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STATE of SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Honorable D. Craig Brown, Circuit Court Judge

Lynel Witherspoon,

Petitioner

V.

State of South Carolina,

Respondent

Appellate Case No. 2016-000633

Pro Se Petition for Writ of Certiorari

Index

ISSUES PRESENTED

(1). Did trial courts amendment of indictment, change the nature of the offense, which deprived the Court of subject matter jurisdiction?

(2.) Did trial courts impermissibly prosecute defendant where there was no indictment for conviction for § 44-53-375(B)(3)?

(3.) Did PCR courts err in failure to find trial Counsel ineffective, where trial counsel failed to object to, and seek curative instruction for prejudicial hearsay testimony?

(4.) Did PCR courts err in failure to find trial Counsel ineffective in failure to suppress video tape which was prejudicial to defendant?

(5.) Did PCR courts err in failing to find trial Counsel ineffective for failing to object to trial Courts inappropriately forcing defendant's identity into jeopardy?

(6.) Did trial Counsels failure to object to trial Courts improper giving of Allen Charge prejudice defendant?

Statement

On August 31st, 2011 Jessica Stone Worked with the Fifteenth Circuit Drug Enforcement Unit as a confidential informant. App. 96 - App. 97. CI Stone allegedly met Petitioner Witherspoon at the Boulevard Motel Apartments in Myrtle Beach on August 31, 2011, to purchase $40 worth of crack cocaine. App. 98.

Petitioner Witherspoon was arrested more than a year later in September 2012 and charged with distribution of cocaine. App. 239. Petitioner proceeded to jury trial in Horry County, July 24-25, 2013. App. 4 - App. 177.

At outset of jury trial petitioner's indictment was Amended by trial court. App. 4, ll. 7 - ll. 21. After deliberation, jury informed Court they could not reach a unanimous decision. App. 156 - 157. After trial courts created A New trial exhibit, Petitioner Witherspoon was convicted of §44-53-375(B)(3), and sentenced to 17 years. App. 167 - 177.

Petitioner Witherspoon filed a notice of appeal, appeal was dismissed Oct. 8, 2014. On Dec. 12, 2014, Petitioner filed an application for post-conviction relief. Judge, D. Craig Brown, issued an order on March 7, 2016 dismissing Witherspoons PCR application.

Issue

Did trial courts amendment of indictment Change the nature of the offense, which deprived the court of subject matter jurisdiction?

Discussion

Defendant who was indicted in Horry County for distribution of cocaine 1st offense, under §44-53-370(b)(1) proceeded to jury trial on July 24-25, 2013. App.239-240.

§44-53-370(b)(1) is an offense which carries a penalty of 0-15 years and an applicable fine of $50,000.

During trial, an amendment to indictment by trial courts, charging defendant with §44-53-375(B)(3) Distribution of cocaine base 3rd, was made. App. 4, 11.7-11.21.

§44-53-375(B)(3) is an offense that carries 10-30 years and an applicable fine of $100,000, which was an increase in penalty, and changed the nat-

ure of the offense charged.

Defendant was convicted and sentenced to 17 years under §44-53-375(B)(3) 3rd offense, App. 174, ll. 25.

Under S.C. Code Ann. §17-19-100(1985), An indictment may be amended, and the trial may proceed as if the amended indictment had been originally returned by the grand jury, if the amendment does not change the nature of the offense charged.

Petitioner willfully shows his indictments for the offense of Distribution of cocaine. App. 239 Petitioner also cites Hopkins v. State, 317 S.C. 7, 451 S.E.2d 389 (1994), which holds that an amendment that increases the penalty changes the nature of the offense and therefore deprives the court of subject matter jurisdiction.

Petitioner contends that the amendment to indictment during trial, which charged Petitioner with §44-53-375(B)(3), distribution of cocaine base 3rd, and carries a penalty of 10-30 years and an applicable fine of $100,000,

Without presentment by the grand jury, impermissibly increased the penalty to 17 years recieved by petitioner, where originally indicted charge was for the offense of §44-53-370(b)(1) distribution of Cocaine, which carries a penalty of 0-15 years and a fine applicable of $50,000 Changed the nature of the offense and therefore deprived the court of subject matter jurisdiction.

