

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge
Lower Court Case No: 2016-CP-40-6916

Appellate Case No. 2017-002577

Charles Eugene Carpenter, #181783,

Appellant,

v.

South Carolina Department of Corrections and
the State of South Carolina,

Respondents.

INITIAL BRIEF OF RESPONDENT FOR THE STATE OF SOUTH CAROLINA

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Did the trial judge err in failing to recognize the propriety of Carpenter asserting claims for declaratory judgment and petition for writ of habeas corpus in the circuit case, as recognized and determined by Judge Toal who addressed and ruled on that issue by prior order in the instant case?
- II. Did the sentencing judge lose authority/jurisdiction to “enhance” or “change” a sentence that was imposed in a previously concluded term of court, regardless of why the sentencing judge was involved or assigned to that particular matter for sentencing initially?
- III. Did the trial court judge fail to address and rule on valid claims made for relief on the basis of a declaratory judgment action, separate and beyond that which was addressed as grounds for habeas corpus?
- IV. Did the South Carolina Department of Corrections engage in activity that constituted a sufficient “change” with respect to the criminal sentence being served by Carpenter such that the actions by SCDC triggered due process rights for Carpenter that were not met?
- V. Did the South Carolina Department of Corrections engage in activity that violated due process through its ongoing, intentionally disparate treatment of Carpenter as compared to other similarly situated?
- VI. Were actions of the trial court so prejudicial to the proceedings such that they effectuated a denial of due process that compels relief on behalf of Appellant to avoid an affront to the judicial system?

COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Appellant was procedurally barred from pursuing habeas corpus relief in the circuit court.
- II. Appellant is barred by *res judicata* from continuing to pursue these allegations. As an alternative sustaining ground, Appellant’s petition was properly dismissed because Judge Cottingham maintained jurisdiction over Appellant’s case and had the power to sentence Appellant as he did. Furthermore, Appellant’s sentence has not expired.
- III. The lower court properly ruled that Appellant’s allegations against the State and the South Carolina Department of Corrections (SCDC) were separate and distinct.
- IV. Appellant concedes that his allegations of impropriety by the lower court are unpreserved. Still, the allegations are baseless.

STATEMENT OF THE CASE¹

Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the South Carolina Clerk of Court for the State Grand Jury (SGJ). (Sentencing Sheets). At a March 1990 session, the South Carolina State Grand Jury (SGJ) issued a seven (7) count superseding indictment against Appellant and nine (9) other defendants. (1990-GS-47-05-001) (Indictments). Specifically, Appellant was indicted for Conspiracy: Trafficking in Marijuana (Count 1), and Trafficking in Marijuana (Count 2). (Indictment). At the same session, the SGJ issued a superseding eighteen (18) count indictment against Appellant and ten (10) other defendants. (1990-GS-47-05-002). (Indictment). Specifically, Appellant was indicted for Conspiracy: Trafficking in Cocaine (Count 1), and Trafficking in Cocaine (Count 2). Appellant was represented on the charges by Lionel S. Lofton, Esquire.

On April 7, 1990, Appellant pled guilty before the Honorable Edward B. Cottingham to the conspiracy counts in both indictments in return for the dismissal of the other counts as well as the dismissal of numerous other serious charges. (Plea Tr. p. 1). Appellant pled pursuant to a written plea agreement which set out the agreed upon terms. (Plea Tr. p. 2-4). If he cooperated with authorities, then the State would request concurrent time. (Plea Tr. p. 3-6). If he failed to cooperate, then the State would be free to ask for consecutive time. (Plea Tr. p. 3-6). Sentencing was deferred until June 4, 1990, where Judge Cottingham sentenced Appellant to 25 years' imprisonment on Indictment 90-002, but deferred sentencing on 90-001 until a hearing would be held on the State's allegations that Appellant had breached the plea agreement by refusing to cooperate. (June 1990 Sentencing p. 20-21).

¹ Appellant has filed numerous challenges to his convictions over the years including a direct appeal, three PCR applications, appeals from each PCR, a petition for federal habeas relief, and this current petition for habeas corpus. A more detailed procedural history is included in the Order of Dismissal. (OOD).

The next hearing was held on August 9, 1990, where Judge Cottingham found Appellant willfully failed to cooperate and indeed had threatened witnesses and codefendants and sentenced Appellant to a consecutive 25 years' imprisonment on Indictment 90-001. (August 1990 Sentencing p. 138-45).

ARGUMENT

I.

