

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Greenville County

Honorable Robin B. Stilwell , Circuit Court Judge

RECEIVED

CHRISTOPHER JAVIER COBB,

DEC 21 2018

PETITIONER

S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000751

PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

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The PCR court erred by denying Petitioner relief, where the trial court did not have subject matter jurisdiction, where Petitioner pleaded guilty to assault and battery of a high and aggravated nature after being indicted for murder, where Petitioner never waived presentment to the grand jury, where ABHAN is not a lesser included offense for murder, and where plea counsel never advised Petitioner of the lack of jurisdiction.5

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ISSUE PRESENTED

Whether the PCR court erred by denying Petitioner relief, where the trial court did not have subject matter jurisdiction, where Petitioner pleaded guilty to assault and battery of a high and aggravated nature after being indicted for murder, where Petitioner never waived presentment to the grand jury, where ABHAN is not a lesser included offense for murder, and where plea counsel never advised Petitioner of the lack of jurisdiction?

STATEMENT

Petitioner was indicted for murder by a Greenville County grand jury on September 16, 2014. App. 77 – 78. On April 4, 2016, he pleaded guilty to assault and battery of a high and aggravated nature before the Honorable Edward W. Miller App. 4 ll. 1 – 5; App. 5 ll. 17 – 21. Katrina Salisbury served as the assistant solicitor, and C. Carlyle Steele represented Petitioner.

The facts alleged by the state at the plea were as follows: On December 18, 2012, law enforcement responded to a report of shots having been fired in Greenville County. App. 7 l. 24 – App. 8 l. 23. A woman named Chiquita Johnson passed away after having been shot. Id. There was no evidence Petitioner was carrying a firearm or that he fired any shots. App. 19 ll. 1 – 3.

Judge Miller accepted Petitioner's plea. App. 9 ll. 19 – 25. Sentencing was deferred so that Petitioner could testify in related cases. App. 9 l. 24 – App. 10 l. 3. On December 6, 2016, the Honorable Perry H. Gravely sentenced Petitioner to ten years' incarceration suspended to four years, with three years' probation. App. 25 ll. 20 – 22.

On June 13, 2017, Petitioner filed an application for post-conviction relief. App. 27 – 34. It contained allegations of ineffective assistance of counsel, lack of subject matter jurisdiction, and prosecutorial misconduct. The State filed its Return and a Motion for More Definite Statement on or about October 11, 2017. App. 35 – 41.

An evidentiary hearing was held on December 11, 2017 before the Honorable Robin B. Stilwell. App. 42. R. Mills Ariail, Jr. represented Petitioner, and DeShawn Mitchell appeared on behalf of the State. Petitioner and plea counsel testified at the hearing.

At the conclusion of the hearing, Judge Stilwell denied relief on the basis that Petitioner failed to prove deficiency. App. 65 ll. 10 – 12. An Order of Dismissal was signed on March 21, 2018.

This petition follows.

ARGUMENT

The PCR court erred by denying Petitioner relief, where the trial court did not have subject matter jurisdiction, where Petitioner pleaded guilty to assault and battery of a high and aggravated nature after being indicted for murder, where Petitioner never waived presentment to the grand jury, where ABHAN is not a lesser included offense for murder, and where plea counsel never advised Petitioner of the lack of jurisdiction.

Relevant facts

The crux of Petitioner's post-conviction relief testimony revolved around counsel's ineffectiveness in letting Petitioner sign a plea when counsel knew Petitioner was innocent. App. 51 ll. 7 – 15. Petitioner admitted to being afraid of a potential life sentence even though he was innocent. App. 52 ll. 9 – 13. However, he wanted to go to trial and contest the charge; he thought a trial would prove his innocence.

Plea counsel was appointed to represent Petitioner. App. 46 ll. 18 – 21. After he was arrested, Petitioner bonded out. App. 46 ll. 8 – 17. The two met numerous times, according to Petitioner. App. 47 ll. 1 – 3. As the trial began, Petitioner was confident that he would be found not guilty. App. 48 ll. 12 – 21. A recess took place, and counsel approached Petitioner with the plea offer. Id.

