

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

 ORIGINAL

Certiorari to Sumter County

Honorable Brooks P. Goldsmith, Circuit Court Judge

RECEIVED

OCT 02 2017

DEXTER WALCOTT,

S.C. SUPREME COURT
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002200

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I.

Whether the PCR court erred in denying Petitioner's motion for production of county grand jury impanelment documents, which were necessary to proving his post-conviction relief allegations?

II.

Whether the PCR court erred in finding that whether trial counsel rendered ineffective assistance of counsel and whether the solicitor committed prosecutorial misconduct related to the indictment were not proper matters for post-conviction relief?

STATEMENT OF THE CASE

On November 14, 2013, the Sumter County Grand Jury purportedly returned a multi-count, true-bill indictment against Petitioner Dexter Walcott for burglary first degree, assault and battery first degree, and possession of a weapon during the commission of a violent crime. Co-defendants Douglas Sprow and Verner Hodge, Jr. were also named in the indictment. App. 110. Walcott was accused of breaking into a shed where he believed that Kevin Schrader was storing a motorcycle that he stole from Walcott. Walcott allegedly shot Schrader in the leg, though Walcott maintained that the gun “went off” in the midst of a struggle. App. 8, l. 10 – 10, l. 10; App. 69, l. 20 – 71, l. 13.

On June 12, 2014, following a partial jury trial on the above offenses, Walcott appeared before the Honorable R. Ferrell Cothran and entered guilty pleas to burglary second degree, assault and battery first degree, and possession of a weapon during the commission of a violent crime. Walcott was represented by Steven McKenzie, and the State was represented by assistant solicitor Bronwyn McElveen. App. 1; App. 3 – 6. Judge Cothran imposed concurrent sentences of fourteen years for burglary second degree, ten years for assault and battery first degree, and five years for the weapons offense. App. 11.

Walcott filed his application for post-conviction relief (“PCR”) on February 18, 2015. App. 13. The State filed its return to the application on March 30, 2015. App. 20. Walcott, through counsel, filed a first amendment to his PCR application on November 12, 2015. App. 28. On February 2, 2016, PCR counsel filed a motion for grand jury impanelment documents. App. 30. A second amendment to the PCR application was filed on March 1, 2016. App. 34.

On March 15, 2016, an evidentiary hearing was held before the Honorable Brooks P. Goldsmith. Walcott was represented by Lance Boozer, and the State was represented by assistant attorney general Daniel Gourley. App. 36. At the outset of the hearing, PCR counsel asked the court to rule on his motion for production of the grand jury impanelment documents, citing Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005). Counsel provided the court with a copy of the court calendar, reflecting that there was no general sessions court convened in Sumter County during the week of November 11-15, 2013. App. 40, l. 20 – 41, l. 23; App. 42, l. 20 – 44, l. 8; App. 44, l. 20 – 45, l. 8; App. 46, l. 7-9; App. 90. The State argued that impanelment documents were only available in state grand jury proceedings and that no such documents existed with respect to county grand juries. App. 42, ll. 1-16; App. 44, l. 9-13; App. 45, l. 18 – 46, l. 6. Judge Goldsmith denied the motion to obtain the impanelment documents and corresponding motion for continuance. App. 46, ll. 12-18.

Following testimony from Walcott and plea counsel Steven McKenzie, Judge Goldsmith ruled that he would deny the application and instructed the State to prepare an order. App. 87, l. 25 – 88, l. 3. An Order of Dismissal formally denying Walcott’s application for post-conviction relief was filed on October 24, 2016. App. 91. In the summary of testimony, the Order noted: “Applicant moved to be provided with a copy of all documents pertaining to the empanelment of the state grand jury which indicted him. Applicant also moved for a continuance to allow time to obtain these documents. This Court denied both motions.” App. 93. The court further ruled that neither ineffective assistance of counsel for failure to procure the grand jury impanelment documents nor prosecutorial misconduct related to the indictment were proper matters for post-conviction relief. App. 98; App. 100.

