

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  

---

CERTIORARI TO CHARLESTON COUNTY  
G. THOMAS COOPER, Jr.  

---

RECEIVED

FEB 04 2020

S.C. SUPREME COURT

ALAN L. BURNS

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2019-000380  

---

JOHNSON PETITION FOR WRIT OF CERTIORARI  

---

JAMES K FALK

Falk Law Firm  
PO Box 1058  
Charleston, SC 29402  
jfalklaw@gmail.com  
(843) 606-6007  
SC BAR 80125

ATTORNEY FOR PETITIONER

**INDEX**

INDEX.....1

TABLE OF AUTHORITIES.....2

ISSUE PRESENTED.....3

STATEMENT OF THE CASE.....4

ARGUMENT.....6

CONCLUSION.....13

PETITION TO BE RELIEVED AS COUNSEL.....14

**TABLE OF AUTHORITIES**

**CASES**

State v Boswell, 391 S.C. 59, 707 S.E.2d 265 (2011).....7, 9, 10

State v Alexander, 424 SC 270, 818 S.E.2d 455, 457 (2018).....7, 8

Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, (1985).....10, 12

Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999).....10, 11, 12

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d. 674 (1984).....10

Thrift v State, 302 S.C. 535, 397 S.E.2d 523 (S.C. 1990).....10

Jones v Barnes, 463 U.S. 745, 746, 103 S.Ct. 3308, 3309, 77 L.Ed 2d. 987 (1983).....10

State v Dudley, 364 S.C. 578, 614 S.E.2d 623 (2005).....11

State v Dudley, 354 S.C. 514, 581 S.E.2d 171 (SC. App. Ct. 2003).....11

Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002).....11

Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991).....12

**STATUTES**

S.C. Code Ann. § 23-1-215(A) *repealed*.....7, 8

S.C. Conde Ann. § 5-7-60.....7

S.C. Code § 17-13-45.....8

S.C. Code § 23-20-50, *repealed*.....8, 9

**ISSUE PRESENTED**

**Did the PCR court erred in failing to find appellate counsel ineffective for failing to raise a non-frivolous issue on appeal namely that the Mount Pleasant Police Department exceeded their jurisdiction by investigating the allegations against Petitioner since at the time of the alleged conduct the offences occurred outside the territorial jurisdiction of Mount Pleasant?**

## STATEMENT OF THE CASE

On June 7, 2011, a Charleston County grand jury indicted Petitioner for two counts of criminal sexual conduct with a minor in the second degree (2011-GS-10-3387 & 2011-GS-10-3388), three counts of lewd act upon a minor (2011-GS-10-3389, 2011-GS-10-3392, & 2011-GS-10-3394), and two counts of criminal sexual conduct with a minor in the first degree (2011-GS-10-3390 & 2011-GS-10-3391). Then on August 1, 2011, the Charleston County grand jury indicted Petitioner for two counts of criminal sexual conduct with a minor in the first degree (2011-GS-10-4776 & 2011-GS-10-4777) and two counts of lewd act upon a minor (2011-GS-10-4778 & 2011-GS-10-4779). On May 7, 2012, the Charleston County grand jury indicted Petitioner for criminal sexual conduct with a minor in the first degree (2012-GS-10-3172) and lewd act upon a minor (2012-GS-10-3173).

The state, represented by Debi Herring-Lash and Randall Stoney, called the case for trial on August 6, 2012 before the Honorable R. Markley Dennis, Jr. and a jury. Petitioner appeared *pro se* with the assistance of standby counsel Lori Proctor and Ted Smith. (App. p. 1) The jury found Petitioner guilty as charged. (App. p. 853 l. 25- 856 l. 11).

The trial court sentenced Petitioner to two consecutive terms of thirty years' imprisonment for two counts of criminal sexual conduct with a minor in the first degree for a total of sixty years. Additionally, the court sentenced Petitioner to thirty years' imprisonment for two additional counts of criminal sexual conduct with a minor in the first degree to be served concurrently. The court then sentenced Petitioner to fifteen years' imprisonment for each of the five counts of lewd act and to twenty years' imprisonment for each of the two counts of criminal sexual conduct with a minor in the second degree. These were to be served

concurrently as well. (App. p. 869 l. 15 – 871 l. 5).