Petitioner asserts this violation exceeded the Statute Code 1976. §17-19-100.

Issue

Did trial courts impermissibly prosecute defendant where there was no indictment for Conviction for §44-53-375(B)(3)?

Discussion

Appellant indicted for distribution of cocaine §44-53-370(b)(1) proceeded to trial. App. 239-240, App. 4. After an impermissible amendment to indictment pursuant to S.C. code Ann. §17-19-100(1985) at the outset of trial, appellant was convicted of and sentenced for the unindicted offense of §44-53-375(B)(3) distribution of cocaine base 3rd. App. 4, 11.7-11.21, App. 241.

Petitioner contends his prosecution was without indictment by grand jury, and his Conviction exceeds S.C. Code Ann. §17-19-10.

S.C. Code Ann. §17-19-10 states "Offense Shall be prosecuted upon grand jury indictment.

This statute holds, No person shall be held to answer in any Court for an alleged crime or offense, unless upon indictment by a grand jury.

Petitioner willfully shows by record that a true billed indictment for distribution of cocaine was unlawfully amended. App 4.11.7-11.21. And he was prosecuted for an unindicted offense of §44-53-375(B)(3). App 12- App.177, App.241, in which petitioner cites the authorities of State v. Munn (S.C. 1987) 292 S.C. 497, 357 S.E.2d 461, "defendant in criminal case is entitled to be tried only on charges set forth in indictment, even though defendant did not object about matter at trial, as trial court lacked subject matter jurisdiction to convict defendant for offense when there was no indictment charging him with that offense."

Further more petitioner points to his sentencing sheet which shows the conviction for §44-53-375(B)(3) which there is no existing indictment for. Accused was only indicted for the offense of §44-53-370(b)(1), and asserts that his rights under §17-19-10 have been violated. Petitioner also cites State v. Owens (S.C. 2001) 346 S.C. 637, 552 S.E.2d 745, except for certain minor offenses, the circuit court does not have subject matter jurisdiction to convict

a defendant of an offense unless (1) there has been an indictment which sufficiently states the offense (2) there has been a waiver of indictment (3) the charge is a lesser included.

Petitioner contends that the originally indicted offense was for distribution of cocaine, Also there is nothing in record that constitutes a waiver of indictment and 3rd the charge of distribution of cocaine base 3rd is not a lesser included offense of distribution of cocaine.

The records will reflect that there is no indictment for the statute of §44-53-375(B)(3) and that trial courts lacked subject matter jurisdiction to convict defendant of charge. State v Beachum (S.C. 1986) 288 S.C. 325, 342 S.E.2d 597

Petitioner maintains indictment number 2013-GS-26-0857 was for distribution of cocaine As called by Solicitor Graustein at trial, App.4, 11.7-11.10. Petitioner asserts this violation exceeds the S.C. Code Ann. §17-19-10

Issue

Did PCR Courts err in failure to find trial Counsel ineffective, where trial counsel failed to object to, and seek curative instruction for prejudicial hearsay testimony?

Discussion

During trial of petitioner in Horry County, July 24-25, 2013, trial Counsel for petitioner, Kia Wilson failed to object to hearsay testimony given by lead investigator and affiant, Agent Pellerin.

On App.48, ll. 22 - App.49, ll. 24 while on direct examination, Agent Pellerin testifies:

Q: During the control buy, was the confidential informant under observation?

A: Yes

Q: Did anybody approach their vehicle while they were at that location?

A: Yes

Q: Who? Were you able to identify anybody?

A: They were parked there for approximately 11-minutes and "one of the agents working with me was able to witness" a black male get

out of a green Lincoln Towncar parked across the street from the location where the CI was parked and walked up to the vehicle, CI's vehicle."

