STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Saluda County

Honorable R. Keith Kelly, Circuit Court Judge

KENDAL SUDDUTH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000955

PRO SE PETITION FOR WRIT OF CERTIORARI

Kendal Suddath #356184
Appellate

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P.O Box 1151
Fairfax, SC 29827

ISSUES PRESENTED

1.) Whether the PCR Court erred in finding petitioner's guilty plea was freely, knowingly, and voluntarily tendered where petitioner was in the third day of trial and counsel agreed petitioner was under tremendous pressure as he was only given ten minutes to decide whether he should accept a plea bargin with a cap of fifteen years or face the rest of his natural life in prison, since counsel did not request any additional time to consult the petitioner?

2.) Whether the PCR Court erred in finding petitioners conviction of 2nd and 3rd degree exploitation of a minor violated the Double Jeopardy Clause.

3.) Whether the PCR Court erred in finding failed to challenge the improper charges.

ARGUMENT I

The PCR Court erred in finding petitioners guilty plea was freely, knowingly, and voluntarily tendered where petitioner was in the third day of trial and Counsel agreed petitioner was under tremendous pressure as he was only given ten minutes to decide whether he should accept a plea bargin with a Cap of Exteen years or face the rest of his Natural life in prison, since Counsel did not request any additional time to Consult with petitioner.

Petitioner Fully Supports ~~appeattate~~ Cansels argument filed in her Johnson Petition for writ of Certiorari.

ARGUMENT 2

The PCR Court erred in Finding that Counsel was ineffective for not objecting to the Exploitation of a minor 2nd degree and Exploitation of a minor 3rd degree indictments. Counsel expressed a belief the State's charging petitioner with both Second and third degree sexual exploitation of a minor constituted double Jeopardy, but never presented this argument to the Trial Court. (PCR tr. p. 15).

The State cited State v. Cuccia, 353 S.E. 430, 438, 578 S.E 2d 45, 49, "Under traditional double Jeopardy analysis, multiple punishment is not prohibited where each offense calls for proof of a fact that ~~each~~ KS the other does not". But they also State in State v. Cuccia "... each of the offenses created requires proof of a different element.

In the PCR order of Dismissal page 16, The State ~~that stated~~ KS printed what petitiones 2nd and third degree indictments reads, but they left out the top portion of the indictments. Petitiones indictments read as follows:

2nd Degree:

That Kendal Suddith did in Saluda County, on or about December 20, 2006 through February 23, 2007, commit the offense of Second degree Sexual exploitation of a minor, in that he did unlawfully and while Knowing the Character or Content of the material, (1)

record, photograph, film, develop, duplicate, produce, or create digital electronic file material that contains a visual representation of a minor engaged in sexual activity; or (2) distribute, transport, exhibit, receive sell, purchase, exchange, or solicit material that contains a visual representation of a minor engaged in sexual activity, to wit: did duplicate, create, solicit or receive a photograph or digital image or digital electronic file(s) or film of a minor engaged in sexual activity and/or material containing a visual representation of a minor engaged in sexual activity as defined in Section 16-15-375(5), in violation of South Carolina Code of Laws Section 16-15-405, 1976, as amended.

Third degree reads:

That Kendal Suddeth, did in Saluda County, on or about December 20, 2006 through February 23, 2007, commit the offense of third degree sexual exploitation of a minor, in that he did unlawfully and while knowing the character or content of the material, did possess material that contained a visual representation of a minor engaging in sexual activity, to wit: photograph(s) and/or digital images(s) and/or digital electronic files and or film(s) of a minor child engaged in sexual activity and/or a visual representation of a minor child engaged in sexual activity as defined in Section 16-15-375(5), in violation of S.C Code of Laws Section 16-15-410, 1976 as amended.

It is very clear that the State Printed the same dates on both 2nd degree and 3rd degree indictments in question. Also, the State Failed to Specify in the Charge of either indictment leaving them to question all elements of the Charges. The State has no evidence that there is distribution or creation of Files and/or Films. At best the State has possession, ~~which is not a crime pursuant to~~ KS ~~Statute~~ By the State not Specifing the elements, this is Clearly a Double Jeopardy Violation.

In US v. Schales, 546 F3d 965 (Ct of appeals) (2008) "We find a double Jeopardy violation because possession of Sexually explicit material is a lesser included offense of receipt of Sexually explicit material and because the Government has not Sufficiently alleged Separate Conduct."

As in petitiones indictments of 2nd and 3rd degree exploitation of a minor, The State Failed to Allege Seperate Conduct. And in US v. Davenport, 519 F. 3d at 943 "Conviction For both receiving child pornography and possessing child pornography violated the Double Jeopardy Clause because the offense of possessing child pornography is a lesser-included offense of the receipt." See Also US v. Miller, 527 F.3d 54, 64 n. 10 (3d Cir 2008). Double Jeopard is a Violation of petitioner's Fifth Amendment. Counsel prejudiced petitioner by failing

To Challenge the Duplicity of petitioners indictments. And record clearly shows that Counsel Anderson believed that the State Could not Convict on both 2nd and 3rd degree charges.