On August 20, 2012 Petitioner filed a timely notice of appeal, and was represented by Susan B Hackett, Esquire the South Carolina Commission on Indigent Defense-Appellate Defense Division. In a merits brief the sole issue raised on appeal was whether the trial judge erred in denying Petitioner's request for documents relating to the grand jury after the indictment was issued that did not seek to invade the secrecy of the grand jury proceedings but only sought information in order to assure the grand jury was impaneled legally. (App. p. 878) By a *per curiam* decision on June 15, 2016 the South Carolina Court of Appeals in case no. 2012-212760 affirmed Petitioner's conviction. (App. p. 922)

On January 18, 2017 Petitioner then filed an application for post-conviction relief in which he alleged ineffective assistance of appellate counsel, territorial jurisdiction violations, and failure of the State to provide grand jury empanelment documentation. The State of South Carolina served its return and motion for a more definite statement and requesting an evidentiary hearing solely on Petitioner's claims of ineffective assistance of appellate counsel and seeking summary dismissal of Petitioner's other two claims as improper for post-conviction relief and barred by the doctrine of res judicata. Thereafter, on December 15, 2017, Petitioner filed an amended application. An evidentiary hearing was held on December 4, 2018, at the Charleston County Courthouse, before the Honorable G Thomas Cooper, Jr. Petitioner was present and appeared *pro se* with the assistance of standby counsel Christopher L. Murphy. The State was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson. At the hearing, testimony was taken from appellate counsel Susan B. Hackett and prosecutor Deborah Herring-Lash.

On February 20, 2019 Judge G Thomas Cooper entered an order denying Petitioner's post-conviction relief application, and dismissing the application with prejudice. This appeal followed. (App. p. 1044)

## ARGUMENT

The PCR court erred in failing to find appellate counsel ineffective for failing to raise a non-frivolous issue on appeal namely that the Mount Pleasant Police Department exceeded their jurisdiction in investigating the allegations against Petitioner since at the time of the alleged conduct the offences occurred outside the territorial jurisdiction of Mount Pleasant.

Detective Michele Bacon of the Mount Pleasant Police Department testified that she became involved in this case on April 6, 2010 when Minor 2 and his parents appeared at the Mount Pleasant police station lobby. (App. p. 443 l. 9- p. 444 l. 6). Minor 2 reported a sexual assault by Petitioner that occurred at an address on Rands Hill Rd. in Mount Pleasant. (App. p. 444 l. 12- 25). Detective Bacon then took a statement from Minor 4 (App. p. 445 l. 20- 446 l. 4) and from Minor 3 who alleged that Petitioner assaulted her at an address on Rand Hill Road in Mount Pleasant, South Carolina. Detective Bacon interviewed Minor 1 who alleged the Defendant assaulted her at a location off of Vening Rd in Mount Pleasant. (App. p. 448 l. 6 – 21). Based upon Minor 2's statement Detective Bacon obtained a warrant for Criminal Sexual Conduct with a Minor, First Degree. (App. p. 449 l. 15- 17); and a warrant for criminal sexual conduct with a minor, second degree for the alleged assault against Minor 1. (App. p. 449 l. 17-19). Deceptive Burns testified that she did not obtain warrants based upon Minor 4's and Minor 3's allegations because the alleged assaults occurred before 1993 and at that time Mount Pleasant did not have jurisdiction of Rands Hill Road or Venning Road. (App. p. 449 l. 20 – 450 l. 2). At a later date Detective Rita Avila of the Charleston County Sherriff's office took a second and more detailed statement from Minor 3. (App. p. 450 l. 23- 451 l 5). Detective Avila then prepared warrants against Petitioner in response to Minor 3's allegations. (App. p. 502 l. 12-15). On cross examination Detective Avila testified that the warrants taken out against Petitioner were based, in part, on written statements originally given to the Mount Pleasant police department. (App. p. 503 12- 504 l. 1).

