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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BAMBERG COUNTY
Doyet A. Early, Circuit Court Judge

Appellate Case No. 2017-002619

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SC Court of Appeals

THE STATE,RESPONDENT

v.

JOHNNIE L. JONES

.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE 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: (1) Appellant failed to show the existence of all five factors required to obtain a new trial on this basis; (2) the motion was untimely because the alleged evidence does not implicate the subject matter jurisdiction of the trial court, and (3) 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 & STATEMENT OF FACTS

Johnnie Lee Jones (Appellant) was indicted at the June 2007 term of the Bamberg County Grand Jury for attempted kidnapping (2007-GS-05-169) and assault and battery with intent to kill (2007-GS-05-168). He was represented by Dan Luginbill and Kent Kirkland, Esquires. On April 13, 2010, Appellant proceeded to a trial by jury trial before the Honorable Doyet A. Early, III, pursuant to which he was found guilty of attempted kidnapping and assault and battery of a high and aggravated nature. Judge Early sentenced Appellant to eighteen (18) years' imprisonment for attempted kidnapping and ten (10) years' concurrent imprisonment for assault and battery of a high and aggravated nature.

Respondent's Statement of Facts from Trial

On January 9, 2007, 70 year old Donald Heirs, the victim, had come home from work around 8:00 p.m. when he was confronted by Appellant in his [the victim's] back yard in Ehrhardt, which is located in Bamberg County. The victim owned a variety store in Ehrhardt and had operated the same for many years. When the victim arrived home from work, Appellant came out of the woods behind the residence. Appellant approached the victim on foot and told the victim he was going to take Appellant for a ride. The victim refused, stating his wife was in the house and sick, and he was not going anywhere. Appellant told the victim he was going with Appellant or Appellant would kill him. Appellant then assaulted the victim with what the victim believed was half of a brick. The victim fled toward his house, and Appellant pursued him. Appellant struck the victim several times. When the victim's wife heard the commotion and turned on an outside light, Appellant fled toward the street in front of the victim's home. The victim was bleeding profusely from his head. The victim called the police, and Chief of Police James Bearden responded.

The victim's wife, who was a registered nurse, drove the victim to the hospital. On the way to the hospital, the victim told his wife he recognized the voice of the assailant, but could not put a name with the voice at that point. At the hospital, once the victim calmed down, he remembered whose voice it was, and informed his wife that it was Appellant, Johnnie Jones, who assaulted him. The victim also told Chief Bearden the identity of the person who had assaulted him and where Appellant used to live. Appellant's parents were long time customers of the victim's store. The victim also knew Appellant and had known him for a long time. The victim identified Appellant's photograph at the hospital before Chief Bearden. This was after the victim had told the chief the name of his assailant. The victim also described the clothing Appellant was wearing when the attempted kidnapping and assault took place. He said Appellant was wearing a blue or black Navy or Army coat, a stocking cap, and brown jersey gloves. The victim identified Appellant at trial as the perpetrator of the attempted kidnapping and ABHAN.

Chief Bearden found a brown jersey glove at the scene of the crime. He was contacted by a Mr. Grant, who told police he had given the coat to Appellant that evening. Chief Bearden recovered the long coat behind or on top of a chair at Mr. Grant's home. Chief Bearden also received a stocking cap from Mr. Grant. Mr. Grant's home was about 150 yards from the victim's residence. D.N.A. linked Appellant to the crime and the victim. The victim's D.N.A. was found on the coat, and Appellant's D.N.A. was found on the coat. Appellant's D.N.A. was also found in hairs discovered in the stocking cap. Appellant admitted at trial the coat was his. Appellant's wife also admitted the coat was Appellant's. John Fowlkes testified that on the night of the victim's assault, around 11:00 to 12:00 midnight, he saw Appellant in Erhardt at his residence. Appellant claimed to Fowlkes that night that he had car trouble. Fowlkes testified

Appellant spent the night at Fowlkes' home. Chief Bearden also testified he saw Appellant in Erhardt *the day of* the victim's assault.

The Direct Appeal

After his conviction, Appellant filed a Notice of Appeal and an appeal was perfected by Deputy Chief Appellate Defender Wanda H. Carter of the South Carolina Office of Appellate Defense. On January 25, 2012, the South Carolina Court of Appeals affirmed the convictions and sentences, and dismissed the appeal. *State v. Jones*, No. 2012-UP-034 (Ct. App. January 25, 2012). The Remittitur was sent on February 14, 2012.

