

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Anderson County
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

GAVIN V. JONES,

RECEIVED
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Appellant, SC Court of Appeals

vs.

THE STATE,

Respondent.

APPELLATE CASE NO 2018-001099

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court denied Appellant's petition for a writ of mandamus to compel Respondent to release him from prison and indict him anew based upon his argument that the solicitor did not follow the proper procedures for obtaining a true-billed indictment for murder two decades ago. Was that denial proper in light of Appellant's failure to demonstrate that he was entitled to the writ due to his inability to satisfy the elements required for the issuance of the writ, the deficiencies of his petition, and the adequate notice afforded to him by the indictment?

STATEMENT OF THE CASE

Appellant is serving a sentence of life without the possibility of parole for murder. Chief Justice Ernest A. Finney, Jr., of the South Carolina Supreme Court, canceled the statutory terms of circuit court in South Carolina for the period beginning on January 4, 1999, and ending on July 2, 1999, by an Order issued on November 1, 1998. The Order authorized the Chief Judge for Administrative purposes in each circuit to schedule additional terms during their period. On December 10, 1998, the Honorable H. Dean Hall issued an Order convening the Anderson County Grand Jury on January 5, 1999. The indictment for murder indicates it was true-billed by the Grand Jury on January 5, 1999. Appellant was found guilty by a jury on July 12-15, 1999, and Judge Hall (Trial Court) sentenced him to life imprisonment without the possibility of parole. Thereafter, Appellant's appellate counsel filed an appellate brief pursuant to Anders v. California, 386 U.S. 738 (1967), Appellant filed a pro se brief, and this Court dismissed Appellant's appeal and affirmed. State v. Jones, Op. No. 2001-UP-55 (S.C. Ct. App. filed July 11, 2001). This Court denied Appellant's petition for rehearing, and the South Carolina Supreme Court denied Appellant's pro se petition for a writ of certiorari on January 24, 2002.

Appellant filed a Petition for Writ of Mandamus on March 14, 2012, arguing that he was entitled to a writ compelling Respondent to release him from imprisonment on the ground that the murder indictment is invalid because it was true-billed outside a term of the Court of General Sessions. Respondent moved to dismiss, pursuant to Rule 12(b), SCRCP, on the grounds that, inter alia, Respondent was not a proper party, Appellant failed to state a claim upon which relief could be granted, Appellant failed to meet the requirements for a writ of mandamus to issue, and the petition was barred by the doctrine of laches. A hearing was convened on February 20, 2014, before the

Honorable J. Cordell Maddox, Jr.¹ Judge Maddox (Circuit Court) denied the petition on February 6, 2018. Appellant then filed a Motion to Alter or Amend Judgement pursuant to Rule 59(e), SCRCR, which was also denied by the Circuit Court. This appeal follows.

¹ During the hearing, Judge Maddox granted Appellant's motion to relieve his counsel, and Appellant has been a pro se litigant in this action ever since.

STANDARD OF REVIEW

Whether to issue a writ of mandamus lies within the sound discretion of the trial court, and an appellate court will not overturn that decision unless the trial court abuses its discretion. Charleston Cty. Sch. Dist. v. Charleston Cty. Election Com'n, 336 S.C. 174, 519 S.E.2d 597 (1999). An abuse of discretion arises where the trial court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support. Id. In reviewing a decision on a mandamus petition, an appellate court will not disturb the factual findings of the trial court when those findings are supported by any reasonable evidence. Id.

ARGUMENT

The circuit court properly denied Appellant's petition for a writ of mandamus because Appellant failed to satisfy the elements required for an issuance of the writ, received sufficient notice from the indictment that was the subject of the petition, and unreasonably delayed in his bringing of the petition. Furthermore, Respondent was not the proper respondent for the petition.