Moving further along in this testimony, Agent Pellerin testifies on App. 50, ll. 1-9

Q: this black male that went up to the vehicle, how long did he stay at the vehicle, do you know?

A: Several minutes. He got inside the vehicle, inside the backseat of the vehicle and was in there for several minutes or so.

Q: All right. Did he get out?

A: After the buy was conducted, he left the vehicle and walked back across the street where his vehicle was parked.

Petitioner contends that this testimony was hearsay, as Agent Pellerin stated in App. 49, ll. 5 that "one of the agents working with me was able to witness" what he just testified to. Petitioner also contends this was a failure to object by his trial counsel.

During cross-examination by trial counsel, it was elicited that Agent Pellerin did not have

personal, first-hand knowledge of the alleged facts he has just testified to. App. 61, ll. 23 - App. 62, ll. 5

Q: And so you're situated some distance away. and you did not actually, personally, firsthand witness the transaction itself, did you?

A: No

Q: So you can't tell this jury that you saw anybody actually make the transaction that is the subject of this case, can you?

A: No

At this point, trial counsel should have objected to Agent Pellerin's testimony and asked for a curative instruction from the court. If challenged by trial counsel Agent Pellerin's testimony should not have been admitted since he had no first-hand knowledge of the events to which he testified.

Testimony from a non-expert witness with no first-hand knowledge is inadmissible under Rule 602 South Carolina Rules of Evidence, which provides: A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may,

but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert Witnesses. See also State v Tennant, 394 S.C.5, 714 S.E.2d 297, 299 (S.C.2011) where the Supreme Court Stated: In general, a witness may not testify as to matters about which she has no personal Knowledge.

In State v. Frazier, 357 S.C.161, 592 S.E.2d 621 (S.C.2004), the South Carolina Supreme Court held that the trial court erred in admitting a statement by the defedant's co-worker that he overheard a telephone conversation that "somebody should Kill that son-of-a-bitch." The Court in Frazier stated: a witness may not testify to a matter unless evidence introduced sufficient to support a finding the witness has personal knowledge of the matter. Id at 624.

In addition to objecting to Pellerin's testimony under Rule 602 South Carolina Rules of Evidence, trial counsel should have cited Rule 802 South Carolina Rules of Evidence as additional grounds for it's objection to the testimony. The State provided no foundation for Agent Pellerin's testimony; presumaboly he testified from information in a police report or based on information provided him by an out-of-court

declarant and was therefore inadmissible hearsay.

Not only was Agent Pellerin's testimony inadmissible hearsay, trial counsel's failure to object the testimony prejudiced the defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution, and Article I §14 of the South Carolina Constitution. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). Pellerin's testimony contained "testimonial" hearsay statements; had trial counsel objected to the testimony, the trial court would have been obligated to sustain the objection.

If trial counsel sought and trial court agreed to a curative instruction, this testimony would have been removed from the record and could not have been used to oppose trial counsel's motion for directed verdict. Additionally, if trial counsel sought and the trial court disallowed a curative instruction, the issue would have been preserved for appeal.

The issue in this case was the identity of the individual who participated with the confidential informant in the controlled buy. None of the investigating officers were able to identify the defendant; and, the CI's video did not show a hand-to-hand trans-

Issue

Did PCR courts err in failure to find trial counsel ineffective in failure to suppress video tape which was prejudicial to defendant?

Discussion

PCR applicant asserts trial counsel was ineffective in failing to suppress a video that has been established in record, video does not confirm the identity of the accused, nor did it confirm the alleged crime of distribution and should have been excluded or inadmissible pursuant to S.C. Rules of Evidence, Rule 403. App. 199, 11.2 - 11.19

PCR counsel representing petitioner at evidentiary hearing adduced during direct examination that trial counsel "didn't think that" moving to suppress video, that provided no probative information or value to the case, pursuant to South Carolina Rules of Evidence, Rule 403," was something that was actually appropriate." App. 199, 11. 20 - App. 200, 11. 2

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "Counsel's conduct so undermined the proper functioning of the Adversarial process that the trial cannot be relied upon as having produced a just result."

