State v. Norton*, 69 S.C. 454, 458 (1904). In *Norton*, the appellants complained that the statute requiring a special count had not been followed, as the solicitor had withdrawn and nolle prossed the special count for concealed weapons at the close of the trial. *Id.* at 455. The Court found that the two counts of the indictment, the murder count and the weapons count, were not dependent on one another and the solicitor had the right to withdraw the weapons count when it was not supported by testimony. *Id.*

While the *Norton* opinion cited to an even earlier opinion, that opinion addressed the right of the solicitor to withdraw the special count, not whether the special count was required. *State v.*

Edwards, 68 S.C. 318, 320 (1904). Both *Norton* and *Edwards* considered the effect of a solicitor withdrawing the special weapons count. Neither case considered the requirement of the count. Strangely, all three cases appear to acknowledge the requirement of the weapons count in the indictment, but all seem to say that the count is actually not required. This position is not supported by the rules of statutory construction.

Statutory construction

The rules of statutory construction in South Carolina are simple and clear. “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *State v. Ramsey*, 409 S.C. 206, 209 (2014) (quoting *Charleston Cnty. Sch. Dist. V. State Budget & Control Bd.*, 313 S.C. 1 (1993)). Legislative intent is most clearly expressed by the text of a statute and the courts are bound by that text. *Id.* “Where the statute’s language is clear and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Id.* (quoting *Hodges v. Rainey*, 341 S.C. 79, 85 (2000)).

S.C. Code §17-19-40 leaves no room for expansion or interpretation; it is clear on its face. In order to properly convey jurisdiction to the circuit court, the legislature requires a special count in an indictment alleging a crime committed with a deadly weapon. That special count must allege the carrying of a concealed weapon and it must be decided on by the jury. The statute give direction through the use of the word “shall.” The word “shall”, when used in a law, is generally regarded as making a provision mandatory. *Horry County v. Myrtle Beach*, 288 S.C. 412, 419 (1986).

The legislature intended for all murders committed with a deadly weapon to be charged with a special count alleging the possession of a concealed weapon. This is a mandatory requirement. Based on the language of the statute, it is required for both consideration by the Court as well as for a verdict to be rendered on one of the classified charges. In this case, Moore could not have been tried for or convicted for murder without compliance with S.C. Code §17-19-40.

Moore’s petition is not barred by the Gentry-Means line of cases

The biggest hurdle for any litigant to pass when arguing an issue related to an indictment is the Supreme Court of South Carolina’s reasoning in the opinions in *State v. Gentry* and *State v. Means*. While those cases appear to bar an attack on the sufficiency of an indictment in post-conviction proceedings, the case involve very different situations from the instant case and neither opinion affects the Court’s power to hear this matter and Grant Moore relief.

When these two cases were decided, they were considered a radical departure from South Carolina precedent. As is often the case in the law, they turned out to be far less of a departure

from prior decisions than first thought.

In *State v. Gentry*, the Supreme Court considered whether a convicted person could raise the sufficiency of an indictment after the jury was sworn. *State v. Gentry*, 363 S.C. 93 (2005). The appellant's primary argument was that the absence of an element of one of the charged crimes in the indictment deprived the court of subject matter jurisdiction. *Id.* at 99. The Court engaged in a fairly extensive discussion of the difference between sufficiency of the evidence and subject matter jurisdiction. *Id.* Ultimately, the Court simply decided that an indictment was a notice document and if challenged, the challenge must come prior to the swearing of the jury. *Id.* at 102. In reaching this holding, the Court relied on the plain language of the South Carolina statute involving objections to defects in indictments, which requires such objections to be made before the jury is sworn. *S.C. Code §17-19-90*. Such limitations do not apply to challenges to the court's subject matter jurisdiction, which can be raised at any time. *Gentry*, 363 S.C. at 101-02.

All *Gentry* requires is, with a practical view towards all surrounding circumstances, that an indictment does two things: (1) state with sufficient certainty and particularity to let the court know what judgment to pronounce and the defendant know what charge to answer; and (2) inform the defendant of the elements of the offense that is charged. *Id.* at 102-03.

Shortly after the *Gentry* opinion, the Supreme Court considered a similar situation in *State v. Means*. 367 S.C. 374 (2006). In *Means*, the Court simply stated that as long as the indictment set out the essential elements of the crime, it was sufficient. *Id.* at 384-84 (collecting cases).

In both of these cases, it is a challenge to sufficiency of the indictment that was considered. However, each case involved an indictment that was substantially sufficient to inform the defendant of the charges against him. Neither of the cases involved indictments that were drawn and presented in violation of a specific and clear statutory mandate from the state legislature.

Moore alleges the error in his case is not the sufficiency of the indictment. The error in this case is the procedure by which he was convicted at trial in the face of an indictment that was missing a required count for conviction. The Court of Appeals has held that even when the sufficiency of an indictment is an integral part of the argument, if the circumstances of the verdict are the real issue, failure to object to an indictment prior to the jury being sworn is not fatal to the argument. *Roberts v. State*, 408 S.C. 123 (Ct.App. 2014).

This case does not involve an insufficient indictment. There are two components to a proper indictment alleging murder with a deadly weapon; the murder count and the special count for possession of a weapon must be included. Because the statute was not followed, an entire count required for a proper indictment was never presented to the grand jury nor was it sent to the jury. The legislature has mandated this process. Failure to follow this process is the equivalent of failing

to present an indictment to the grand jury. Without that indictment, the circuit court did not have subject matter jurisdiction in this case.

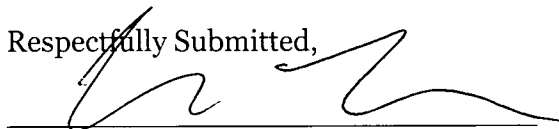
CONCLUSION

Terms of a statute should be applied according to their literal meaning. *Starnes v. South Carolina Dep't of Pub. Safety*, 342 S.C. 216, 220 (Ct.App. 2000). The plain and ordinary meaning of words must not be interpreted in a forced way to limit or expand the operation of the statute. *State v. Muldrow*, 348 S.C. 264, 268 (2002). All statutes related to criminal punishment are construed strictly against the State and in favor of the Defendant. *Id.*

The South Carolina legislature has mandated a clear process for the indictment, trial, and conviction of a person charged with murder with a deadly weapon. There is an unambiguous statute requiring a special count in all indictments alleging the use of a deadly weapon. The required process was not followed in this case and should require this Court to vacate Moore's conviction and sentence.

Petitioner Tony Moore, Jr., through his undersigned counsel, respectfully requests this Honorable Court hear his appeal for the reasons presented above.

Respectfully Submitted,



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