

STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM HORRY COUNTY
Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2015-002107

THE STATE,RESPONDENT

v.

ARNOLD LEA WARD,APPELLANT.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Respondent's Statement of Issues on Appeal	1
Statement of the Case.....	2
Statement of Facts.....	3
Argument:	
I. The circuit court properly denied Appellant's Rule 29(b) motion for a new trial based on after-discovered evidence because he failed to show the existence of all five factors required to obtain a new trial on this basis.	4
II. The circuit court properly denied Appellant's Rule 29(b) motion for a new trial based on after-discovered evidence where the motion was untimely because the alleged evidence does not implicate the subject matter jurisdiction of the trial court and where the motion was without merit because Appellant failed to carry his burden of proving the grand jury was not properly impaneled pursuant to the relevant statutes.....	7
Conclusion	10

TABLE OF AUTHORITIES

Federal Cases:

<i>Roseboro v. Garrison</i> , 528 F.2d 309 (4th Cir. 1975).....	3
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State Cases:

<i>Dove v. Gold Kist, Inc.</i> , 314 S.C. 235, 442 S.E.2d 598 (1994).....	7
<i>Evans v. State</i> , 363 S.C. 495, 611 S.E.2d 510 (2005).....	8, 9
<i>Harbit v. City of Charleston</i> , 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009).....	6
<i>Jamison v. State</i> , 410 S.C. 456, 765 S.E.2d 123 (2017)	5
<i>State v. Allen</i> , 276 S.C. 412, 279 S.E.2d 365 (1981)	5
<i>State v. Dunbar</i> , 356 S.C. 138, 587 S.E.2d 691 (2003)	6
<i>State v. Gentry</i> , 363 S.C.93, 610 S.E.2d 494 (2005)	7
<i>State v. Green</i> , 397 S.C. 268, 724 S.E.2d 664 (2012).....	6
<i>State v. Hill</i> , 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011).....	6
<i>State v. Howard</i> , 384 S.C. 212, 682 S.E.2d 42 (2009)	6
<i>State v. Legg</i> , 416 S.C. 9, 785 S.E.2d 369 (2016).....	6, 7
<i>State v. Needs</i> , 333 S.C. 134, 508 S.E.2d 857 (1998).....	5
<i>Stono River Envtl. Prot. Ass’n v. S.C. Dep’t of Health and Envtl. Control</i> , 305 S.C. 90, 406 S.E.2d 340 (1991)	6

Federal Statutes:

28 U.S.C. § 22541	3
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State Statutes:

S.C. Const. art. V, § 1	8
S.C. Const. art. V, § 4	9
S.C. Code Ann. § 14-5-810.....	4, 7, 9

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court properly denied Appellant's Rule 29(b) motion for a new trial based on after-discovered evidence where he failed to show the existence of all five factors required to obtain a new trial on this basis .
2. Whether the circuit court properly denied Appellant's Rule 29(b) motion for a new trial based on after-discovered evidence where the motion was untimely because the alleged evidence does not implicate the subject matter jurisdiction of the trial court and where the motion was without merit because Appellant failed to carry his burden of proving the grand jury was not properly impaneled pursuant to the relevant statutes.

STATEMENT OF THE CASE

Arnold Lea Ward (Appellant) was indicted at the January 2007 term of the grand jury of Horry County for attempted first-degree burglary. (R. p. 3). He was represented by William Thomas Floyd, Esquire. On April 13-14, 2010, Appellant proceeded to a trial by jury before the Honorable Steven H. John pursuant to which he was found guilty as indicted. Judge John sentenced Appellant to fifteen (15) years' imprisonment.

Appellant timely filed and served notice of appeal and Wanda H. Carter of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Appellant's conviction on February 29, 2012. *State v. Ward*, Op. No. 2012-UP-123 (S.C. Ct. App. filed February 29, 2012). The Court of Appeals returned the remittitur to the circuit court on March 16, 2012.

On August 12, 2012, Appellant filed an Application for Post-Conviction Relief (PCR) in the Horry County Court of Common Pleas. The State made a return to the Application on December 17, 2012, and an evidentiary hearing into the matter was convened on June 19, 2014, before the Honorable Benjamin H. Culbertson at the Horry County Courthouse. Appellant was present and was represented by Tristan M. Shaffer, Esquire. The State was represented by Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office. In an Order of Dismissal dated August 1, 2014, Judge Culbertson denied and dismissed the Application with prejudice.

Appellant timely served and filed a notice of appeal and a *Johnson* petition for a writ of certiorari was submitted on his behalf by Assistant Appellate Defender John H. Strom of the South Carolina Office of Appellate Defense. In an order dated August 20, 2015, the Supreme Court denied the petition and on September 9, 2015, sent the remittitur to the lower court.