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) Butler v State, 286 S.C. 441, 334 S.E. 2d 813 (1985).

Petitioner will first point to the irrelevance of this video in this case and why he asserts video should have been suppressed.

As shown in contrast by State v. Schmidt, 288 S.C. 301, 342 S.E. 2d 401 (1986) evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.

As the record will reflect, App. 109, ll. 19 - App. 110, ll. 25. App 198, ll. 19 - App. 199, ll. 19, Where trial Counsel testifies at petitioners evidentiary hearing:

> Q: Now, this video, you acknowledge that he wasn't -- you couldn't really see him, you couldn't see his face, and you couldn't see the transaction?
>
> A: Right.

Petitioner contends, video admitted into evidence doesn't establish or make more or less probable matters in issue, and therefore video that had no probative value should have been deemed irrelevant, and under reasonable professional norms trial counsel should have made a motion to suppress video where it's improper admission was highly prejudicial to petitioner's trial.

In further examination of the improper admittance of this video, PCR counsel representing petitioner, questions trial counsel about the prejudicial effect of Agent Pellerin's reference of petitioners name called into speculation at the begining of the video. App.200, ll.4 - App.202, ll.2. State v Jones 343 S.C.562, 541 S.E.2d 813, States' evidence that police began an investigation because of reports of criminal activity is admissible; however, identification of an individual as the suspect of a Criminal investigation, based upon speculation and effectively calling into question that individual's Character, is not." German v State supra.

Wherefore petitioner maintains that but for trial counsel's deficient performance and unprofessional errors there is a reasonable probability that the results would have been different. Cherry v State, 300 S.C. 117-118, 386 S.E.2d 624 (1989)

Petitioner contends this wrongly admitted evidence prejudiced his trial. It is adduced at trial, that there is no probative value to this video. Trial Counsel pointed out at trial that this video held no evidence probative to the matters in issue. App.109, ll.17 - App.117, ll.25. But she lets this video into evidence uncontested, where Agent

Pellerin calls petitioner, Lynel Withurspoon's identity into question as being the target of this operation. App. 200, ll. 8 - App. 202, ll. 2. And it is clear from testimony by Kia Wilson on direct examination at petitioner's evidentiary hearing, that there is reasonable probability this wrongly admitted evidence influenced the jury's verdict, State v Byers 392 S.C. 438, 444, 710 S.E. 2d 55, 58 (2011). PCR counsel demonstrates this prejudice in App. 201, ll. 18 - App. 202, ll. 2:

A: In fact, in that video Lt. Pellerin says the target of this operation is Lynel Witherspoon

Q: Thank you. So the State certainly focused on that testimony in their closing; is that accurate?

A: On that line they did, yes.

Q: So when the jury sees this video, they already have it in their head that this - that they are seeing a video of a control buy of my client for a buy of Crack Cocaine

A: Yes, I would assume so.

Trial counsel admitted that she did not consider redacting or correcting the prejudicial effect of this video before it was played, and the unfair prejudice

that was brought in by trial counsels failure to suppress was not trial strategy. App. 200, 11.15 - 11.21. Petitioner maintains that but for this counsel's unprofessional error this prejudicial evidence could have been excluded pursuant to State v Alexander, 303 S.C. 377, 401 S.E.2d 142 (1991) cites federal Rule of Evidence 403 that, "Although relevant, evidence may be excluded where it's probative value is substantially outweighed by the danger of unfair prejudice".

Petitioner holds that trial counsel was ineffective where she deficiently performed in keeping prejudicial video from influencing jury at Petitioner's trial. Trial counsel's failure to suppress video pursuant to Rule 403 of South Carolina's Rule of Evidence grossly undermined the proper functioning of the adversarial process and after this prejudice took place, petitioner's trial could not be relied upon as having produced a just result. Strickland v Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v State, 286 S.C. 441, 334 S.E.2d 813 (1985)

The PCR court erred in not finding trial counsel ineffective.