The PCR Action

Appellant then filed an application for post-conviction relief (PCR) on April 30, 2012, which he amended on July 1, 2013. Respondent made its Return on August 9, 2012. An evidentiary hearing into the matter was convened on July 8, 2013, at the Aiken County Courthouse, before the Honorable Ferrell Cothran, Jr. Appellant was present at the hearing and was represented Charles T. Brooks, III, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office. In his original and amended application for PCR, Appellant alleged he was being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of Counsel.
 - a. "Failing to object to the solicitor's improper closing that violated the golden rule and denied Appellant his right to a fair trial."
 - b. "Failing to request the trial court instruct the jury on essential element of 'criminal intent,' which is an essential element of every common law offense."
 - c. "Lack of Chain of Custody"
 - d. "Solicitor misleading witness"

e. "Counsel never discussed plea bargain with Appellant."

At the evidentiary hearing, Appellant testified on his own behalf. The State presented testimony from trial counsel, Daniel W. Luginbill, Esquire (Counsel). The Court also had before it a copy of Appellant's trial transcript, the records of the Bamberg County Clerk of Court regarding Appellant, Appellant's appellate records, and Appellant's records from the South Carolina Department of Corrections. On August 9, 2013, the PCR Court issued its Order of Dismissal denying and dismissing the PCR application with prejudice. The Order of was filed with the Bamberg County Clerk of Court on August 23, 2013.

The PCR Appeal

Appellant appealed from the denial of PCR by way of a *Johnson* Petition to the South Carolina Supreme Court. Appellant was represented in the PCR appeal by Wanda H. Carter, Deputy Chief Appellate Defender. In the *Johnson* Petition, Ms. Carter raised the following issue to the South Carolina Supreme Court:

Trial counsel erred in failing to communicate the state's plea offer presented in the Case because but for this omission, Appellant would have accepted the plea offer and Received a sentence that was more lenient than the sentence he received at trial.

Appellant filed a *pro se* Response to the *Johnson* Petition raising the following issue(s):

The Appellant writ of certiorari should be remanded back to the Lower Court to address issues that the PCR Court failed to address in the order denying Appellant's PCR.

The Lower Court record does not support the finding that Appellant knowingly or voluntarily waived any of his PCR allegations.

On September 24, 2014, after careful consideration of the record as required by *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), the South Carolina Supreme Court denied certiorari and granted Ms. Carter's request to withdraw. Remittitur was issued on October 10, 2014.

The Federal Habeas Petition

On November 24, 2014, 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. § 2254. The State filed a motion for summary judgment on April 9, 2015, along with a return and memorandum. On the same day, United States Magistrate Judge Jacquelyn D. Austin, issued an order 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. On May 29, 2015, Appellant filed a motion to expand the record and the State filed a response in opposition on June 12, 2015. Appellant filed a response in opposition to summary judgment on July 27, 2015. On January 15, 2016, Magistrate Judge Austin issued a Report and Recommendation which recommended respondent's motion for summary judgment be granted and the petition be denied. On March 2, 2016, the United States District Court issued an order adopting the Report and Recommendation, entering summary judgment against Appellant, denying Appellant's motion to expand the record, and dismissing his habeas petition. (March 2, 2016 Order in C/A No.: 8:14-cv-4556-RMG).

The Current Rule 29(b) Motion for New Trial

On April 26, 2016, Appellant filed a "Motion for After-Newly Discovered Evidence and Motion to Expand Record" in the Bamberg County Court of General Sessions. (R. p. 11-17). On May 11, 2017, he filed a "Petition for Writ of Mandamus" in the South Carolina Supreme Court and the Court of General Sessions asking that the circuit court conduct an evidentiary hearing. (R. p. 26-31). On July 25, 2017, a hearing into the matter was convened before the Honorable Doyet A. Early, III, at the Bamberg County Courthouse. Appellant was present and appeared *pro se*. The State was represented by Deputy Solicitor David W. Miller of the Second

Circuit Solicitor's Office. At the conclusion of the hearing, after hearing arguments from both parties, Judge Early took the matter under advisement. In a seven-page written order issued August 24, 2017, and filed August 25, 2017, Judge Early denied and dismissed the motion for after-discovered evidence and the petition for writ of mandamus on several grounds. (R. p.18-24). On December 18, 2017, Appellant filed a notice of intent to appeal with this court, and on September 21, 2018, 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: (1) he failed to show the existence of all five factors required to obtain a new trial on this basis; (2) the motion was untimely because the alleged evidence does not implicate the subject matter jurisdiction of the trial court, and (3) the motion was without merit where Appellant failed to carry his burden of proving the grand jury was not properly impaneled pursuant to the relevant statutes.

