

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Honorable D. Craig Brown, Circuit Court Judge

GREGORY GREEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000658

PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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ISSUE PRESENTED

The PCR judge erred in failing to vacate petitioner's plea to trafficking in heroin, first offense, as an alleged lesser offense per his indictment on the offense of trafficking in heroin, second offense, because trafficking in heroin, first offense, is not a lesser offense of trafficking in heroin, second offense.

STATEMENT

Petitioner Gregory Green pled guilty to trafficking in heroin, first offense (4-14 grams), during the May 2014 term of the Charleston County General Sessions Court before Judge Roger M. Young, Sr. and was sentenced to imprisonment for a period of ten years and fined \$50,000. App. 1 – 19. Stuart M. Axelrod represented petitioner at the plea proceeding and Assistant Solicitor Michael Travis appeared on behalf of the state. Petitioner did not enjoy the benefit of a direct appeal of his conviction or sentence.

On November 5, 2014, petitioner filed a PCR application with the Horry County Office of the Clerk of Court. App. 21 – 28. The respondent filed a return dated July 1, 2015, requesting that a hearing be held in response to petitioners PCR action. App. 29 – 31.

A PCR hearing was convened on February 11, 2016, at the Horry County Courthouse before Judge D. Craig Brown. App. 33 – 60. Petitioner was present at the hearing and represented by James Falk, and Assistant Attorney General Jessica Kinard appeared on behalf of the state.

On March 7, 2014, Judge Brown issued an Order of Dismissal denying petitioner's PCR action. App. 62 – 69.

Petitioner appealed Judge Brown's Order of Dismissal. This petition follows.

ARGUMENT

The PCR judge erred in failing to vacate petitioner's plea to trafficking in heroin, first offense, as an alleged lesser offense per his indictment on the offense of trafficking in heroin, second offense, because trafficking in heroin, first offense, is not a lesser offense of trafficking, second offense.

During the plea proceeding, the solicitor apprised the plea judge of the plea negotiations as follows:

Solicitor: [Petitioner's] indicted for trafficking in heroin 4 to 14 grams, second offense. He's pleading guilty to the lesser-included defense of trafficking in heroin, 4 to 14 grams, first offense.....carry 7 to 25 years...the recommendation being made by the state is a range between 9 and 12 years. App. 2 lines 5-9.

During the PCR hearing, petitioner's counsel argued that he negotiated with the solicitor to agree to a plea "to a lesser included [offense] of trafficking first [offense]." App. 49, lines 23-25. Counsel admitted that "[he] clearly told [petitioner] that [the plea was for] a lesser included." App. 50, lines 14-15; App. 51, lines 6-7; App. 19, l. 20. Counsel stated that the plea was "a lesser included charge of trafficking second down to a trafficking first." App. 54, l. 4 – 6.

Petitioner testified at the PCR hearing and explained that he was indicted for a second offense of trafficking in heroin and that "it was [his] understanding [he] was pleading to a lesser offense," which turned out to be a first offense of trafficking in heroin, but that he learned later that there are no lesser trafficking offenses; and thus the circuit court had no jurisdiction to accept his plea as he was convicted and sentenced for a crime he was not indicted for in his case. App. 38, lines 8-19; App. 39, lines 7-9. Petitioner argued that "there is no South Carolina case law to support the fact that one trafficking offense is a lesser included offense of another trafficking offense." App. 39, l. 17-20. Petitioner stated that it was his understanding that he

was “pleading to a lesser offense.” App. 39, l. 23-25. Petitioner’s position was that the charge to which he pled under first offense of trafficking in heroin was not a lesser offense of a second offense of trafficking in heroin. App. 39, l. 23 – p. 8, l. 4. But for the offer on a lesser, petitioner stated he would have gone to trial. App. 41, l. 23 – p. 10, l. 2. Petitioner stated if the lesser offense offer has not been made, then he would have opted for a jury trial. App. 41, l 19 – App. 42, l. 1.

