THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Court of General Sessions

Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2017-000557

THE STATE,..... Respondent,

v.

WILLIE YOUNG,..... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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I. Contrary to the State's arguments, because Young's request for counsel was denied, this Court should hesitate to hold the record's deficiencies against him.

Despite well-intentioned efforts to the contrary, Willie Young finds himself caught between a legal Scylla and Charybdis, and the State asks this Court not to spare him from this dilemma, but instead to hold him accountable for it. Young, in his efforts to review his conviction and proceedings *pro se*, discovered an alleged defect in the process by which he was hailed to court. After consulting with Court Administration and concluding that the indictment in his case may have been fraudulently generated, Young promptly filed a Rule 29 motion. Being a state prisoner, Young lacked the ability to research this issue sufficiently, to contact potential witnesses, to visit the courthouse to review records, or to subpoena witnesses. As such, Young made the wise choice to request counsel *in writing*, knowing full well that he lacked the technical and procedural expertise that would be required to present these issues to the court, and to preserve his right to meaningful appellate review. The court denied Young's request, and he was forced to present his arguments below *pro se*.[1]

Proceeding without the aid of counsel, Young did his best to articulate the issues he discovered, and the Court ultimately denied his motion. After beginning

[1] As an aside, it bears noting that appointing Young an attorney to litigate these issues would have cost the State approximately 5% of what it spends to incarcerate Young *every year*. *See* "South Carolina Department of Corrections cost per inmate fiscal years 1988-2017," available at dc.statelibrary.sc.gov/handle/10827/25172.

the process to appeal that ruling, Young was able to retain counsel, and present counsel promptly made a motion to remand the case in order to correct deficiencies in the record. The State opposed that motion, stating that the record before this Court is sufficient to rule on these issues. Now, the State urges this Court to hold Young accountable for the deficiencies in the record. In summary, after Young discovered these alleged issues *pro se*, and after he was denied the assistance of counsel, and after he was forced to litigate these issues himself, and after he moved to remand the case to the trial court to fix deficiencies in the record, the State now urges this Court to lay blame for this predicament on Young. Respectfully, this Court should decline to do so. Further, if the Court concludes that the record is inadequate to meaningfully review these issues, Young respectfully urges this Court to find that remand is the appropriate remedy, rather than affirming the lower court's judgment.

II. Contrary to the State's argument, Young's motion did allege newly-discovered evidence, and was timely.

The State argues that Young's argument fails because his motion did not "allege any newly-discovered facts . . . the alleged defects in the indictment could have been discovered when this case went to trial in 2002." (Br. of Resp't at 6). As a preliminary matter, the court below did not rule that Young's argument regarding his indictment fails on the ground that it is not newly-discovered, despite having the opportunity to do so. Having declined to dismiss Young's motion on those

grounds, Young respectfully urges this Court to defer to the lower court's implied conclusion, and reach the substance of these claims.

Further, Young respectfully urges this Court to discard the State's argument that Young could have discovered these facts "when this case went to trial in 2002." (Br. of Resp't at 6). At the time when Young's case went to trial, he was represented by counsel. The State appears to ask this Court to burden a criminal defendant with conducting an independent, parallel investigation into the details of his case while it is in a pre-trial posture (and he is represented by counsel), otherwise he would waive Rule 29 issues that *could have been* discovered at that time.[2] To be sure, the argument could be made that constitutionally effective counsel would have identified and challenged this defect, but what procedural vehicle does a defendant have when this deficiency is not raised by any of his prior attorneys, and existence of the issue only comes *to his attention* after his direct appeal and PCR proceedings have lapsed?

The lower court and the State appear to answer to this question by characterizing Young's Rule 29 motion as "yet another application for post-conviction relief masquerading as a Rule 29(b) motion." (Br. of Resp't at 6). The implication is that this claim should have been raised in an application for post-

[2] Bear in mind that, even if Young had conducted such an investigation, and had encountered this defect in the indictment, the decision whether to challenge the defect during his trial would not have been Young's to make. *Abney v. State*, 408 S.C. 41, 49-50 (2014)(decisions that are strategic or tactical in nature are "reserved to defense counsel."); *State v. Devore*, 416 S.C. 115 (2106)("[s]ince there is no right to hybrid representation, substantive documents filed pro se by a person represented by counsel are not accepted unless submitted by counsel.")(quoting *State v. Stuckey*, 333 S.C. 56, 58 (1998)).