This petition for writ of certiorari follows.

ARGUMENT

I. The PCR court erred in denying Petitioner’s motion for production of county grand jury impanelment documents, which were necessary to proving his post-conviction relief allegations.

Walcott questioned the validity of the indictment purportedly returned against him because it stated that it was returned following “a Court of General Sessions, convened on November 14, 2013” in Sumter County. App. 106. Research of the S.C. Judicial Department calendar showed there was no General Sessions court during the week of November 11, 2013. App. 90. Walcott argued that he was entitled to the grand jury impanelment documents, which were necessary to show that the grand jury was not legally impaneled and to support his allegations of ineffective assistance of counsel and prosecutorial misconduct with respect to the indictment. App. 30 – 31; App. 40, l. 20 – 41, l. 23; App. 42, l. 20 – 44, l. 8; App. 44, l. 20 – 45, l. 8; App. 46, l. 7-9.

Walcott was unaware of the discrepancy between the indictment and the general sessions calendar until after he entered his guilty plea. App. 54, l. 18 – 58, l. 3; App. 60, ll. 1-8; App. 62, ll. 3-8; App. 64, ll. 14-23. Trial counsel testified that he did not have any reason to doubt that the grand jury met from the face of the indictment and that he was under the impression that the grand jury met on the Thursday prior to the beginning of a term of general sessions. App. 78, ll. 4-12; App. 79, l. 5 – 81, l. 5. At the end of the evidentiary hearing, the State argued: “In regards to the indictment issue, I believe Mr. Walcott has presented no credible evidence or arguments to support his claim that the indictment was not properly true-billed or that the county grand jury was [not] convened appropriately.” App. 87, ll. 3-7.

S.C. CODE ANN. § 14-9-210, regarding indictments for county court cases by grand jury of court of general sessions, provides:

The county solicitor shall prepare and, through the presiding judge of the court of general sessions, **submit to the grand jury, while in attendance upon the court of general sessions, bills of indictment in all cases pending in the county court in which the punishment may exceed a fine of one hundred dollars or imprisonment for thirty days**, when such cases have not been previously acted on by the grand jury. The grand jury shall act thereon and report its action to the presiding judge of the court of general sessions and said judge shall direct the clerk of the court of general sessions to report the same to the presiding judge of the county court at its next ensuing term. All cases in which bills of indictment are so found shall stand for trial by the county court as though found by the grand jury while in attendance upon the county court.

(emphasis added). A defendant has a constitutional right to demand that a grand jury which is properly established and constituted under the law consider the criminal allegations against him. *See* S.C. Const. art. I, § 11 and art. V, § 22; U.S. Const. amend. V. “One who demands and is refused the right to be tried for crime charged against him only upon an indictment presented by a legal grand jury, in instances where such indictment is required, may thereafter justly take the position that he has been deprived of life, liberty or property without due process of law in violation of the state constitution.” Evans v. State, 363 S.C. 495, 509, 611 S.E.2d 510, 518 (2005) (internal quotations omitted).

In State v. Evans, 363 S.C. 495, 504, 611 S.E.2d 510, 515 (2005), this Court ruled that with respect to state jury proceedings, “impanelment documents, including the State’s petition, supporting materials, and the impaneling judge’s order, may be released to a defendant prior to trial upon timely request or to an applicant in a PCR proceeding.” 363 S.C. at 504, 611 S.E.2d at 515. “A defendant is allowed to obtain and use the impanelment documents in preparing a defense and ensuring protection of his due process rights.” Id. at 507, 611 S.E.2d at 516. The Court noted its prior holding that a defendant’s challenge to the sufficiency of a grand jury

indictment does not implicate the subject matter jurisdiction of the trial court. Id. at 507-08, 611 S.E.2d at 516-17 (citing State v. Gentry, 363 S.C. 92, 610 S.E.2d 494 (2005)). Challenges to the sufficiency of the indictment must be made before the jury is sworn in order to preserve the error for direct appellate review. Id. at 508–09, 611 S.E.2d at 517; S.C. CODE ANN. § 17-19-90 (“Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards.”).