Appellant was procedurally barred from pursuing habeas corpus relief in the circuit court.

Discussion

First, Appellant argues the lower court erred in finding that he was procedurally barred from petitioning the circuit court because the allegations could and should have been raised in a PCR application. Appellant relies exclusively on the lower court's order denying the State's motion to dismiss to argue that the procedural bar is excused in his case. The lower court's order makes no such finding, and Appellant fails to even address why the procedural bar should have been excused.

The lower court correctly ruled Appellant's petition was not appropriately heard in the circuit court. A state habeas petition must be filed in the original jurisdiction of the South Carolina Supreme Court. See Keeler v. Mauney, 330 S.C. 568, 500 S.E.2d 123 (Ct. App. 1998). Relief must be sought in the original jurisdiction of the South Carolina Supreme Court or in a successive PCR application filed in the appropriate county. The law is abundantly clear that any issues that are cognizable under the Uniform Post-Conviction Procedure Act² must be raised in a PCR application and not in a petition for habeas corpus. The enactment of the PCR Act "drastically limited the availability of habeas corpus." Id. (citation omitted). Post-conviction relief is intended to include all "relief available under the common law writ of habeas corpus, the relief available under the expansion of the writ, and the relief available by collateral attack under any common law, statutory or other writ, motion, petition, proceeding, or remedy." See Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 430 (1998); see also S.C. Code Ann. § 17-27-20(b)

² S.C. Code Ann. §§ 17-27-10, et. seq. (2003).

(2003) (noting post-conviction relief “comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence”). Appellant’s allegations that the trial court lacked jurisdiction to impose the sentence are not only in the purview of the PCR Act, they are *explicitly* enumerated. See S.C. Code Ann. § 17-27-20(A) (“Any person who has been convicted of, or sentenced for, a crime and who claims: . . . (2) That the court was without jurisdiction to impose the sentence.”). Appellant’s other allegation that his sentence has expired is also explicitly covered by the PCR act. See S.C. Code Ann. § 17-27-20(A) (“(5) That his sentence has expired . . .”).

Appellant made no argument to the lower court and makes no argument here that his allegations are not within the purview of the PCR Act. Instead, Appellant relies on the order denying the State’s motion to dismiss to argue he should have been allowed to pursue his claims in a circuit court habeas petition. The State filed a motion to dismiss the petition in the circuit court arguing that the court lacked subject matter jurisdiction to entertain the matter. The order denying the motion to dismiss merely ruled that Appellant had made a sufficient showing, under Rule 12(b), SCRCP, that the circuit court does have subject matter jurisdiction over a habeas petition. Whether the lower court had subject matter jurisdiction is a separate question of whether Appellant’s specific allegations are procedurally barred. This was highlighted during the motion to dismiss hearing. (MTD Transcript p. 41-53). The order denying the motion to dismiss only found Appellant was entitled to a hearing to determine whether he could meet his burden in proving his case under the appropriate legal framework as properly applied by the lower court. Specifically, Appellant had to show that his allegations were not encompassed by the PCR Act. He could not. Appellant’s allegations are clearly cognizable under the PCR Act, and, therefore, are procedurally barred from being raised before the circuit court.

II.

Appellant is barred by *res judicata* from continuing to pursue these allegations. As an alternative sustaining ground, Appellant's petition was properly dismissed because Judge Cottingham maintained jurisdiction over Appellant's case and had the power to sentence Appellant as he did. Furthermore, Appellant's sentence has not expired.

Appellant argues the lower court erred in finding that Judge Cottingham had jurisdiction to impose the consecutive 25-year sentence at the August 9, 1990 sentencing hearing.

How the Issue Arose Below

On April 7, 1990, Appellant pled guilty before Judge Cottingham to conspiracy counts in the two SGJ indictments in return for the dismissal of all other SGJ counts as well as the dismissal of numerous other serious charges.³ (Plea Tr. p. 1-7). Appellant pled pursuant to a written plea agreement which provided that he would receive concurrent twenty-five (25) year sentences on the conspiracy counts *if* he abided by the plea agreement and cooperated with authorities, but the State could request that the sentences be run *consecutively* if he failed to cooperate. (Plea Tr. p. 3; 13). Sentencing was deferred until June 4, 1990, at which point the parties returned before Judge Cottingham. (June 1990 Sentencing p. 1). Appellant had moved to fire Mr. Lofton and retain new counsel, Timothy F. Rogers and Michael J. Cox, Esquires. Judge Cottingham allowed Mr. Rogers and Mr. Cox to appear but ordered Mr. Lofton to remain on the case due to his familiarity with the issues and the late nature of Appellant's decision. (June 1990 Sentencing p. 3). Judge Cottingham sentenced Appellant to twenty-five (25) years'

