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S.C. SUPREME COURT

STATES OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Abbeville County

Honorable G. Thomas Cooper, Circuit Court Judge

Dwayne Eddie Starks,

Petitioner

V.

STATE OF SOUTH CAROLINA,

Responden

APPELLATE CASE No. 2017-001731

Pro se Petition for writ of certiorari for a vaction of conviction and sentencing and a demand for release.

S/ Dwayne Starks

pro se petitioner

LCI-F3-D-1216
990 Wisacky Hwy.
Bishopville, S.C.,
29010

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ISSUE'S PRESENTED

1) Did PCR judge err in refusing to find trial counsel ineffective for agreeing to and not objecting to amendment of indictment of armed robbery of a gas station. A True Bill indictment.

2) Did PCR judge err in refusing to find trial counsel ineffective for not serving a notice of objection to admission of evidence and a demand for chain of custody witnesses from the Abbeville County City Police department, pursuant to rule(6) of the rules of Criminal procedure and, for not objecting to exhibit's #28 #29 #30 #31 being submitted into evidence

3) Did the Circuit Court lack subject matter jurisdiction to try defendant for armed robbery.

STATEMENT

In July of 2012, the Abbeville County Grand Jury indicted Petitioner, Dwayne Eddie Starks, for armed robbery and possession of a firearm during the commission of a violent crime, indictments #2012-AS-01-391, 392. On April 1, 2013, Petitioner proceeded to jury trial before the Honorable Thomas L. Hughston, Jr. Patricia Bolen and Jonna Nelson represented Petitioner at trial. Solicitor David Stumbo and Yates Brown prosecuted the case. The jury returned verdicts of guilty. Judge Hughston sentenced Petitioner to twenty-five years (25) years for armed robbery and five (5) years concurrent for the weapon charge. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of appeals affirmed the convictions and sentencing. State v. Dwayne Eddie Starks, Op. NO. 2014-UP-490 (S.C. Ct. App. filed October 29, 2014.

On June 10, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on July 21, 2016. On June 5, 2017, an evidentiary hearing was held before the Honorable G. Thomas Cooper. Laura Saunders represented Petitioner at the PCR hearing. Justin Hunter represented State. In a written order signed June 16, 2017, Judge Cooper denied relief and dismissed the application. A timely notice of intent to appeal was served on August 28, 2017. This written memorandum Petition of vacation of conviction and sentencing and a demand of immediate release.

ARGUMENT'S

1) The PCR judge erred in refusing to find trial counsel ineffective for agreeing to and not objecting to amendment of indictment of armed robbery of a gas station in open court, immediately before trial, changing the original gas station in the indictment with another gas station. The amendment of indictment for armed robbery of a gas station, replacing the original gas station made the charge in indictment a different charge that was presented to Grand Jury and so, devested the Circuit Court of subject matter jurisdiction to try defendant for armed robbery. ——Also the amendment violated defendant's 5th 6th and 14th amendment of the United States Constitution. The 5th amendment of the United States Constitution, tobe tried and convicted on a presentment or an indictment of the Grand Jury. The 6th amendment of the United States Constitution, to be informed of the nature and cause of the actusation against him. The 14th amendment of the United States Constitution, due process of the Law, which requires that a defendant be served with a valid indictment. In this case defendant was prejudiced by a lack of notice and an insufficient indictment. Trial counsel should have objected to amendment then the defected indictment would have been taken by demurrer or on motion to quash indictment or motion for direct verdict before the jury was sworn in.

South Caroling Law provides: Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and Place, as required by law, Charges the Crime substantially in language of the Common law or of the statute prohibiting the Crime or so plainly that the nature of the offense Charged may be easily

understood and, if the offense be an statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

2) The PCR judge erred in refusing to find trial counsel ineffective for not serving a notice of objection to admission of evidence and a demand for chain of custody witnesses from the Abbeville County City Police department and for not objecting to exhibit's #28 #29 #30 and #31 being sumitted into evidence as item's of evidence pursuant to rule (6) of the rules of criminal procedure, because no evidence chain of custody was ever established on item's of evidence in this case by the Abbeville County City police department. There's no evidence room Custodian signature signed on the evidence chain of custody sheet in this case. All the court went on was detective Wilkie's word. There is no witness to detective Wilkie putting item's into evidence room at time he signed on chain of custody sheet. If trial counsel had served a notice of objection to admission of evidence and a demand for chain of custody witnesses from Abbeville County City police department, an evidential hearing would have been held and the item's of evidence would have been suppressed, cause no complete chain of evidence was ever established by the Abbeville County City Police department because there's only detective Wilkie's signature on the evidence chain of custody sheet in this case. There's no one that testified or who could have testified to seeing or receiving item's from detective Wilkie at time he signed on evidence chain of custody sheet in this case, If trial Counsel had objected or filed an motion of notice of objection to admission of evidence exhibit's #28 #29 #30 and #31 would have anciany DNA evidence that Came from item's would have been suppressed then it would