However, the Court recognized that the issue raised in Evans was not concerned with the sufficiency of the indictment, but rather was concerned “with the legality and sufficiency of the process of the state grand jury which issued the indictment.” 363 S.C. at 509, 611 S.E.2d at 517. **“An indictment or ‘notice document’ issued by a grand jury which is established or constituted illegally is deemed a nullity.”** Id. at 510, 611 S.E.2d at 518 (emphasis added). “In such cases, a defendant’s challenge does not assert a disqualification which affects only a member of a body otherwise lawful, nor a mere irregularity in doing that which the law requires, which assumes a power to act; but it goes to the existence of the grand jury as a body, that it is void as such, and that its indictment is therefore a nullity.” Id. (internal quotations omitted). “Similarly, an indictment issued by a grand jury in which the jurors were selected in an illegal or discriminatory manner likely would be deemed a nullity and, as a matter of law, would be insufficient to give the required notice to a defendant.” Id. at 511, 611 S.E.2d at 519.

The Evans Court explained that in the aforementioned circumstances, “the circuit court must strike down the indictment when a defendant, in a timely motion to quash an indictment made before the jury renders its verdict, demonstrates the grand jury which indicted him is a nullity or proves the disqualification of an individual juror.” 363 S.C. at 512, 611 S.E.2d at 519. To hold otherwise would result in a defendant’s constitutional right to demand that his case be

considered by a grand jury which is properly established and constituted under the law having no force or effect. Id. In other circumstances, where the defendant asserts a “truly minor irregularity in the functioning or processes of the grand jury,” the circuit court ordinarily should not quash an indictment because the challenge does not implicate the legality of the grand jury or constitute a lesser irregularity which rises to the level of a constitutional violation. Id. at 512–13, 611 S.E.2d at 519–20.

The Evans Court summarized that “a defendant is entitled to review impanelment documents in order to determine, by a timely motion to quash an indictment made before the jury renders its verdict, whether the state grand jury which indicted him was legally established or suffered from any lesser irregularity which implicates the defendant’s constitutional right to have his case considered by a grand jury which is properly constituted under the law.” 363 S.C. at 513, 611 S.E.2d at 520. Thus, the Court provided the following process related to obtaining impanelment documents:

[I]mpanelment documents ordinarily may be released to a defendant after the state grand jury has issued a true bill of indictment against that defendant. A defendant’s request should be made prior to trial pursuant to Rule 5, SCCrimP. If the State should object to releasing all or part of the impanelment documents, a defendant may move to compel discovery of the documents. The burden of proof is on the State to demonstrate why the documents should not be released because only the State possesses the necessary information to analyze the issue and explain to the court why releasing the documents should be prohibited or delayed. The circuit court may, if necessary, conduct an *in camera* review of the impaneling documents to determine whether the State has met its burden in either prohibiting or delaying their release.

The regularity of grand jury proceedings is presumed absent clear evidence to the contrary. Thus, after a defendant obtains the requested information, the burden is on the defendant to prove facts upon which a challenge to the legality of the grand jury or its proceedings is predicated. Further, the appellate court will reverse the circuit court’s decision on the issue only if that court has abused its discretion.

Id. at 513-14, 611 S.E.2d at 520 (internal citations omitted).

While Evans was a state grand jury case, the Court's reasoning is equally applicable to county grand jury cases. At Walcott's PCR hearing, the State contended that because county grand jury procedures are governed by S.C. Code Ann. §§ 14-7-1510 to 1550, rather than by the state grand jury procedures specified in S.C. CODE ANN. § 14-7-1630, that no impanelment documents exist related to county grand juries. App. 44, ll. 9-13. While there will not be the same notification from the Attorney General and Chief of the South Carolina Law Enforcement Division, it seems improbable that there is no documentation of the county grand jury process. If such is the case, then it is difficult to imagine how a defendant indicted by a county grand jury could ever have force and effect given to his constitutional right to demand that his case be considered by a grand jury which is properly established and constituted under the law. See Evans, 363 S.C. at 512, 611 S.E.2d at 519.