In his brief, Appellant argues the lower court erred in denying his petition/motion for newly discovered evidence on claims of "extrinsic fraud" because the State failed to produce supportive evidence at the July 25, 2017, hearing to rebut his claim of "fraudulent actions by the Solicitor and Grand Jury foreperson [sic] of signing and processing of such documents (R. p. 32-33) of this action out-side the convening of courts Grand Jury." In his underlying Rule 29 motion before the lower court, Appellant argued the solicitor committed a "procedural error" by "unlawfully" impaneling the grand jury that indicted him outside the term of court identified by Section 14-5-630 of the South Carolina Code. He claimed the State "lacked the requisite jurisdiction to complete return of its true-billed indictment" where it did not obtain the prior approval of the Chief Justice of the Supreme Court for an additional term pursuant to Rule 77 of the South Carolina Rules of Civil Procedure. Appellant argued this violated his right to due process and that the foreperson of the grand jury committed "constructive fraud" upon the court by signing the indictment under these circumstances. He went on to claim that as a result of these actions, the trial court was without subject matter jurisdiction to proceed to trial. Appellant asked the circuit court to vacate his convictions and sentences based on the trial court's alleged lack of jurisdiction. The State submits Appellant's arguments are both untimely and without

merit under the relevant rules, and therefore his Rule 29 motion for a new trial was properly denied and dismissed by the circuit court.

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).¹ 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. He further fails to explain how it could not have been discovered before his 2012 Application for PCR, or the amendment to the Application. 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,

¹ The one year statute of limitations for making motions based on after-discovered evidence was added to Rule 29 on April 28, 2011, more than one year before Appellant filed his Application for PCR.

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. As recognized by the circuit court as an additional basis for denial of relief, Appellant could have attempted to raise his current allegations in his prior PCR. Thus, his motion was untimely under Rule 29(b), SCRCrimP, 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 where he 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 Early 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"). 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 direct appeal from the jury trial, (4) a PCR hearing to collaterally challenge that right where he was represented by counsel, (5) a direct PCR appeal, and (6) a federal habeas action. The fundamental requirements of due process were met and the lower court properly dismissed Appellant's motion.

Appellant's related claim that the trial court was without subject matter jurisdiction to proceed to trial is likewise 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 numbers 2007-GS-05-168 and 2007-GS-05-169, which put him on notice of what charges he was called upon to answer, apprised him of the elements of the offenses, 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. Those indictments demonstrate Appellant's charges were presented to, and true billed by, the Bamberg County grand jury on May 31, 2007. Appellant's challenge before the lower court and in this appeal goes merely 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. § 14-5-630 which states the following:

The court of general sessions for Bamberg County shall be held at Bamberg on the third Monday in February for a term of one week and on the second Monday in September for one week.

S.C. Code Ann. § 14-5-630(2) (2017). Appellant appears to contend that, because he was indicted in the fifth week of May rather than one of the weeks identified in the statute, his indictments 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 14-5-630 does not provide for Bamberg County general sessions terms of court at the specific 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 impaneled. Here, he simply failed to carry his burden of proof. Contrary to Appellant's claims, the State had no burden to "produce supportive evidence" to refute his allegations, and to the extent it does, the indictments themselves provide that proof. Thus, Appellant's Rule 29 motion was properly denied by the lower court.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment of the lower court denying and dismissing Appellant's Rule 29(b) motion for a new trial be affirmed.


Respectfully submitted,

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CERTIFICATE OF COUNSEL

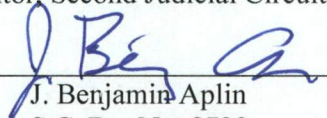
“The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211 (b),
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