STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2017-000557

THE STATE,

Respondent,

v.

WILLIE YOUNG,

Appellant.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STANDARD OF REVIEW 2

STATEMENT OF THE CASE 3

ARGUMENT 4

I. The circuit court did not abuse its discretion by declining to appoint counsel to represent Appellant on his 29(b) motion because there is no right to counsel in a collateral attack on a criminal conviction 4

II. The lower court correctly denied Appellant's 29(b) motion for a new trial because Appellant's motion was not timely and he did not produce any newly discovered evidence. 6

CONCLUSION 13

TABLE OF AUTHORITIES

Federal Cases

Gideon v. Wainwright, 372 U.S. 335 (1963) 4, 5

Pennsylvania v. Finley, 481 U.S. 551 (1987) 4

United States v. Williamson, 706 F.3d 405 (4th Cir. 2013) 4

State Cases

Broom v. Jennifer J., 403 S.C. 96, 742 S.E.2d 382 (2013) 5

Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994) 8

Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005) 8

Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2017) 6

State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997) 5

State v. Clinkscales, 318 S.C. 513, 458 S.E.2d 548 (1995) 4

State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) 7, 8

State v. Lark, 64 S.C. 350, 42 S.E. 175 (1902) 7, 8, 9, 10

State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998) 2, 6

State v. Sanders, 269 S.C. 215, 237 S.E.2d 53 (1977) 5

State Statutes

S.C. Code Ann. § 17-19-90 7

S.C. Code §14-5-620 .... 7, 10, 11

S.C. Const. art. V, § 1 9

S.C. Const. art. V, § 4 .... 10, 11

STATEMENT OF ISSUES ON APPEAL

I.

The circuit court did not abuse its discretion by declining to appoint counsel to represent Appellant on his 29(b) motion because there is no right to counsel in a collateral attack on a criminal conviction.

II.

The lower court correctly denied Appellant's 29(b) motion for a new trial because Appellant's motion was not timely and he did not produce any newly discovered evidence.

Standard of Review

The granting of a motion for a new trial based on after-discovered evidence is not favored and, absent error of law or abuse of discretion, an appellate court will not disturb the trial judge's denial of the motion. State v. Needs, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1998).

STATEMENT OF THE CASE

In 2002, Appellant was convicted in Orangeburg County of armed robbery and sentenced to thirty years' incarceration. Appellant timely filed a notice of appeal and an appeal was perfected in the form of an Anders brief. This Court reviewed the record pursuant to Anders and dismissed the appeal. State v. Young, No. 2003-UP-564 (Ct. App. September 29, 2003). Appellant subsequently filed four collateral attacks on his conviction, all of which were denied.[1]

On July 26, 2016, Appellant filed a pro se motion for a new trial pursuant to Rule 29(b) SCRCrimP. A hearing was held at the Orangeburg County Courthouse on October 26, 2016, before the Honorable Edgar W. Dickson. Appellant told the court he was unable to hire counsel and requested the court appoint counsel. Tr. 3. The trial court initially expressed doubt that it had the authority to appoint counsel for a Rule 29(b) motion. Tr. 4. The court consulted with Breen Stevens of the First Circuit Public Defender's Office, who opined that the court had the inherent authority to appoint counsel. Tr. 5-6. The court accepted it had the authority to appoint counsel but declined to do so. Tr. 10. Appellant proceeded pro se.

Appellant did not allege any newly-discovered facts related to the merits of his case. Instead, he raised a legal challenge to the indictment under which he was convicted, complaining of alleged defects apparent on the face of the indictment. He also argued his conviction for armed robbery was invalid because he was acquitted of a companion weapons charge.[2] The trial court denied Appellant's motion in a written order dated December 21, 2016. R.— This appeal follows.

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[1] Young v. State, 2003-CP-38-1585; Young v. Burtt, C.A. No. 6:07-2893-CMC-WMC; Young v. State, 2010-CP-38-1759; Young v. State, 2013-CP-38-00757.

[2] Young raised the subject matter jurisdiction and weapons charge issues in prior collateral attacks. R.—

ARGUMENT

I.

The circuit court did not abuse its discretion by declining to appoint counsel to represent Appellant on his 29(b) motion because there is no right to counsel in a collateral attack on a criminal conviction.

Appellant claims the circuit court erred by refusing to appoint counsel to represent him on his motion for a new trial, citing cases involving the constitutional right to counsel. However, Appellant was not entitled to counsel at this proceeding because his motion was a collateral attack on his conviction and the right to counsel extends only to the first appeal of right. Appellant has not shown an abuse of discretion in the court's ruling. This Court should affirm.