Notably, Evans was a post-conviction relief appeal. 363 S.C. at 502, 611 S.E.2d at 514. Though the impanelment documents were not provided to Evans' PCR counsel, they were provided to the PCR judge to review *in camera*. Id. at 515, 611 S.E.2d at 520. The impanelment documents were thus a part of the lower court record and reviewed by the appellate court. Id. at 515, 611 S.E.2d at 520-21. Based upon a review of the documents, the Evans Court concluded that the petitions and impaneling orders were in compliance with the statutory mandates. Id. The Court further concluded that Evans' trial counsel was not ineffective in failing to request and review the impaneling documents and supporting materials, citing the principle that an "attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial." Id. at 515, 611 S.E.2d at 521. Additionally, the Court found that Evans had "not demonstrated prejudice under the facts of this case." Id. This finding is consistent with the

Court's conclusion that the documents revealed nothing improper in the state grand jury impanelment.

In the present case, the PCR judge erroneously denied Walcott any access to the county grand jury impanelment documents. Thus, they were not reviewed by PCR counsel or the PCR court, and they are not a part of the record before this Court. The reasoning for the denial of access had nothing to do with secrecy, which was found not to be sufficient to limit such access to state grand jury impanelment documents in Evans. Rather, the PCR judge accepted the State's assertion that no impanelment documents existed at the county level. With no order requiring their production, neither the parties nor this Court can know what documents are maintained and producible with respect to county grand jury proceedings.

A two-prong test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland v. Washington, 466 U.S. 668 (1984)). Without the impanelment documents, Walcott was unable to meet his burden of proving ineffective assistance of counsel. Additionally, a prosecutor's misconduct can render a trial fundamentally unfair. See Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006); U.S. Const. Amend. VI. Again, the impanelment documents were necessary to prove the allegation of prosecutorial misconduct for knowingly proceeding with an illegally obtained indictment.

The PCR judge erred in failing to order production of the county grand jury impanelment documents related to Walcott's indictment. There is no evidence that such documents do not exist and they were necessary to proving Walcott's PCR claims.

II. The PCR court erred in finding that whether trial counsel rendered ineffective assistance of counsel and whether the solicitor committed prosecutorial misconduct related to the indictment were not proper matters for post-conviction relief.

Walcott's PCR allegations included ineffective assistance of counsel for failing to object to the indictment, ineffective assistance of counsel for failing to obtain impanelment documents and supporting materials prior to trial, and prosecutorial misconduct by unlawfully impaneling the grand jury outside of the jurisdiction of the court of general sessions. App. 28; App. 34. Walcott framed his PCR allegations related to the indictment in multiple contexts, in anticipation of obtaining the grand jury impanelment documents that would prove that the grand jury was impanelled illegally. This would allow the PCR court the option of casting blame on the solicitor's office or on plea counsel, depending upon whether the court found that counsel had a duty to investigate the indictment. If counsel did not have such an obligation, then Walcott could still be granted a new trial based upon prosecutorial misconduct for proceeding to trial with an illegal indictment. Anticipating this Court's agreement that Walcott was entitled to the county grand jury impanelment documents to support his PCR allegations, but cognizant of the "two-issue rule," Petitioner also contests the PCR court's erroneous rulings that the latter two issues were not proper for post-conviction relief. See Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.").