Detective Bacon testified that throughout Mount Pleasant there were areas described as “doughnut holes<sup>1</sup>” which, prior to 1993, were under the jurisdiction of Charleston County and Mount Pleasant. (App. p. 450 l. 6- 16). Detective Bacon testified that in 1993 Mount Pleasant and Charleston County entered into a mutual agreement through which Mount Pleasant would respond to 911 calls, take reports, and respond to calls for service in the doughnut hole areas. (App. p. 493 l. 20 – 494 l. 7). State’s Exhibit no 22 was a contract dated September 10, 1998 between the County of Charleston and the City of Mount Pleasant. (App. p. 590). Under the agreement the County agreed to pay the Mount Pleasant Police Department for law enforcement services in the doughnut hole areas. (App. p. 590 l. 4-9). This contract replaced the original contract between the two entities that was entered in 1993. (App. p. 591 l. 1-4). Although there was testimony in the criminal case regarding both contracts only the 1998 contract was entered as an exhibit. Petitioner introduced both the 1993 and 1998 agreements as his exhibits 1 & 2 at his PCR hearing. (App. p. 1022 & p. 1028)

In his motion for directed verdict, Petitioner argued that the State failed to prove that the Mount Pleasant Police department had the territorial jurisdictional authority to investigate the allegations against Petitioner. (App. p. 560 l. 20-561 l. 15; 719 l. 19- 722 l. 20). As authority for the argument Petitioner cited the following authorities: S.C. Code §§ 23-1-215(a), 5-7-60, and *State v Boswell*, 391 S.C. 59, 707 S.E.2d 265 (2011). (App. p. 721 p. 1- 722 l. 20)

***Mount Pleasant Police lacked Territorial Jurisdiction to investigate allegations against Petitioner.***

Generally and absent express statutory authority, the jurisdiction of a municipal police officer does not extend beyond the territorial limits of the municipality. *State v Alexander*, 424 SC 270, 818 S.E.2d 455, 457 (2018). In *Alexander* the Court stated that *jurisdictional boundaries mean something and, absent specific lawful authority, an officer has no authority to act in his official capacity beyond*

---

<sup>1</sup> The doughnut holes are described as unincorporated areas of Charleston that were in many instances totally surrounded by the Town of Mount Pleasant. (State’s General Sessions Trial Exhibit 23)

*his jurisdiction. Id* 424 S.C. at 276, 818 S.E.2d at 458. The municipal police officer in *Alexander* was responding to a 911 call regarding a motorist stranded in a ditch at a location thought to be within that municipality. *Id* 424 SC at 272, 818 S.E.2d at 456. The *Alexander* Court held that S.C. Code Ann § 17-13-45<sup>2</sup> provided a municipal police officer who was responding to a 911 the authority to detain a motorist even though the car was outside of the officer's municipality. *Id* 424 SC at 277, 818 S.E.2d at 458. However, in the instant case, since Detective Bacon was not responding to either a distress call or a request for assistance, the provisions of S.C. Code Ann § 17-13-45 did not provide her with the authority to investigate allegations against Petitioner allegedly occurring outside the geographical limits of Mount Pleasant.

Absent express statutory authority to act, the only other grounds upon which Detective Bacon had the authority to investigate the allegations against Petitioner would be if the investigation was authorized under the terms of the multi-jurisdictional agreement Charleston County entered into with the town of Mount Pleasant. At the time of Petitioner's trial, a municipality's authority to enter into this type of agreement was governed by S.C. Code Ann § 23-1-215(A) and § 23-20-50. Both of these statutes were repealed in 2016. However in 2011, S.C. Code Ann § 23-1-215(A) provided:

In the event of a crime or crimes that have occurred where multiple jurisdictions, either county or municipal, are involved, law enforcement officers are authorized to exercise jurisdiction within other counties or municipalities for the purpose of criminal investigations only if a written agreement between or among the law enforcement agencies involved has been executed. This limitation on law enforcement activity shall not apply to any activity authorized by Section 17-13-40. (2007 Act No. 3, § 2, eff March 28, 2007. Repealed by 2016 Act No. 222, § 2, eff June 3, 2016.)