On February 1, 2016, Appellant filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the District of South Carolina pursuant to 28 U.S.C. § 22541. Respondent filed a motion for summary judgment on April 25, 2016, along with a return and memorandum. United States Magistrate Judge Thomas E. Rogers, III, issued an order filed April 28, 2016, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), advising Appellant of the motion for summary judgment procedure and the possible consequences if he failed to respond adequately. After receiving an extension, Petitioner filed a response in opposition on August 4, 2016. Respondent filed a reply on August 15, 2016. On February 1, 2017, Magistrate Judge Rogers issued a Report and Recommendation which recommended respondent's motion for summary judgment be granted and the petition be dismissed without an evidentiary hearing. On February 24, 2017, the United State's District Court issued an order adopting the Report and Recommendation, entering summary judgment against Ward, and dismissing his petition. (February 24, 2017, Order in C/A No.: 4:16-cv-0320-DCN).

Before initiating his habeas action in the Federal Court, Appellant filed a motion for after/newly discovered evidence in the Horry County Court of General Sessions. On September 1, 2015, a hearing into the matter was convened before the Honorable Benjamin H. Culbertson at the Horry County Courthouse. Appellant was present and appeared *pro se*. The State was represented by former Assistant Solicitor Bradley C. Richardson of the Fifteenth Circuit Solicitor's Office. At the conclusion of the hearing, after hearing arguments from both parties, Judge Culbertson orally denied Appellant's motion. In a Form 4C Order issued September 1, 2015, the day of the hearing, Judge Culbertson denied the motion for newly discovered evidence. (R. p. 4). In a separate Form 4C Order issued September 17, 2015, Judge Culbertson denied Appellant's motion for reconsideration of that denial. (R. p. 10). In October of 2015 Appellant

filed a notice of intent to appeal with this court and on August 1, 2017, he submitted his initial brief of Appellant. This Brief of Respondent now follows.

ARGUMENT

I.

The circuit court properly denied Appellant's Rule 29(b) motion for a new trial based on after-discovered evidence because he failed to show the existence of all five factors required to obtain a new trial on this basis.

Appellant first contends the lower court erred in denying his petition/motion for newly discovered evidence because the State did not produce evidence at the September 1, 2015, hearing to rebut his claim of fraud against the State. He claims the solicitor committed a "procedural error" and "contempt of the proceedings" by "unlawfully and illegally" impaneling the grand jury outside the term of court identified by Section 14-5-810 of the South Carolina Code without a signed order from the Chief Justice of the Supreme Court or a presiding Associate Justice for a special term of court pursuant to Section 14-5-910. Appellant goes on to argue the denial of his motion somehow violated his Fourteenth Amendment right to due process. (Brief of Appellant, p.1-p.6). The State submits Appellant's allegations in this regard are both untimely and without merit under the relevant rules, and therefore his motion was properly denied and dismissed.

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. A motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion. Leave of the appellate court is

not required if no appeal has been taken or if the appeal has been finally decided in the appellate court.

Rule 29(b), SCRCrimP (emphasis added). 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 failed to make the requisite showing.

Neither in his argument to the lower court or in his brief on appeal does Appellant posit or explain how the evidence at issue could not have been discovered before trial through the exercise of due diligence, or how it could not have been discovered before his 2012 Application for post-conviction relief. This is likely because all of the information Appellant now relies upon was available and discoverable well before his 2010 trial. The theory of after-discovered evidence does not extend to evidence available or attainable from public record before the time of trial. *State v. Allen*, 276 S.C. 412, 414, 279 S.E.2d 365, 366 (1981). In effect, Appellant's Rule 29 motion is merely another attempt at an application for PCR, where his first application was denied and dismissed with prejudice in a prior proceeding. Appellant could have attempted to raise his current allegations in his prior PCR. Thus, his motion was untimely under Rule 29(b), SCRCrimP, for a variety of reasons, and was properly dismissed.

Appellant also fails to explain or demonstrate how the alleged newly discovered evidence is material to his guilt or innocence. Indeed, he makes a purely technical challenge to the impanelment of the grand jury and his subsequent indictment by that grand jury. Appellant had a

jury trial and was found guilty beyond a reasonable doubt. Thus, the actions of the grand jury which indicted Appellant are not material to guilt or innocence.

Similarly, the lower court did not infringe upon or abridge Appellant's right to due process by denying his motion. Initially, the State notes this argument is not preserved for review because it was not made to Judge Culbertson at the hearing. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Furthermore, Appellant's due process argument should be deemed abandoned on appeal because it is conclusory. *See State v. Howard*, 384 S.C. 212, 217-218, 682 S.E.2d 42, 45 (2009) (finding "[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority"); *State v. Hill*, 394 S.C. 280, 297, 715 S.E.2d 368, 377-78 (Ct. App. 2011) (finding an issue is deemed abandoned on appeal where appellate counsel made a "two sentence conclusory argument with citation to only *Brady* and no analysis whatsoever as to why or how *Brady* applies"). Appellant cites a canon from the Code of Judicial Conduct; however, it does not provide any supporting authority for his position. As a result, Appellant's argument is conclusory and should be deemed abandoned. In any event, the argument is without merit.