have been the defendant's word against store clerk and sense the only evidence then would have been the store clerk word that she recognized defendant's voice and body bill. If a defendant Plea his innocent and go to a jury trial and the only evidence against him is one other person word the court must instruct the jury on that the state is charging defendant with or for committing a crime but the defendant plea his innocent and it's not up to the defendant to prove he's innocent because he is innocent it's up to the state to prove beyond a reasonable bout that defendant committed the crime and, without item's of evidence and DNA results from them there's no way defendant would have been found guilty. See, Benton v. Pellum, 232 S.C. 26, 100 S.E. 2d. 534 (1957), Proof of chain of custody need not negate all possibility of tampering, but must establish a complete chain of evidence as for as practicable, quoting State v. Cribb, 426 S.E. 2d 306.

Also see Criminal Law ⊙→ 388(3) Chain of Custody requires that where analyed substance has passed through several hands, evidence must not leave it to cojecter as to who had substance and what was done with it between taking and anelysis. Party offering evidence is required to establish complete chain of evidence, tracing possession from time specman is taken to final anelysis. Indentity of persons who handle evidence must be estiblished. See State v. Williams, 376 S.E. 2d 773 (1989).

3) The Circuit Court lacked subject matter jurisdiction to prosecute defendant for armed robbery. The court lacked subject

matter jurisdiction for this offense because the court allowed an *109 the amendment of indictment immediately prior to trial, changing the gas station with another gas station. Changes deprived defendant of notice of what he was required to defend. The AFFIDAVIT "arrest warrant" in this Case clearly states, that on 2-27-12 Dwayne Starks did enter the ONE STOP, defendant was indicted and true billed for the armed robbery an gas station. The statute in indictment indicated crime involved the armed robbery of one particular gas station and, although defendant was indicted under the name of a previse gas station that leased building under a different management. The Law recognize that if the building is under a different management makes the building a different place. The amendment changed the identity of the gas station named as the victim in indictment and by changing the victim made the charge a totalley different offense that was presented to the Grand Jury when it convened on July 27, 2012. Defendant was prejudice by lack of notice and an insufficient indictment., which is a violation of defendant's Due process of the Law. See State v. Bryson (S.C.App 2005) 357 S.C. 106, 591 S.E. 2d 657 Criminal Law 102, also see, State v. Smalls (S.C. 2005) 364 S.C. 343, 613 S.E. 2d 754. Constitutional Law ©=4579 Although an indictment does not confer subject matter jurisdiction but, Due process requires that a criminal defendant be properly served with a valid indictment. See, 41 Am. jur. 2d indictments and informations §174 (1995) (An indictment is impermissibly amended if the altered indictment charges a different offense or changes the nature of the offense. Cit, State v. Smalls (S.C. 2005) 364 S.C. 343, 613 S.E. 2d 754. Constitutional Law ©=4579, Although an indictment does not confer subject matter jurisdiction, but due process requires that a criminal defendant be properly served with a valid indictment.

see, State v. Sigmon, (S.C. 2005) 366 S.C. 552, 623 S.E.2d 648, An accused's sixth amendment right to be informed of the nature and cause of the accusations against him is satisfied if the notice to accused is reasonable.

See, Indictment & Information ⇨ 71.2 (2) Informing accused of nature of charge. S.C. App 2000. For an indictment to be valid, due process requires that it state the offense with sufficient certainty and particularity to enable the defendant to know what he is called upon to answer; U.S. Cst. Const. Amend 14. — In re Jason T. 531 S.E.2d 544, 340 S.C. 455 Also see State v. Bryson, (S.C. App 2003) 357 S.C. 106, 591 S.E.2d 637, Criminal Law 102. See U.S. v. Means, Citing Gentry, an indictment is an notice document," albeit one required by our state constitution and statutes. See South Carolina Const. art 1, §11 and art. V, §22 [Foot notes omitted]; S.C. Code Ann. §17-19-10 (2003) ("No person shall be held to answer in any court for an alleged crime (or) offense, unless upon an indictment by a Grand Jury" except in specified instances). The primary purposes of an indictment are to put a defendant on notice of what he is called upon to answer, i.e. / to apprise him of the elements of the offense and allow him to decide whether to plead guilty (or) stand trial, and to enable the Circuit Court to know what judgement to pronounce if the defendant is convicted. Gentry, 363 S.C. at 102-03, 610 S.E.2d. at 500); S.C. Code Ann. §17-19-20 (2003). This required notice is a component of the due process that is accorded every criminal defendant. See U.S. Const. amend. V; S.C. Const. art. 1, §3. / Given that the sufficiency of an indictment will not longer be considered an issue of subject matter jurisdiction which may be raised at any time, we applied the general rule regarding preservation of error and held that a defendant must raise an issue regarding the sufficiency of the indictment before the jury is