---

<sup>2</sup> When a law enforcement officer responds to a distress call or a request for assistance in an adjacent jurisdiction, the authority, rights, privileges, and immunities, including coverage under the workers' compensation laws, and tort liability coverage obtained pursuant to the provisions of Chapter 78, Title 15, that are applicable to an officer within the jurisdiction in which he is employed are extended to and include the adjacent jurisdiction. S.C. Code Ann § 17-13-45.

And S.C. Code Ann § 23-20-50 provided:

Section 23–20–50. (A) An agreement entered into pursuant to this chapter on behalf of a law enforcement authority must be approved by the appropriate state, county, or local law enforcement authority's chief executive officer. A state law enforcement authority must provide a copy of the agreement to the Governor and the Executive Director of the State Budget and Control Board no later than one business day after executing the agreement. An agreement entered into with a local law enforcement authority pursuant to this chapter must be approved by the governing body of each jurisdiction. *For agreements entered into prior to June 1, 2000, the agreement may be ratified by the governing body of each jurisdiction.* (emphasis added)

(B) The officers of the law enforcement provider have the same legal rights, powers, and duties to enforce the laws of South Carolina as the law enforcement agency contracting for the services. 2000 Act No. 382, § 1. Repealed by 2016 Act No. 222, § 2, eff June 3, 2016.

In *State v Boswell, supra* 391 S.C.592, 707 S.E2d 265, the South Carolina Supreme Court addressed the authority of a Lexington County Sherriff's officer to arrest the defendant in Calhoun County. *Id.* In 1999 the sheriffs of Lexington and Calhoun counties entered into a written agreement *for the purpose to securing to each other the benefits of mutual aid in the event of natural disasters, disorder, or other emergency situations.* *Id.* 391 S.C. 601, 707 S.E. 2d 270. The *Boswell* Court held that in order for a pre- June 1, 2000 multi-jurisdictional agreement to retain its validity, the governing bodies must formally ratify that agreement. *Id.* 391 S.C. 602, 707 S.E. 2d 270. At trial, the General Counsel for the Lexington County Sherriff's office testified that the 1999 agreement had not yet been ratified by the county council. *Id.* The Court in *Boswell* disagreed with the interpretation that the statutes' "may be ratified" language meant that the relevant governing bodies did not have to formally approve a preexisting agreement. *Id.* The *Boswell* court noted *that taking into account the significance of territorial jurisdiction, we believe a more stringent approach needs to be followed in order to confer this type of authority.* *Id.* The *Boswell* court concluded that since the 1999 agreement had not been officially ratified it was invalid thus Lexington County Sherriff's officers were not authorized to arrest

the defendant in Calhoun County. *Id.* Consequently the trial judge erred in refusing to suppress the defendant's confession as the product of an unlawful arrest. *Id.* 391 S.C. 606, 707 S.E.2d 272.

In the instant case there was no evidence that Detective Bacon was responding to a distress call or a request for emergency assistance. At his criminal trial Petitioner called Charleston County Deputy County Attorney, Edward Kinsey to testify. Mr. Kinsey testified that as of May 3, 2012 he knew of no type of agreement between the Charleston County Sheriff's Office and the Mount Pleasant Police Department regarding the investigation which resulted in the charges against Petitioner. (App. p. 585 l. 6-14). Therefore Detective Bacon's actions did not fall within the coverage of S.C. Code Ann § 17-23-45. Additionally, there was no testimony offered in the criminal trial to show that the 1998 contract between Charleston County and Mount Pleasant was ever formally adopted by both entities after the 2007 enactment S.C. Code Ann 23-20-50. Therefore even though 1998 contract provided for automatic annual renewals after the expiration of its initial one-year term, the lack of proof that the parties formally ratified the agreement invalidates that agreement. *See, State v Boswell.*

***Right to effective assistance of appellate counsel***

Defendants are constitutionally entitled to effective appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, (1985). In deciding a claim of ineffective assistance of appellate counsel, the focus is on "the fundamental fairness of the proceeding whose result is being challenged." *Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d. 674 (1984). Appellate counsel is not required to raise non-meritorious issues on appeal. *Thrift v State*, 302 S.C. 535, 397 S.E.2d 523 (S.C. 1990). "Appellate counsel has no constitutional right to compel appointed counsel to press non-frivolous points requested by the client, if counsel, as a matter of professional judgement decides not to press those points." *Jones v Barnes*, 463 U.S. 745, 746, 103 S.Ct. 3308, 3309, 77 L.Ed 2d. 987 (1983).