The fundamental requirements of procedural due process include fair notice and proper standards for adjudication, such as an opportunity to be heard in a meaningful way and judicial review. *State v. Green*, 397 S.C. 268, 279, 724 S.E.2d 664, 669 (2012); *Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health and Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991); *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009). Due process is not a technical concept with fixed parameters unrelated to time, place, and circumstances; rather, it is a flexible concept that calls for such procedural protections as the situation demands. *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016). Thus, procedural

due process contemplates a fair hearing before a legally constituted impartial tribunal. *Id.* Here, Appellant was given: (1) fair notice of the charges against him, (2) a jury trial with all the appurtenant constitutional rights including the right to the effective assistance of counsel, (3) a PCR hearing to collaterally challenge that right where he was represented by counsel, and (4) a direct PCR appeal. The fundamental requirements of due process were met and the lower court properly dismissed Appellant's motion.

II.

The circuit court properly denied Appellant's Rule 29(b) motion for a new trial based on after-discovered evidence where the motion was untimely because the alleged evidence does not implicate the subject matter jurisdiction of the trial court and where the motion was without merit because Appellant failed to carry his burden of proving the grand jury was not properly impaneled pursuant to the relevant statutes.

Appellant argues the trial court erred in denying his petition/motion for newly discovered evidence because: (1) proper impanelment of the grand jury pursuant to sections 14-5-810 or - 910 is a jurisdictional requirement; (2) the grand jury that indicted him was not properly impaneled; (3) the trial court, therefore, was without subject matter jurisdiction to proceed to trial. He asks this Court to vacate his conviction and sentence based on the trial court's lack of jurisdiction and to grant him a new trial. The State submits Appellant's argument is both untimely and without merit.

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*, 363 S.C.93, 610 S.E.2d 494 (2005), 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. *Evans v. State*, 363 S.C. 495, 507, 611 S.E.2d 510, 516 (2005). Instead, the subject matter jurisdiction of the circuit court and the sufficiency of an indictment are two distinct concepts. *Id.* at 507, 611 S.E.2d at 517. 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. *Id.* at 509, 611 S.E.2d at 518. However, such a challenge does not implicate the subject matter jurisdiction of the circuit court. *Id.*

Here, Appellant does not dispute the existence of indictment number 2007-GS-26-418 which put him on notice of what charge he was called upon to answer, apprised him of the elements of the offense, and allowed him to decide whether to plead guilty or stand trial, and which enabled the circuit court to know what judgment to pronounce when Appellant was convicted. As noted by the lower court, (R. p. 16, lines 21-23), that indictment demonstrates Appellant's charge was presented to, and true billed by, the Horry County grand jury on January 25, 2007. 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 timely and was properly dismissed pursuant to Rule 29(b), SCRCrimP.

In any event, Appellant's challenge fails on the merits because he failed to carry his burden of proof. 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 brief, Appellant relied on S.C. Code Ann. § 14-5-810, which states the following:

The Court of General Sessions for Horry County shall be held at Conway on the second Monday in January for one week, on the first Monday in March for two weeks, on the first Monday in June for two weeks, and on the first Monday in October for two weeks.

S.C. Code Ann. § 14-5-810 (2017). Appellant appears to contend that, because he was indicted in the fourth week of January rather than the second week, 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.

As noted above, the Chief Justice has the power to set the terms of any court and shall have the power to assign any judge to sit in any court within the unified judicial system. S.C. Const. art. V, § 4. Although section 14-5-810 does not provide for Horry County general sessions terms of court at the time Appellant was indicted, South Carolina Court Administration, pursuant to authority given by the Chief Justice, appears to have specifically scheduled general sessions terms of court during that week, and it acted within its constitutional authority in doing

so. Even if Appellant's allegations were somehow timely, Appellant bears the burden of proving the grand jury was not properly impanelled. Here, he failed to carry his burden of proof. Thus, his motion was properly denied by the lower court.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the circuit court's decision to deny and dismiss Appellant's Rule 29 motion for a new trial based on after-discovered evidence be affirmed.

Respectfully submitted,

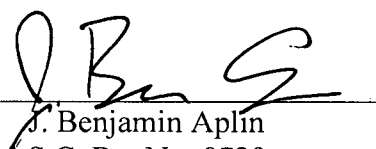
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b),
SCACR.

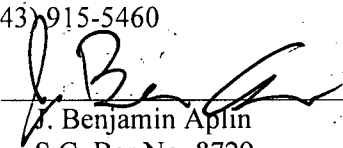
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