Appellant contends that the procedures followed when he was indicted deviated from the procedures provided for in S.C. Code Ann. § 14-9-210, that the indictment was therefore void, and that the Circuit Court erred in denying his petition for a writ of mandamus to compel Respondent to release him from imprisonment and indict him anew. Appellant relies upon language printed on the fact of the indictment, which he alleges proves that the Anderson County Grand Jury true-billed his indictment without authority in light of an order of Chief Justice Finney of the South Carolina Supreme Court that rescheduled the term of the Court of General Sessions. Appellant disregards language in the order that indicated that the judicial circuits still had discretion to conduct their own affairs as they deemed necessary. Further, Appellant disregards an order of the Chief Judge for Administrative Purposes convening the Grand Jury on the date on which Applicant's indictment was true-billed, and ignores the practice in this State of allowing the judicial circuits to convene the grand jury outside of terms of the Court of General Sessions.

Appellant's petition for a writ of mandamus was properly denied by the Circuit Court because Appellant has failed to demonstrate that he is entitled to the writ in light of the circuit court's authority to convene the grand jury. He failed to demonstrate that the indictment did not afford him sufficient notice. Further, his petition should be barred by the doctrine of laches. This Court should affirm the Circuit Court's denial of the writ.

Appellant cannot meet the requirements for the issuance of the writ

Appellant's petition for a writ of mandamus fails because Respondent is not a public official with a ministerial duty to act in accordance with Appellant's wishes. In order for a writ of mandamus to be issued, Appellant must show:

(1) [A] duty of the Respondent to perform the act; (2) the ministerial nature of the act; (3) the Petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy.

Edwards v. State, 383 S.C. 82, 96, 678 S.E.2d 412, 491 (2009).

The writ of mandamus is the highest judicial writ known to the law. Id. at 95, 678 S.E.2d at 419. It is a coercive writ that compels a public official to perform a ministerial duty. Id. at 96, 678 S.E.2d at 419. The writ of mandamus is "based on the theory that an officer charged with a purely ministerial duty can be compelled to perform that duty in case of refusal." Wilson v. Preston, 378 S.C. 348, 354, 662 S.E.2d 580, 583 (2008). A public official has a ministerial duty when the duty:

[I]s absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts. It is ministerial if it is defined by law with such precision as to leave nothing to the exercise of discretion.

Id.; see also Montefusco v. Commonwealth, 895 N.E.2d 478, 479-80 (Mass. 2008) (finding that petitioner for a writ of mandamus failed to establish any "clear cut duty" or obligation to perform the act in the manner prayed for in the petition).

First, Respondent was improperly named a party in Appellant's petition. Appellant has failed to name as a respondent in his petition a public official whose actions the lower court could compel. This failure is a deficiency. See Id. at 348 (wherein a county administrator was named as a party when petitioner sought to compel the production of financial records); Blalock v. Johnston, 180 S.C. 40, 185 S.E. 51 (1936) (wherein the Governor of South Carolina was named as a party when

petitioner sought to compel the Governor to appoint petitioner to a position in government); see also 52 AM. JUR. 2D *Mandamus* § 391 (2019) (summarizing that “[a] mandamus proceeding is properly directed against the officer, body, corporation, or person who has the duty to perform the act sought to be enforced); State ex rel. Nelson v. City of Berkeley, 991 S.W.2d 747 (Mo. 1999) (holding that the official or body whose action petitioner seeks to compel is a necessary party and should be named). Respondent is not an official or public body that would be subject to a writ of mandamus compelling the convening of a grand jury upon the vacation of an indictment.

Second, Respondent does not have the duty to act in the way demanded by Appellant. In his petition, Appellant prays that the court would issue a writ to “release him from unconstitutional confinement.” Appellant concludes his Initial Brief before this Court by stating that “the Court’s only position is to grant a new trial with the appellant using a lawfully obtained indictment.” As Edwards provides that a writ of mandamus compels a public official to act in a specified way, and as Applicant has named Respondent alone as a respondent to his petition, Appellant is petitioning the courts to compel Respondent to release him from prison. Appellant does not cite a single authority that places a duty upon Respondent to release Appellant from imprisonment. Not only does Respondent not have the authority or duty to act in accordance with Appellant’s petition, but Respondent is complying with the courts by continuing to imprison him, in accordance with the sentence imposed thereby. Rather than identifying any duty of Respondent, Appellant argues that the solicitor did not lawfully perform a ministerial duty. This argument of Appellant treats Respondent and the solicitor as they are the same party. A solicitor is a full-time state employee, S.C. Code Ann. § 1-7-325, and is elected in each judicial circuit by the qualified electors, S.C. Code Ann. § 1-7-310. Respondent cannot be simultaneously the State and an employee of the State. To further compound