Petitioner called appellate counsel Susan Hackett, to testify at the evidentiary hearing for Petitioner's post-conviction relief application. Appellate counsel testified that the territorial jurisdiction issue was not meritorious and therefore did not raise that issue on appeal. (App. p. 65 l. 15-20). Appellate Counsel testified further that *because of the evidence that had been put in the record in front of Judge Dennis I did not think that he had made an error of law.* (App. p. 65 l. 22-24). Appellate counsel was then asked whether issues of territorial jurisdiction could be raised for the first time on a direct appeal. (App. p. 67 l. 1-8). In response appellate counsel testified: *I am not aware of a case that says that territorial jurisdiction can be raised for the first time on appeal. It may exist, but I am simply not aware of it.* (App. p. 67.l. 9-11). Petitioner then argued that pursuant to *State v Dudley*, 364 S.C. 578, 614 S.E.2d 623 (2005) territorial jurisdiction could be raised for the first time on direct appeal. (App. p. 68 l. 23- 70 l. 13).

The Defendant in *Dudley* was prosecuted in Anderson County Circuit Court for conspiracy to traffic cocaine, based upon alleged conduct occurring in Georgia. In the Court of Appeals defendant raised for the first time whether South Carolina had jurisdiction to prosecute her because any alleged criminal conduct took place outside the state. *State v Dudley*, 354 S.C. 514, 581 S.E.2d 171 (SC. App. Ct. 2003). On a petition for certiorari, the South Carolina Supreme stated: "Although territorial jurisdiction is not a component of subject matter jurisdiction, we hold that it is a fundamental issue that may be raised by a party or by a court at any point in the proceeding". *Dudley supra* 354 S.C. at 582, 614 S.E.2d at 625. Therefore even if the territorial jurisdiction issue was not properly preserved before Judge Dennis, Petitioner counsel was not precluded for raising the issue on direct appeal.

Had appellate counsel raised this issue on appeal there is a reasonable likelihood that the Court would have reversed Petitioner's conviction. *See Southerland v. State*, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999) (finding both deficient performance and prejudice when appellate counsel abandoned a meritorious jury instruction claim); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002)

(finding appellate counsel ineffective for failing to adequately assert a claim of prosecutorial retaliation); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991) (finding appellate counsel ineffective for abandoning an insufficiency claim). Therefore by failing to include this issue on direct appeal, appellate counsel's performance was deficient and prejudicial. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Southerland*, 337 S.C. at 615, 524 S.E.2d at 836.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for a new trial.

Respectfully, Submitted

A handwritten signature in black ink, appearing to read 'J. Falk', is written over a horizontal line.

James K Falk  
Falk Law Firm  
SC Bar 80125

ATTORNEY FOR PETITIONER

This 3<sup>rd</sup> day of January, 2020

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
CERTIORARI TO JEFFERSON COUNTY  
G. THOMAS COOPER, JR.

RECEIVED  
FEB 04 2020  
S.C. SUPREME COURT

ALAN L. BURNS,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000380

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Alan L Burns states:

1. He was appointed by order of The Supreme Court of South Carolina to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held December 4, 2018. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has pursuant to Johnson v State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Alan L. Burns.

Respectfully Submitted,



James K Falk  
Falk Law Firm  
SC Bar 80125

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
CERTIORARI TO CHARLESTON COUNTY  
G. THOMAS COOPER, Jr, CIRCUIT COURT JUDGE

RECEIVED  
FEB 04 2020  
S.C. SUPREME COURT

ALAN L BURNS

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT,

APPELLATE CASE NO. 2018-000396

CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson Petition for Writ of Certiorari and Appendix in this case was served upon Megan Harrigan Jameson, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Alan L Burns 143218 at Broad River Correctional Institute this February 4, 2020



JAMES K FALK  
Falk Law Firm

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME, this February 3, 2020

*Erin Magua*

Notary Public for South Carolina  
*my Commission Expires!*  
*6-30-2020*