In the Order of Dismissal, the PCR judge ruled that the allegation that plea counsel was ineffective for failing to obtain impanelment documents and supporting materials prior to trial was "not proper for post-conviction relief." App. 97 – 98. The court reasoned that "the sufficiency of an indictment must be challenged before the jury is sworn." App. 98. As

discussed *supra* in Issue I, the challenge raised here is not to the “sufficiency” of the indictment, but rather to the “legality and sufficiency of the process” of the county grand jury that issued the indictment. See Evans, 363 S.C. at 509-10, 611 S.E.2d at 517-18. Interestingly, in its prior ruling on the allegation on that plea counsel was ineffective for failing to object to the indictment, the PCR court wrote: “In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003).” App. 95. Walcott’s related allegation that counsel was ineffective in failing to obtain the impanelment documents prior to trial, which is more akin to a claim ineffective assistance of counsel for failing to investigate, is no less proper for PCR. Evans, 363 S.C. at 515, 611 S.E.2d at 521 (ruling on whether Petitioner’s trial counsel was “ineffective in failing to request and review the impaneling documents and supposed materials”); Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (discussing a criminal defense attorney’s duty to conduct a reasonable investigation). Evans provided a basis upon which to request the grand jury documents in discovery pursuant to Rule 5, SCRCrimP. Evans, 363 S.C. at 513, 611 S.E.2d at 520. The PCR court erred in finding that Walcott’s allegation related to counsel’s failure to procure the grand jury impanelment documents in his investigation was not proper for PCR.

The PCR court further ruled that prosecutorial misconduct “is not an issue for post-conviction relief” but rather “a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003).” App. 100. The Court found that Walcott “could have raised this issue on appeal” and that “[t]he failure to do so has waived this allegation as grounds for relief.” App. 100. To be properly preserved for direct appeal, an allegation of prosecutorial misconduct –

typically made with a corresponding motion for mistrial or motion to bar retrial under Double Jeopardy – must have been raised and ruled upon at trial. See, e.g., State v. Inman, 395 S.C. 539, 561, 720 S.E.2d 31, 43 (2011); State v. Parker, 391 S.C. 606, 609, 707 S.E.2d 799, 800 (2011); State v. Coleman, 365 S.C. 258, 262–64, 616 S.E.2d 444, 446–47 (Ct. App. 2005); State v. Merriman, 287 S.C. 74, 79–80, 337 S.E.2d 218, 221–22 (Ct. App. 1985); see also State v. Pee Dee News Co., 286 S.C. 562, 566–68, 336 S.E.2d 8, 9–11 (1985).

Here, plea counsel made no allegation of prosecutorial misconduct with respect to the legality of the indictment, or otherwise, at the plea hearing. See App. 1 – 12. Thus, Walcott’s first opportunity to raise his claim of prosecutorial misconduct was on PCR. See Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006) (“We are concerned here not with the routine PCR issue whether trial counsel was ineffective, but instead with the question whether prosecutorial misconduct denied petitioner’s due process right to a fair trial.”); Simpson v. Moore, 367 S.C. 587, 601–02, 627 S.E.2d 701, 708–09 (2006); Gibson v. State, 334 S.C. 515, 527–29, 514 S.E.2d 320, 326–27 (1999); see also Terry v. State, 394 S.C. 62, 67, 714 S.E.2d 326, 329 (2011). “Prosecutors are ministers of justice and not merely advocates.” State v. Quattlebaum, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000). “A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics.” Id. A prosecutor’s misconduct can render a trial fundamentally unfair. See Riddle, 369 S.C. at 48, 631 S.E.2d at 75; U.S. Const. Amend. VI. The PCR court erred in finding that Walcott was procedurally barred from raising an allegation of prosecutorial misconduct on PCR.

CONCLUSION

Based on the foregoing, Petitioner Dexter Walcott respectfully requests that this Court grant the petition for writ of certiorari and order further briefing on this issues raised herein. In the event this Court dispenses with further briefing, Petitioner requests that his case be remanded for a new post-conviction relief hearing at which he will be given access to the grand jury impanelment documents.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of October, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

Honorable Brooks P. Goldsmith, Circuit Court Judge

DEXTER WALCOTT,

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 Julie Coleman, 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 Dexter Walcott, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 2nd day of October, 2017.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of October, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027