The plea was assault and battery of a high and aggravated nature. App. 48 l. 25 – App. 49 l. 25. Petitioner questioned why a plea offer was being discussed if he stood to be acquitted. Id. Counsel informed Petitioner that the State was going to make the incident out to be a gang shooting. Id. Petitioner became afraid of the possibility of a lengthy sentence and agreed to plead guilty based on the understanding that he could go home if he signed the plea. Id. When

asked on cross-examination whose decision it was to plead guilty, Petitioner indicated that it was counsel's decision; Petitioner just "went along with it." App. 55 ll. 13 – 16.

Counsel told Petitioner that the plea offer entailed a suspended sentence such that Petitioner would plea and then return for sentencing later. Id. It understandably followed that Petitioner did not believe that he would be incarcerated based on conversations with counsel. App. 50 ll. 7 – 14. In fact, counsel said Petitioner should not receive a sentence which would include prison time. App. 54 ll. 6 – 16.

Counsel apologized at the evidentiary hearing for not being able to convince the sentencing judge to give Petitioner home incarceration in lieu of a prison sentence. App. 59 ll. 12 – 22. On cross-examination, counsel vouched for Petitioner's credibility, describing him as "an honest fella." App. 61 l. 23 – App. 62 l. 3.

As mentioned above, the PCR court denied relief at the conclusion of the hearing. App. 63 l. 1 – App. 65 l. 22. Judge Stilwell found "that there was a fairly strong case for the hand of one is the hand of all, that is accomplice liability." Id. The decision to deny relief was based "entirely on the transcript and what [Petitioner] said at the time." Id. The Order of Dismissal analyzed three issues: ineffective assistance of counsel, subject matter jurisdiction, and prosecutorial misconduct. The PCR court reached the following conclusion regarding the subject matter jurisdiction claim:

While Applicant is correct that he was charged with murder and ABHAN is not a lesser included offense of murder nor did he waive presentment for this charge, Applicant received the plea deal he bargained for.

App. 74.

Discussion

The State admitted “[t]here was no evidence that [Petitioner], himself, was armed with a firearm or that he fired any shots.” App. 19 ll. 1 – 3. The State, at trial, planned to utilize an accomplice liability theory to prosecute Petitioner. However, Petitioner did not even know who the decedent was. App. 6 ll. 10 – 11. Following his plea to ABHAN, Petitioner inquired whether he would still have a murder charge on his record. App. 10 l. 24 – App. 11 l. 11. Petitioner indicated that he had been fired from a job after being charged with murder; he indicated that he wanted to ensure that the charge would not appear on a background check.

As a result of the State’s lack of evidence pertaining to Petitioner, he “came into the courtroom thinking ... that [he and counsel] pretty much were going to win the case.” App. 48 ll. 12 – 21. At a recess, counsel approached Petitioner with a plea offer. App. 48 l. 12 – App. 49 l. 10. In response, Petitioner questioned why he should plead guilty if they anticipated winning at trial. Id. Counsel informed Petitioner that the State “would make it look like a gang shooting.” Id. With regards to the post-conviction relief allegations, Petitioner testified that counsel knew he was innocent yet let him sign a plea deal on unindicted charges. App. 51 ll. 7 – 15. Petitioner “just kind of just followed” the advice of his attorney although he was “never sure [about] making the decision” to plead guilty. App. 52 ll. 3 – 5. Notably, Petitioner testified that he would have been successful with trial had he and counsel elected to go that route. App. 51 ll. 16 – 19.