ARGUMENT 3

The PCR Court Erred in Finding that Petitioners Trial Counsel was ineffective by failing to challenge the improper charges. As Stated by the State and Counsel Andrew "Andy" Anderson, Counsel has over 25 years of experience as an Attorney. With this much experience, Counsel Should have challenged the indictments and the process of the State that obtained the indictments. PCR Counsel Asked Counsel Anderson " Q. Mr. Anderson, I believe my client testified that at one point in time there were eighty-four pending indictments against him?" "A. That doesn't sound wrong. Thats -- thats -- that could be right... Well I mean, it was a joke. I mean, we would get -- I swear there was a period where we were getting something almost every day from her. And we were in close contact, ~~with~~ so it was, you know, what did we get today!" (Transcript of record 2013-CP-41-00236, PCR, page 74 L. 3, 4, 5, 6, 14, 15, 16, 17.) These indictments were obtained outside of General sessions court and failed to comply with statutory provisions and and lacks subject matter Jurisdiction.

" The Jurisdiction of a Court over the subject matter of a proceeding is determined by the Constitution, The Laws of the State, and its Fundamental." State v. Heyward, 564 SE 2d 379 (SC app 2002) (citing Anderson v. Anderson, 299 SC 110, 115, 382 SE 2d 897, 900 (1989) (emphasis added). Subject matter Jurisdiction may not be waived even with Consent of the parties, and may be raised at any time. Brown v. State, 343, SC 342, 540 SE 2d 846 (2001). And "No indictment may be true billed by grand Jury when circuit Court lacks jurisdiction, Since Grand Jurys Jurisdiction is Coextensive

with Criminal Jurisdiction of the Court in which it is impaneled and for which it is to make inquiry ..." State v. McClure, 277 SC 432, 289 SE 2d 158 (SC 1982) and State v. Funderburk, 259 SC 256, 191 SE 2d 520 (1972); State v. Wheeler, 259 SC 571, 193 SE 2d 515 (1972).

The statutory provisions at issue are contained in Section 14-9-210 of the SC Code of Laws and provides in pertinent part that: "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 indictments 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 shall report its action to the presiding Judge of the Court of General Sessions and Said Judge shall direct Clerk of the General Sessions Court to report the Same to the presiding Judge of the County at its next ensuing term ..."

Section 14-9-210, requires Strict Compliance with its provisions and mandates that the Grand Jury must be impaneled under the Jurisdiction of the Court of General Sessions before lawful return of a true billed indictment can take Place.

However, here, evidence establishes that the State unlawfully impaneled its Grand Jury outside the Jurisdiction of the Court of General

Sessions, and then willfully printed and published false and misleading information in its indictments in order to keep secret its violations of statutory laws.

Counsel acknowledges the indictments provided by the State was a "Joke". And with 25 years experience in law, Counsel should have been aware of the provisions of Section 14-9-210 and should have questioned the process of how the State obtained True billed indictments over a six year period of the same charges throughout. Counsel should have known to question indictments just by reading the false information printed on indictments.

In this case Petitioners bill of indictments prints that it was returned, "At a Court of General Sessions convened on July 9, 2013, The Grand Jurors of Saluda County present upon their oath:" The indictments are signed by the Solicitor/ Assistant Solicitor and Sealed with a True Billed Stamp. Further, the the Title page of States indictments Points "County of Saluda, Court of General Sessions, July Term 2013".

The term of Court of General Sessions for Saluda County are fixed by SC Code ~~of Criminal~~ K3 Ann § 14-5-760 and which does not offer provisions for a Court to be open for General Sessions on July 9th, 2013. Thus, state could not have lawfully returned its indictments "at a Court of General Sessions, convened on July 9th, 2013".

As established, Section 14-9-210 is clearly a Jurisdictional Statute, and Sets Forth mandatory procedure to be utilized by the State for lawful return of a true-billed indictment. A Substantional body of South Carolina Law holds that a failure to Comply with Statutory Law jurisdictional in nature deprives the Court of Subject matter Jurisdiction, State v. Lee, 564, SE 2d 372 (SC app 2002); State v. Brown 570 SE 2d 559 (Ct app 2002) State v. Felder, 437 SE 2d 43 (SC 1993) and State v. Richburg, 304 SC 162, 403 SE 2d 315 (1991).

Our Supreme Court has determined that No indictment may be true-billed by a Grand Jury when the Court lacks Jurisdiction. The Grand Jury must be impaneled under the Jurisdiction of the Court of General Sessions before lawful return of indictments can take place. See State v. McClure, State v. Funderburk, and State v. Wheeler.

Counsel commited Serious attorney error because his performance fell below an objective Standard of reasonableness by disregarding the legal at Petitioners Pre-Trial hearing and failed to Object to the illegal indictments and challenge their improper impanelment of the Grand Jury.

CONCLUSION

Based on the foregoing argument, petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on these issues.

Kendal Suddeth
Appellate defendant
Pro Se

This 21st day of December, 2018

Luth #356184

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