PCR counsel argued the following at the PCR hearing:

PCR Counsel: Our initial argument is that the Court had no jurisdiction to accept this plea [because petitioner] was indicted under...44-53-370 (e)(3)(A)(2) which is trafficking second [but] pled to 44-53-370 (e)(3)(a)(1) under the idea that he was pleading to a lesser included offense. App. 36, lines 1-6. Our argument is that trafficking first is not a lesser offense of trafficking second...The same elements needed to prove trafficking one versus trafficking two...are identical. App. 36, lines 7-13. As a result you have a court accepting a plea on something [for which he] was not indicted. App. 36, lines 20-21.

The PCR judge ruled that petitioner’s “argument regarding this not being a lesser offense lacked merit.” App. 68.

S.C. Code Ann. § 44-53-370(e)(3)(a)(1), which references heroin, declares that:

Any person who knowingly sells manufactures, cultivates, delivers, purchases or brings into this state, or who provided financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this state, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual possession of four grams or more but less than fourteen grams for a first offense [must be] imprison[ed] [for] not less than seven years nor more than twenty-five years, no part of which may be suspended nor probation granted.

S.C. Code Ann. § 44-53-370(e)(3)(a)(2), which references heroin, declares that:

Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this state, or who provided

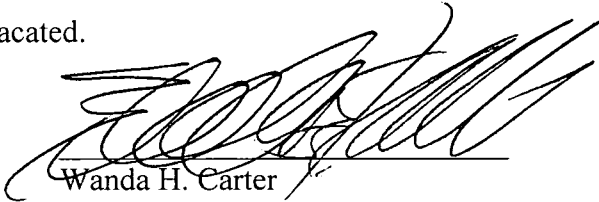
financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual possession of four grams or more but less than fourteen grams for a second or subsequent offense a mandatory minimum term of imprisonment of twenty-five years required.

The test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses included all the elements of the lesser offense; and if the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater. State v. Mitchell, 362 S.C.289, 608 S.E.2d 140 (2005); Blockburger v. United States, 284 U.S. 299 (1932). Per the statutes in question, trafficking in heroin, first offense, contains the same elements of trafficking in heroin second offense. The only difference between the two offenses would be the sentencing consequences. Hence, petitioner's plea to trafficking in heroin, first offense, was not a lesser included offense of trafficking in heroin, second offense, as indicted. Therefore, since petitioner was indicted for trafficking in heroin, second offense, the circuit court had no jurisdiction to accept petitioner's plea to an unindicted offense that was not a lesser offense. Although State v. Gentry, 363 S.C.93, 610 S.E.2d 494 (2005), held that an indictment is a notice document, there is still a threshold requirement that under S.C. Code Ann § 17-19-10, mandating that no offense shall be prosecuted upon a grand jury indictment. Therefore, since trafficking in heroin, first offense, to which petitioner pled guilty, is not a lesser offense of trafficking in heroin second offense, for which petitioner was indicted, and no indictment was issued for trafficking in heroin, first offense, and no waiver of presentment of an indictment for trafficking in heroin, first offense, was signed by petitioner, then the circuit court lacked jurisdiction to accept a plea from petitioner on the offense of

trafficking in heroin, first offense. As a result, petitioner's sentence and conviction on the offense of trafficking in heroin, first offense, should be vacated.

CONCLUSION

Based on the foregoing argument, petitioner's conviction and sentence on the offense of trafficking in heroin, first offense, should be vacated.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of October, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Horry County

Honorable D. Craig Brown, Circuit Court Judge

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GREGORY GREEN,

PETITIONER,

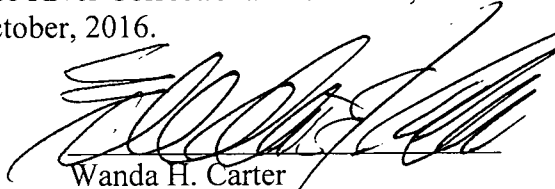
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

—————
CERTIFICATE OF SERVICE
—————

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Caitlin Hastings, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Gregory Green, #196495, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 24th day of October, 2016.



Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 24th day of October, 2016.

_____(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022