³ While not part of the plea agreement, numerous charges brought by other jurisdictions were dismissed. Marlboro County burglary and kidnapping charges were dismissed. Richland County charges were dismissed. Federal firearm charges were dismissed out of the Florence Division of the U.S. Attorney's Office. It was agreed that sentences on pending North Carolina charges would be served concurrently with the South Carolina sentences. The State further agreed not to pursue charges against Appellant for offenses that were committed prior to the State Grand Jury indictments.

imprisonment and a \$200,000 fine on Indictment 90-002 (Cocaine), but deferred sentencing on Indictment 90-001 until a hearing could be held on the State's allegations that Appellant had breached the plea agreement previously entered by refusing to cooperate as outlined by his plea agreement. (June 1990 Sentencing p. 21-27).

Thereafter, on August 9, 1990, Judge Cottingham convened a hearing to determine whether Appellant had breached the plea agreement. (August 1990 Sentencing p. 1-4). Testimony was taken from various witnesses including investigators and a codefendant. (August 1990 Sentencing p. 15-119). At the conclusion of the hearing, Judge Cottingham found that Appellant had willfully failed to cooperate with authorities and indeed had threatened the lives of witnesses and codefendants. (August 1990 Sentencing p. 139-44). Accordingly, Judge Cottingham found that Appellant violated his obligations under the plea agreement and sentenced Appellant to a consecutive twenty-five (25) years and \$50,000 fine on Indictment 90-001. (August 1990 Sentencing p. 141).

Judge Cottingham retained jurisdiction to allow Appellant a final opportunity to cooperate with law enforcement as required by his plea agreement. On February 3, 1992, Judge Cottingham issued an order affirming the August 9, 1990, consecutive sentence for conspiracy to traffic marijuana and divesting himself of jurisdiction over the matter. (Order).

Discussion

- A. Appellant is barred by *res judicata* from challenging the lower court's ruling because the South Carolina Supreme Court has denied his subsequent petition for writ of habeas corpus seeking relief on the same grounds.

As an initial matter, the South Carolina Supreme Court has considered Appellant's Petition for Writ of Habeas Corpus on the merits and has denied relief. (S. Ct. Order, June 12, 2018). On December 20, 2017, Appellant filed numerous documents with the supreme court: Petition for Original Jurisdiction and Writ of Habeas Corpus, Petition for Certification of Appeal

to this Court and Consolidation with Original Jurisdiction Proceeding, and Notice of: Petition in the Original Jurisdiction. On June 12, 2018, the supreme court denied all filings including the writ of habeas corpus.

Appellant is barred by the doctrine of *res judicata* at this stage in the litigation as these exact issues have been ruled upon by the supreme court. Appellant filed an identical petition for writ of habeas corpus with the supreme court as originally filed with the lower court. Under the doctrine of *res judicata*, “[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” Judy v. Judy, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (quoting Plum Creek Dev. Co. v. City of Conway, 334 S.C. 34, 512 S.E.2d 109 (1999)). The elements of *res judicata* are: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Judy, 393 S.C. at 167, 712 S.E.2d at 412 (citing Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992)). “[F]or purposes of *res judicata*, a ‘cause of action’ is not the form of action in which a claim is asserted but, rather the ‘cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.’” Plum Creek Dev. Co., 334 S.C. at 36, 512 S.E.2d at 110 (quoting 50 C.J.S. Judgment § 749 (1997)).

In its order denying the petition, the supreme court cited Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998), which sets out the requirements for habeas petitions and holds that relief is “available only when other remedies, such as PCR, are inadequate or unavailable.” The supreme court also cited Simpson which holds that if a matter is cognizable under the PCR Act, then it may not be raised by a petition for writ of habeas corpus. Simpson, 329 S.C. at 46. The State has argued and relied on these cases throughout these proceedings. In his Initial Brief

before this Court, Appellant actually asks this Court to “allow the matter to be decided by the South Carolina Supreme Court.” (IBOA, p. 34). Since that court has done so, this matter should be dismissed. The supreme court has considered this exact issue on the merits, it has been finally adjudicated in an action involving the same parties, so therefore *res judicata* bars Appellant from seeking the relief in this action. Accordingly, this action should be dismissed.