In a criminal case the trial court’s subject matter jurisdiction is limited to those crimes charged in the indictment and all lesser included offenses. State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (Ct. App. 2002). Subject matter jurisdiction may be raised at any time. Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995). The trial court lacks subject matter jurisdiction to

accept a plea unless: (1) there is an indictment that sufficiently states the offense, (2) the defendant has waived indictment, or (3) the plea is to a lesser included offense of the crime charged in the indictment. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998). In this case, Petitioner was neither indicted for ABHAN nor waived presentment to the grand jury. For the reasons explained below, ABHAN is not a lesser included offense to murder, meaning the trial court lacked jurisdiction to accept the plea.

The test for determining when a crime is a lesser included offense is whether the greater of the two offenses includes all the elements of the lesser offense. Murdock v. State, 308 S.C. 134, 417 S.E.2d 542 (1992). ABHAN is an unlawful act of violent injury to another person accompanied by circumstances of aggravation. State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). A definition codified in 2010 lists the offense as unlawful injury to another either with great bodily injury as a result or accompanied by means likely to produce death or great bodily injury. S.C. Code Ann. § 16-3-600(B)(1). “Assault and battery of a high and aggravated nature is a lesser-included offense of attempted murder as defined in Section 16-3-29.” S.C. Code Ann. § 16-3-600(B)(3).

On the other hand, murder is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. 16-3-10. Voluntary and involuntary manslaughter are lesser-included offenses of murder. State v. Scott, 414 S.C. 482, 779 S.E.2d 529 (2015); State v. Sams, 410 S.C. 303, 764 S.E.2d 511 (2014).

Because ABHAN is not a lesser included offense of murder and Petitioner did not waive presentment to the grand jury, the trial court did not have subject matter jurisdiction in Petitioner’s case. Counsel was ineffective for failing to advise Petitioner on the lack of

jurisdiction and allowing the State to proceed on an unindicted charge which resulted in a ten year sentence.

A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998).

The test for determining the validity of a guilty plea based upon alleged ineffective assistance of counsel is whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and whether there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989). "A defendant who pleads guilty upon the advice of counsel may only attack the voluntary and intelligent character of the guilty plea by showing the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases." Richardson v. State, 310 S.C. 360, 363, 426 S.E.2d 795, 797 (1993).

Because the grand jury never indicted Petitioner for the ABHAN charge, and Petitioner did not waive present to the grand jury, Petitioner's plea was made to a court lacking jurisdiction. ABHAN is not a lesser included offense of murder. Therefore, the trial court was without jurisdiction to accept Petitioner's plea to the unindicted charge. See Campbell v State, 342 S.C. 100, 535 S.E.2d 929 (2000).

Petitioner repeatedly conferred with counsel at the guilty plea, often in response to a question posed by the judge. App. 4 l. 18; App. 4 l. 23; App. 5 l. 7; App. 5 l. 20; App. 6 l. 22. Based on the concessions by the assistant solicitor that Petitioner was unarmed and did not fire

any shots, the State may not have been able to prove Petitioner's involvement in the murder beyond a reasonable doubt. Petitioner was entitled to the advice of counsel who should have notified him that ABHAN was not a lesser included offense to murder. Had counsel made either his client, the State, or the trial court aware of this discrepancy, the State could have dismissed the murder indictment. Doing so may have made clear to the court that Petitioner should not receive a lengthy sentence. Regardless, the court did not have subject matter jurisdiction to accept Petitioner's guilty plea.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read 'Taylor D Gilliam', written over a horizontal line.


Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of December, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."


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Appellate Defender

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ATTORNEY FOR PETITIONER

This 21st day of December, 2018.

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CHRISTOPHER JAVIER COBB,

PETITIONER

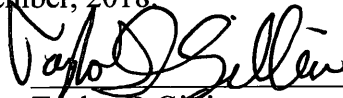
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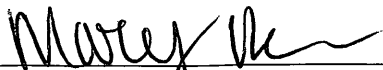
CERTIFICATE OF SERVICE

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 Megan Harrigan Jameson, 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 Christopher Javier Cobb, #370711, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 21st day of December, 2018.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 21st day of December, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.