Issue

Did PCR courts err in failing to find trial Counsel ineffective for failing to object to trial Courts inappropriately forcing defendant's identity into jeopardy?

Discussion

Petitioner contends he was prejudiced in a jury trial when a failure to object by trial counsel impermissibly allowed trial courts to force defendants indentity into jeopardy. App. 166, ll. 24-App. 167, ll. 6:

> Ms. Johnson: They would like the defendant to stand up and face us.
>
> The Court: Any objection?
>
> Ms. Wilson: I would, your honor, but...
>
> The Court: I think that is appropriate. Please stand. Please stand.

Petitioner asserts the failure to object here is the cause of his trial being unfair and subject to prejudice and therefore willfully shows what constitues as an objection, by Black's Law Dictionary. Objection - a formal statement opposing something

that has occured, or is about to occur, in court and seeking the judge's immediate ruling on the point.

Petitioner maintains that his trial counsel was deficient in her performance here for at least two reasons. (1) An objection is said to be a formal statement opposing something that has occured, Petitioner Points to State v Byers 392 S.C. 438, 710 S.E.2d 55 (2011) holds "for an objection to be preserved for Appellate review, the objection must be made at the time the evidence is presented, and with sufficient specificity to inform the circuit court judge of the point being urged by the objector.

Petitioner assert's trial counsels statement does not sufficiently specify anything, did not inform the circuit court judge of anything and therefore could not qualify as an objection. And reason (a) trial counsel Wilson states "I would, your honor, but . . ." Petitioner contends the word "but," means, 'on the contrary" or shows contrast or used to negate which means, to make ineffective. Wherefore petitioner also cites State v Bennett 328 S.C. 251 493 S.E.2d 845 which states "general objection to question without stating ground was too vague to preserve any evidentiary issue for review.

The record will reflect the necessity of an objection at this point of the defendants trial.

In a jury trial for petitioner where the identification of the perpetrator was the main issue, a video that was establish during trial which never showed the alleged suspect, or the alleged crime at all, was introduced into evidence. App. 104, ll. 19 - App. 110, ll. 25, App. 112, ll. 24 - App. 114, ll. 17.

At petitioners evidentiary hearing, trial counsel testified that she did not belive a suppression hearing pursuant to Neil v Biggers 409 U.S. 188 (1972) was necessary because the video did not seem detrimental, as it did not show petitioners face, nor did it show a hand-to-hand transaction, wherefore petitioner asserts, gave more reason that video should have been suppressed and held inadmissible pursuant to Rule 403 of South Carolina Rules of Evidence, because of it's lack of probative information to the case and it's possible undue prejudicial value to defendant.

During trial, Judge Hyman, charges the jury after state and defense rest their cases. It is clear and obvious from the jury charge that the state has failed to meet it's burden of proof. The state has not proven identity beyond a reasonable doubt.

App. 143, ll. 11 - 11.18, Where the judge charges the jury:

"An issue in this case is the identification of the defendant as a person who committed the crime charged. The state has the burden of proving identity beyond a reasonable doubt. You must be satisfied beyond a reasonable doubt. of the accuracy of the identification of the defendant before you may convict the defendant."

Petitioner contends that the state has not made probable the identity of the accused at the close of states evidence. Petitioner also contends there was no visual evidence that depicts defendant committing this crime, therefore the state failed to show the jury anything to compare or determine the accuracy of the identification of the defendant, wherefore a reasonable doubt still existed until trial counsel failed to object to trial courts inappropriately requiring defendant to place his identity into jeopardy. App. 143 - App. 167. Wherefore petitioner cites State v Patterson 324 S.C. 5, 482 S.Ed 760 which holds "general objection which does not

specify particular ground on which objection is based is insufficient to preserve question for review.

Defendant contends that trial counsel's failure to object to the request to stand up, impermissibly allowed trial courts to create a new trial exhibit and new evidence of defendants identity when identification was the main issue in question. Defendant maintains the failure to object permitted the courts to call defendants identity into jeopardy, after state and defense has rested it's cases.