This is not a proceeding where Appellant was "haled into court" to answer criminal charges. See Gideon v. Wainwright, 372 U.S. 335, 344 (1963). This motion was filed by Appellant fourteen years after his conviction following four separate collateral challenges. A motion for a new trial based on after discovered evidence filed outside the time for post-trial motions and after the direct appeal is a collateral proceeding. State v. Clinkscales, 318 S.C. 513, 515, 458 S.E.2d 548, 549 (1995) ("We hold that Clinkscales was not entitled to counsel. Clearly, the New Trial Motion on the ground of after-discovered evidence was not heard and determined at a critical stage. Moreover, the record does not contain evidence which would support a New Trial for after-discovered evidence."); United States v. Williamson, 706 F.3d 405, 415 (4th Cir. 2013) (collecting cases and explaining "after an appeal has been filed and the window has closed on the record of conviction, Rule 33 'newly discovered evidence' proceedings in the district court are truly collateral proceedings to which the Sixth Amendment right to counsel does not attach"). There is no right to counsel in collateral proceedings. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("Our cases establish that the right to

appointed counsel extends to the first appeal of right, and no further."). Accordingly, Appellant was not entitled to appointed counsel for his 29(b) motion.

Appellant ignores the above-cited controlling authority and instead cites a family court termination of parental rights case[3] and three cases[4] involving the right to counsel during a jury trial. These cases are inapplicable to a collateral challenge. Appellant cites no other case or provision of law in support of his argument, and has failed to show how the trial court abused its discretion by refusing to appoint counsel to represent Appellant on this successive, untimely, and meritless motion. This Court should affirm.

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[3] Broom v. Jennifer J., 403 S.C. 96, 742 S.E.2d 382 (2013).

[4] State v. Sanders, 269 S.C. 215, 237 S.E.2d 53 (1977); State v. Brewer, 328 S.C. 117, 119, 492 S.E.2d 97, 98 (1997); Gideon v. Wainwright, 372 U.S. 335 (1963).

II.

The lower court correctly denied Appellant's 29(b) motion for a new trial because Appellant's motion was not timely and he did not produce any newly discovered evidence.

Though styled as a motion for a new trial based on after-discovered evidence, Appellant's Rule 29(b) motion does not allege any newly-discovered facts, much less facts material to guilt or innocence. Instead, it is a legal challenge to the indictment under which Appellant was tried. Furthermore, the motion is untimely because the alleged defects in the indictment could have been discovered when this case went to trial in 2002. The lower court correctly characterized the motion as yet another application for post-conviction relief masquerading as a Rule 29(b) motion for a new trial. In any case, Appellant's claims are meritless because defects in an indictment do not deprive a court of subject matter jurisdiction. This Court should affirm.

Rule 29(b) of the South Carolina Rules of Criminal Procedure states, in pertinent part:

> A motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence.

In South Carolina, to obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered since trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. Jamison v. State, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2017); State v. Needs, 333 S.C. 134, 157-58, 508 S.E.2d 857, 869 (1998). Appellant fails to make the requisite showing.

First, Appellant's motion is untimely. The alleged defect in the indictment could have been discovered at or before trial by simply looking at the charging document. Not only is the motion untimely under Rule 29(b), S.C. Code Ann. § 17-19-90 provides: "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." See also State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005) (citing S.C. Code §17-19-90) (holding "if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards"). The purpose of the statute is "to prevent motions to arrest judgment on grounds based upon defects in indictment apparent on the face thereof." State v. Lark, 64 S.C. 350, 42 S.E. 175, 176 (1902). This is precisely the type of challenge Appellant now mounts— one apparent on the face of the indictment. Appellant was required to raise this issue at trial, and may not do so now.

Moving on to the substance of Appellant's motion, Appellant alleges the indictment under which he was convicted was "null and void" because it was stamped with a true bill on January 28, 2002. Appellant alleges the Orangeburg County Court of General Sessions lacked jurisdiction at this time, citing S.C. Code §14-5-620, the statute that lays out the minimum terms of court that must be held yearly in each county. See Appellant's written motion, R.—. At the motion hearing, Appellant further claimed the indictment was invalid because the true bill date did not match the term of court listed in the caption of the indictment. Tr. 11.

The merits of Appellant's motion need not even be considered because he does not allege any new facts related to his guilt or innocence. Instead, he makes a purely legal challenge on grounds that were apparent on the face of the indictment and available a trial. As such, his motion is not based on after-discovered evidence at all, and is not within the scope of Rule 29(b).

Regardless, Appellant's claim is meritless. Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). In State v. Gentry, our supreme court abandoned the view that, in criminal matters, the circuit court acquires subject matter jurisdiction to hear a particular case by way of a valid indictment by either a county or state grand jury. State v. Gentry, 363 S.C.93, 101, 610 S.E.2d 494, 499 n.6 (2005) ("We note that a presentment of an indictment or a waiver of presentment is not needed to confer subject matter jurisdiction on the circuit court. However, an indictment is needed to give *notice* to the defendant of the charge(s) against him.") (emphasis in original). The subject matter jurisdiction of the circuit court and the sufficiency of an indictment are two distinct concepts. Id. 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. Evans v. State, 363 S.C. 495, 509, 611 S.E.2d 510, 518 (2005). However, such a challenge does not implicate the subject matter jurisdiction of the circuit court. Id.