conviction relief (which would have been time-barred in 2016), and therefore Young raised it under Rule 29 to circumvent the statute of limitations in S.C. Code § 17-27-45. In other words, it appears as though the lower court and the State would prescribe no vehicle for Young to have these claims heard. And further, they appear to argue that Young – who the State claims offered "zero proof" to substantiate his Rule 29 claims during his motion hearing – was possessed with the procedural savvy to file under Rule 29 in order to utilize its more favorable limitations period. Respectfully, Young asks this Court to discard this argument. Young has conducted himself in good faith, and he filed his Rule 29 motion in a timely manner after discovering the defects alleged in his motion. Young asks this Court to conclude that his motion was timely, substantive, and made in good faith.

III. Contrary to the State's argument, Young's motion did not allege a mere defect in "the statutory procedures employed" when he was indicted.

The State argues that, because Young's arguments here deal with defects in his indictment, they have no bearing on the validity of his conviction, and would not have changed the result at trial. (Br. of Resp't at 10-11). The Supreme Court has noted that it is crucial for a defendant to be given the opportunity to mount an attack on "not only the [] evidence and the circumstances in which it was found, but the *thoroughness and even the good faith of the investigation, as well*." *Kyles v. Whitley*, 514 U.S. 419, 445 (1995)(emphasis added). Young's claims clearly raise the specter of improper action on the State's behalf in obtaining his indictment; whether that conduct is better described as negligence or outright fraud would have

been a key area for trial counsel to explore during Young's trial, and could have had a direct bearing on a validity of the State's investigation into Young, and its decision to charge him. Put another way, calling into question the propriety of the State's conduct during Young's prosecution could have simultaneously called into question the State's motives in proceeding against him, and could have cast an unfavorable light on the entire case.

Furthermore, Young's motion alleged facts that would have been known to the State since the date of his indictment. Although the face of the indictment states that Young was indicted during a term of general sessions court, if this is not entirely true, this constitutes material information that was known to the State and never affirmatively disclosed to Young. To now claim that these heretofore-undisclosed issues are immaterial to the question of guilt would empower the courts in this State to conduct grand jury proceedings (or not conduct them at all, as the case may be) in any manner they see fit, and further to withhold the details of those proceedings from defendants facing trial. Young respectfully urges this Court not to reach that result in this case.

IV. Contrary to the State's argument, it was not proper for the trial court to take judicial notice of the applicable terms of court, nor is it clear that the court did take notice of such alleged facts.

As noted in our brief, the lower court's order concludes that "South Carolina Court Administration specifically scheduled general sessions terms of court during those weeks..." (Br. of Appellant at 11 n.3). The State argues that this was proper,

because "it was permissible for the court to take judicial notice of terms of court." (Br. of Resp't at 10). First, it is not clear from the record before this Court that the lower court actually invoked Rule 201, SCRE to take notice of this fact – indeed, it appears that the court gleaned this fact from some source outside of court. But the record is silent regarding the source of this information, or whether it was incorporated into the record pursuant to Rule 201. Moreover, even if this could properly be characterized as the court taking judicial notice of the terms of court in Orangeburg County, the lower court failed to abide by the plain language of Rule 201 in doing so. Specifically, Rule 201 states:

> A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

Rule 201(e), SCRE. The rule specifically contemplates that a party must be given the opportunity to object to the court's taking notice of extrajudicial facts. Inherent to this requirement is the need for formal notice of the court's intention to take notice of facts in the first place. That appears nowhere in this record. Nor can the lower court's written order be characterized as proper notice. The order does not expressly state that the court took judicial notice of the applicable terms of court, nor did it invite Young to pose objections to such judicial notice. This Court should not expect Young, who was *pro se* when he received the lower court's order, to divine the lower court's intention with respect to its findings of fact. Consequently,

Young respectfully urges this Court to discard the State's allegation that the terms of court are in the record by judicial notice, and instead simply discard these findings of fact as unsupported by the record.

CONCLUSION

For the reasons stated herein, and previously enumerated in the Brief of the Appellant, this Court should reverse the judgment of the lower court. Alternatively, Young respectfully urges this Court to remand the case to Orangeburg County for additional proceedings.

Respectfully submitted,

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DATED: January 19, 2019.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the enclosed Final Reply Brief of Appellant in the above-referenced case has been served upon Joshua A. Edwards at P.O. Box 11549, Columbia SC 29211.

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DATED: January 19, 2019