- B. As an alternative sustaining ground, Judge Cottingham maintained proper jurisdiction over Appellant’s case and had the power to act as he did.

Even if this Court were to consider the lower court’s ruling on the merits, Appellant’s arguments still fail.

The South Carolina Constitution provides for the possibility of habeas corpus relief. S.C. Const. Art. 1, § 18. “Habeas relief is seldom used and acts as an ultimate ensurer of fundamental constitutional rights. For these reasons, a defendant bears a much higher burden in a habeas proceeding.” Williams v. Ozmint, 380 S.C. at 477, 671 S.E.2d at 602. A writ of habeas corpus is reserved for only the most serious of constitutional violations which – in the setting – constitute a “denial of fundamental fairness shocking to the universal sense of justice.” Id. (citing Green v. Maynard, 349 S.C. 535, 538, 564 S.E.2d 83, 84 (2002)); see also Butler v. State, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). This Court has held, however, that not “every constitutional error at trial will justify issuance of the writ.” McWee v. State, 357 S.C. 403, 406, 593 S.E.2d 456, 457 (2004) (quoting Green v. Maynard, 349 S.C. at 538, 564 S.E.2d at 84). This Court will grant a writ of habeas corpus only under “unique and compelling circumstances.” Id. Habeas corpus is available only when other remedies – such as post-conviction relief – are either inadequate or unavailable. See Gibson v. State, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998).

The lower court was correct in finding even if the issues were properly before it, Appellant failed to show the alleged constitutional violations have denied him fundamental

fairness that is shocking to the universal sense of justice. Appellant's first argument was that Judge Cottingham lacked the authority to retain jurisdiction over the case and defer sentencing to a later date. Appellant incorrectly frames this as a subject matter jurisdiction challenge. An applicant may challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), *overruled in part by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, 610 S.E.2d at 499; See also S.C. Const. Art. V, § 7. Thus, rather than raising an issue of subject matter jurisdiction, Appellant is raising a challenge to the trial court's authority. The record completely refutes Appellant's claims that Judge Cottingham improperly deferred sentencing while retaining jurisdiction over the case.

The chief administrative judge for general sessions for the Fifth Judicial Circuit oversees the State Grand Jury and is referred to as the "presiding judge" throughout the State Grand Jury Act. S.C Code Ann. § 14-7-1630(B). The presiding judge is responsible for the docket management of all criminal and civil proceedings arising out of the State Grand Jury including issues with subpoenas, the impanelment of the jurors, and the bond hearings for defendants indicted by the SGJ. The presiding judge also handles all of the administrative matters relating to the SGJ including issuance of orders, search warrants, and arrest warrants. Id. Once a defendant is indicted and after a venue order is entered, the Chief Justice of the Supreme Court assigns a judge to "take jurisdiction of and preside over all civil and criminal proceedings, with the exception of post-conviction relief matters, arising out of that investigation and set terms of court for the trial of these cases in the county where venue is set by the Presiding Judge of the State

Grand Jury.” See Administrative Order State Grand Jury, S.C. Sup. Ct. Order dated March 20, 2003.⁴

Here, venue was ordered in Chesterfield County, and Judge Cottingham was assigned by Chief Justice George T. Gregory, Jr., to preside over all cases arising out of the SGJ investigation. (Order, S.C. Sup. Ct. Order dated November 15, 1989). With that order, Judge Cottingham had continuing jurisdiction over Appellant’s case along with his codefendants’ cases. This allowed Judge Cottingham to get a full picture of the investigation and the allegations set forth in the indictments. Judge Cottingham had the authority to manage Appellant’s case as he saw fit. The trial court was not limited in its jurisdiction as it may have been if Judge Cottingham had been assigned a specific weekly term of court, because he was vested with continuing jurisdiction over the case, which is unique to SGJ cases.

Appellant further argued that Judge Cottingham was without authority to defer sentencing. Since there was clearly continuing jurisdiction over Appellant’s case, the question turns to whether Judge Cottingham properly deferred sentencing. “Judgment in a criminal case is not final until sentence is imposed.” State v. Robinson, 287 S.C. 173, 174, 337 S.E.2d 204, 204 (1985). Here, Appellant’s sentence was not final until he was sentenced on the trafficking in marijuana indictment. That sentence was imposed on August 9, 1990, as evidenced by the sentencing sheet and the transcript. (August 9, 1990 Sentencing Sheet). Judge Cottingham was well within his authority to defer sentencing and to provide Appellant an opportunity to cooperate as set forth in the plea agreement. It is important to note that while Appellant argues

⁴ This Order was issued after Appellant had been sentenced, but these were the procedures in place at the time. The Supreme Court issued an order that “the Honorable Edward B. Cottingham, be, and he hereby is, vested with concurrent jurisdiction in all circuits of the state to dispose of all common pleas and general sessions matters, including trials by jury, arising from State Grand Jury Investigation No. 89-005.” S. Ct. Order issued November 15, 1989.