sworn in, in order to preserve the error for direct appellate review. A defendant has a right a constitutional and statutory right to demand that a properly constituted Grand Jury consider his case and decide whether to issue a sufficient indictment. See also Evans, 363 S.C. at 508-13, 611 S.E.2d at 517-19 (Citing Gentry, 363 S.C. at 102-03, 610 S.E.2d at 500 and also citing cases in which the court has emphasized the importance of the Grand Jury process. Furthermore, a sufficient Indictment prevents later retrials for the same offense in contravention of the constitutional prohibition against double jeopardy and prevents a prosecutor from usurping the power of the Grand Jury by ensuring a defendant is tried for the crime for which he was indicted. See State v. Shoemaker, 276 S.C. 86, 275 S.E.2d 578 (1981), Guthriel, 352 S.C. at 107-108, 572 S.E.2d at 312 (In determining whether an indictment meet's the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances..... Further, whether the indictment could be more definite or certain is irrelevant. Gentry, 363 S.C. at 103, 610 S.E.2d at 500 (Citations emitted) all the surrounding circumstances must be weighed to make an accurate determination of whether the defendant was prejudice by lack of notice and an insufficient indictment. See State v. Gunn, 313 S.C. 124, 130 437, S.E.2d 75-78 (1993), Evans v. State, 216 S.C. 328, 57 S.E.2d 756 (1950). See, S.C. App. 1998. Indictment is sufficient if it contains necessary elements of offense intended to be charged and sufficiently apprises defendant of what he or she must be prepared to meet, State v. Warren, 500 S.E.2d 128, 330 S.C. 584, rehearing denied, and certiorari granted, reversed 534 S.E.2d 687, 341 S.C. 349. Also see, S.C. 2004. Indictment is sufficient to convey jurisdiction if it apprises the defendant of the

elements of the offense intended to be charged and informs the defendant of the circumstances he must be prepared to defend, Koon v. State, 595 S.E. 2d 456, 358 S.C. 359, rehearing denied, grant of Post-conviction relief, reversed 643 S.E 2d 680, 372 S.C. 531. S.C. App. 1830. also see State v. Halder 2 Mc Cord 377, 13 Am. Dec. 738.

In this case the amendment changed victim's in indictment making the charged offense in indictment different from charge presented to the Grand Jury when it convened on July 27, 2012. The affidavit, "arrest warrant" in this case clearly states, on 2/27/12 Dwayne Starks did enter the ONE STOP located at 810 West Greenwood Street in the City limits of Abbeville, but defendant was tried and convicted for the armed robbery of an Shell gas station, something he was never arrested for or put on notice of. Defendant was convicted of a totally different charge from charge in original indictment. Defendant states that every issue that was raised at the PCR hearing, trial Counsel lied in her testimony about every issue, defendant states, that when trial counsel approached him about her prosecuting him in the past, Counsel told defendant that she had prosecuted him a few years before when she worked for the solicitor office but, counsel didnt recuse herself from case or explain to defendat that he could go before the Court to have her removed from case because of the potential conflict of intrest, Trial Counsel stated in her PCR testimony, that defendant said it wasn't a big deal. But defendant wrote Shane Goranson the public defender that was appointted to this case first, before Patricia Bolen, see attachment (1) A Copy of the letter defendant wrote Shane Goranson, it proves trial Counsel lied doing her PCR testimony. Attachment (2) a Copy of the original True Billed indictment and amended indictment. Attachment (3) A Copy of the

affidavit "arrest warrant". Attachment (H) A copy of the evidence chain of custody sheet in this case with only detective Wilkie's signature signed on it. The amendment to original True Billed indictment prejudiced defendant by lack of notice and an insufficient indictment.

CONCLUSION

Based on the above arguments, it's clear defendant was prejudice and should be granted Petition of vacation of Conviction and sentencing and a Demand for release.

S/Dwayne Starks

Dwayne E. Starks #253926
PRO SE Petitioner

This 24th day of April 2020