Here, Appellant does not dispute the existence of an indictment which put him on notice of what charge he was called upon to answer, apprised him of the elements of the offense, allowed him to decide whether to plead guilty or stand trial, and enabled the circuit court to know what judgment to pronounce when Appellant was convicted. The indictment demonstrates Appellant's charge was presented to, and true billed by, the Orangeburg County grand jury on January 28, 2002. Appellant's challenge before the lower court and in this appeal goes to the statutory procedures employed to empanel the grand jury that indicted him. Because this challenge does not implicate subject matter jurisdiction, it is not a ground for relief. See State v.

Lark, 64 S.C. 350, 42 S.E. 175, 176 (1902) ("[T]he caption of an indictment is no part of the finding of the grand jury[.]").

The judicial power is vested under Article V of the South Carolina Constitution in the unified judicial system. It provides: "The judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law." S.C. Const. art. V, § 1. With regard to setting terms of court, this power remains with the Chief Justice of the Supreme Court, who is the administrative head of the unified judicial system. S.C. Const. art. V, § 4. The provision states in pertinent part:

> [E]ach county shall be entitled to four weeks of court each year and such terms therefor shall be provided by the General Assembly. Provided, further, that the Chief Justice shall set a term of at least one week in any court of original jurisdiction in any county within sixty days after receipt by him of a resolution of the county bar requesting it. The Supreme Court shall make rules governing the administration of all the courts of the State.

Id.

In his written motion, Appellant relied on S.C. Code Ann. § 14-5-620, which states the following:

> (3) Orangeburg County. - The court of general sessions for the county of Orangeburg shall be held at Orangeburg the second Monday in January, the first Monday in May and the second Monday in September. The term shall be for two weeks for the January and September sessions. The term shall be for three weeks for the May session. The court of common pleas for the county of Orangeburg

> shall be held at Orangeburg on the second Monday in March for three weeks, the first Monday in June for three weeks, and a three-week term commencing the first Monday in October, continuing for two weeks and then recommencing on the fourth Monday and continuing for an additional week.

S.C. Code Ann. § 14-5-620 (2017). Appellant appears to contend that, because he was not indicted and tried in the second week of January, his indictment and subsequent conviction are null and void. However, the above statute merely provides for a minimum amount of terms of court that are to be scheduled in each county, which is the responsibility of the General Assembly. The statute does not limit the ability of the Chief Justice of the Supreme Court to schedule additional terms of court pursuant to its constitutional power delineated in Article V, Section 4. Although section 14-5-620 does not provide for Orangeburg County general sessions terms of court at the time of Appellant's trial, South Carolina Court Administration, pursuant to authority given by the Chief Justice, appears to have specifically scheduled general sessions terms of court during those weeks, and it acted within its constitutional authority in doing so.

Even though Appellant offered zero proof that Court Administration did not schedule court for the week his indictment was true billed or when his trial held, the trial court took it upon itself to look up the 2002 terms of court and discovered Orangeburg County did in fact have General Sessions jurisdiction at those times. See Order, R.—. Appellant claims this Court must discard the lower court's finding, ironically claiming it is without evidence. However, it was permissible for the court to take judicial notice of terms of court. See State v. Lark, 64 S.C. 350, 42 S.E. 175, 176 (1902) ("But the best evidence of the time of the finding of the indictment was the court journals, of which, doubtless, the trial judge took notice."). Appellant bears the burden of proving the grand jury was not properly impaneled. Here, he failed to carry his burden

of proof. In other words, Appellant has failed to demonstrate that the alleged newly-discovered "evidence" is material to guilt or innocence and would have changed the result of trial. Thus, his motion was properly denied by the lower court.

CONCLUSION

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

Respectfully submitted,

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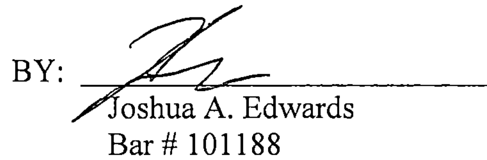
DAVID PASCOE
Solicitor, First Judicial Circuit

BY: 
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December 13, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions
Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2017-000557

THE STATE, Respondent,

v.

WILLIE YOUNG, Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter Appellant by by depositing a copy of same in the United States mail, postage prepaid, addressed to Christopher R. Geel, Esquire, Geel Law Firm, LLC, 171 Church Street, Suite 330, Charleston, SC 29401.

I further certify that all parties required by Rule to be served have been served.
This 13th day of December, 2018.

Anne Mueller
Legal Assistant for Respondent

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ALAN WILSON
ATTORNEY GENERAL

December 13, 2018

Christopher R. Geel, Esquire
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Charleston, SC 29401

RE: State v. Willie Young
Appellate Case No. 2017-000557

Dear Mr. Geel:

I am enclosing two (2) copies of the Initial Brief of Respondent in the above-referenced case.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
Bar # 101188

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DEC 13 2018
SC Court of Appeals

JAE/aam
Enclosures

cc: Honorable Jenny A. Kitchings (original and 1 enclosed)
Victim Advocacy Division