Judge Cottingham was without subject matter jurisdiction, the question is really whether Judge Cottingham had the power to act in a particular manner. See State v. Campbell, 376 S.C. 212, 656 S.E.2d 371 (2008) (distinguishing jurisdiction from subject matter jurisdiction and explaining that a trial judge is without the power to act under the general rule despite the existence of subject matter jurisdiction).

Appellant also argues that his sentence has expired. This is based on the faulty assumption that he was sentenced to concurrent terms of twenty-five (25) years' imprisonment. The comprehensive record shows that Appellant was sentenced to *consecutive* terms of twenty-five (25) years' imprisonment. If the Court reversed on the grounds that Judge Cottingham did not have jurisdiction or authority to act, then no sentence would have been imposed on the trafficking marijuana indictment. This would not require Appellant's release and would instead merely require a remand to have that sentence imposed. This further supports the State's argument that habeas relief is improper as the only remedy in habeas is release.

III.

The lower court properly ruled that Appellant's allegations against the State and the South Carolina Department of Correction (SCDC) were separate and distinct.

Appellant argues the lower court erred by not addressing Appellant's arguments that he is entitled to habeas corpus relief based on the actions of SCDC. The lower court properly recognized the issues as distinct as between the State and SCDC. The allegations that Judge Cottingham was without jurisdiction to impose his sentence and that Appellant's sentence had expired were grounds that only concerned the State. The allegations that SCDC's actions constituted an equal protection violation and that Appellant's due process rights were violated were distinct from any allegations made against the State. The State does not address the issues

specific to SCDC in this brief. Appellant has needlessly complicated these proceedings and issues. The issues presented to the lower court were properly ruled upon as to each party.

IV.

Appellant concedes that his allegations of impropriety by the lower court are unpreserved. Still, the allegations are baseless.

Finally, Appellant argues the lower court committed numerous ethical violations while presiding over this matter. Notably, Appellant concedes that this issue was neither raised nor ruled upon by the lower court and is therefore not properly before this court for consideration. (IBOA, p. 34-35). An argument not raised to and ruled on by the lower court is not preserved for appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (“An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court’s opinion should be vacated to the extent it addressed an issue that was not preserved.”).

While this issue is clearly not preserved, the State, nevertheless, notes that this is a brazen attempt by Appellant to distract from the actual issues by making baseless allegations against Judge Hood, the lower court judge. Specifically, Appellant argues that because Judge Hood was employed as a prosecutor by the South Carolina Attorney General’s Office that he was therefore an advocate for the State and ruled “so as to protect his former employer.” (IBOA, p. 34). This allegation is completely unsupported by the record. Appellant makes numerous other outlandish and baseless allegations regarding the lower court judge’s impropriety. These arguments are absurd and should be treated as such by this Court.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

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August 15, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Robert E. Hood, Circuit Court Judge
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Appellate Case No. 2017-002577

Charles Eugene Carpenter, #181783,

Appellant,

v.

South Carolina Department of Corrections and
the State of South Carolina,

Respondents.

CERTIFICATE OF SERVICE

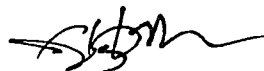
I, J. Clayton Mitchell, certify that I have today served the within **Initial Brief of Respondent for the State of South Carolina and Designation of Matter** upon all parties by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 15th day of August, 2018.



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August 15, 2018

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Re: Charles Eugene Carpenter v. State of South Carolina
Appellate Case No. 2017-002577
Lower Court Case No. 2016-CP-40-06916

Dear Ms. Kitchings:

Enclosed please find for filing the original and one copy of both the **Initial Brief of Respondent for the State of South Carolina** and the **Designation of Matter** to be included in the Record on Appeal.

Sincerely,

J. Clayton Mitchell
Assistant Attorney General
S.C. Bar No. 101443

JCM/cc

cc: Desa Bellard, Esquire (2 copies)
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