Wherefore defendant maintains that if trial counsel had of objected to stand up request, defendants identity would have never been in jeopardy and therefore still would have remained a reasonable doubt to petitioners identification, or the issue would have been preserved for appellate review.

The PCR court erred in not finding trial counsel ineffective.

action, nor did it provide a clear image of the petitioner. Since the State's evidence identifying the petitioner was relatively weak the admission of impermissible testimony which tended to support the CI's testimony was highly prejudicial to petitioner.

Petitioner maintains that but for trial counsel's deficient performance in failing to object to this hearsay testimony this issue would have at least been preserved for his direct appeal.

Petitioner would also draw the Court's attention to the Federal Rules of Evidence. (1972 Proposed Rule). Where the Advisory Committee noted:

> The rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information." McCormick §10, p. 19. These foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personall perception. 2 Wigmore §650. It will be observed that the rule is in fact a specialized application of the provisions of Rule 104(b) on conditional relevancy.

PCR court erred in not finding trial counsel ineffective,

Issue

Did trial counsel's failure to object to trial courts improper giving of Allen Charge prejudice defendants?

Discussion

During jury trial for defendant, jurors while in deliberation, send the trial courts questions that generally display a reasonable doubt and also show that the State has failed to reach the standard of burden of proof at this point. Petitioner contends that trial counsels failure to object, permitted trial courts to give An Allen charge to a jury that only had parts of incompetent evidence to deliberate from, which in effect coercively expedited petitioners trial. App. 149, 11.2 - App. 161.

The records will reflect that when the jury reconvened the following day (July 25, 2013), trial judge immediately rushed into Allen charge with urgency as depicted in trial transcript. App 156, 11.1 - App. 157, 11.16

Due to the weakness of the State's case Mitchell

720 f.2d 370, the jury in its same confused and misled state still had the need to review evidence which record reflects, was highly incompetent. Wherefore trial judge noticed plainly the state of jury's confusion and fails to recharge and clarify issues of law, facts of case, and reopening of evidence before the giving of additional separate instruction was erroneous, Blandburg v. State 434 S.E. 2d 510.

PCR courts erred in not finding trial counsel ineffective.

Conclusion

Based on the above, Certiorari should be granted, and Petitioner's convictions and sentence vacated, and the case remanded for a new trial.

Lynel Witherspoon

Lynel Witherspoon
Petitioner #254076

Pro Se Petition

This 16th day of November, 2016

State of South Carolina
In The Supreme Court

Certiorari to Horry County
Honorable D. Craig Brown, Circuit Court Judge

Lynel Witherspoon,

Petitioner

V.

State of South Carolina,

Respondent

Certificate of Service

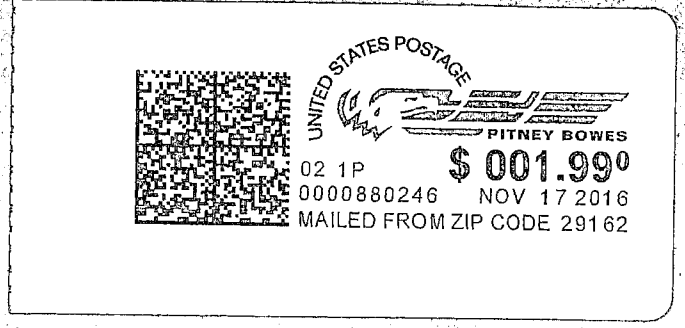
The Petitioner, Lynel Witherspoon has served upon the supreme court a Pro Se copy of the above referenced case at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, S.C. 29201, this 16th day of November, 2016

Sworn to and subscribed before me this
16TH day of November, 2016
Notary Public for South Carolina (L.S.)

My Commission Expires: May 24, 2026

x Lynel Witherspoon #254076

W. Thurspoon 254012
VILLE C.I.
OOM
LARENCE COKER HWY.
VILLE, SC 29162



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