Appellant's error, he asks the courts to issue a writ of mandamus to compel Respondent to take an action that is different from the action taken by the solicitor. Appellant has failed to show that he is entitled to the writ because his allegations concern the allegation that a party different from Respondent failed to perform a ministerial duty and that, as relief, Respondent should be compelled to act in a way for which there is no duty.

Furthermore, Appellant is launching a collateral attack against his conviction in contravention of the Uniform Post-Conviction Procedure Act, which takes the place of all other remedies available from a collateral attack and "shall be used exclusively in place of them." S.C. Code Ann. § 17-27-20(b). Respondent submits that this is an attempt to avoid the statute of limitations provided in Code Section 17-27-45, and the disfavor towards successive post-conviction relief actions found in Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991), since Appellant's original PCR action was filed almost ten years before his petition for a writ of mandamus.

Respondent notes for the Court that Appellant has previously raised the issue at the core of his petition. Following Appellant's conviction, his appellate counsel filed an Anders brief, and Appellant thereafter filed a pro se brief, alleging therein that, inter alia, he was not adequately informed of the accusations against him because the evidence that the solicitor presented during his trial did not conform to the accusations presented in the murder indictment. This Court dismissed Appellant's appeal and affirmed. State v. Jones, Op. No. 2001-UP-55 (S.C. Ct. App. filed July 11, 2001). This Court denied Appellant's petition for rehearing, and the South Carolina Supreme Court denied Appellant's pro se petition for a writ of certiorari on January 24, 2002.

Appellant filed a post-conviction relief action on June 6, 2002, in which he alleged that, inter alia, the Trial Court lacked subject-matter jurisdiction on the ground that Appellant was not indicted

within ninety days of his arrest. After a hearing was held before Judge Maddox, the action was dismissed.² Jones v. State, No. 02-CP-04-1817 (Anderson, S.C., Ct. Common Pleas, February 9, 2005). Appellant filed a petition for a writ of certiorari, in which the issue of subject-matter jurisdiction was not raised, and our Supreme Court denied the petition. Jones v. State, S.C. Sup. Ct. Order dated November 16, 2005. The Remittitur was issued on December 2, 2005.

On November 5, 2008, Appellant filed a motion for a new trial, and argued therein that he was entitled to a new trial on the basis of newly discovered evidence because he had discovered in June of 2008 that the Anderson County Grand Jury true-billed the murder indictment on January 5, 1999, despite the fact that Chief Justice Finney's Order on November 1, 1998, cancelled the General Sessions term. Appellant also argued that Judge Hall's Order convening the Grand Jury on January 5, 1999, was void as contradictory to the Chief Justice's earlier Order. On October 7, 2009, Judge Maddox denied Appellant's motion for a new trial, and dismissed the action. Jones v. State, No. 02-CP-04-1817 (Anderson, S.C., Ct. Common Pleas, October 7, 2009).³ Appellant sought review of the denial by filing a petition for a writ of certiorari. Our Supreme Court denied the petition.⁴ Jones v. State, S.C. Sup. Ct. Order dated May 13, 2011. The Remittitur was issued on June 1, 2011.

According to the doctrine of res judicata, "a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit. Plum Creek Dev. Co., Inc. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (precluding petitioner who was previously granted a writ of mandamus against respondent from later

² Appellant was a pro se litigant with standby counsel in the circuit court proceedings in this action.

³ Appellant was a pro se litigant in the circuit court proceedings regarding the motion.

⁴ Appellant was a pro se litigant in this appeal.

bringing an action for damages because the two actions arose from the same facts despite the difference between the remedy sought). Although Appellant raised the identical issue in this petition only in his motion for a new trial in November of 2008 and the subsequent appeal, he failed to raise the issue at earlier opportunities or raised similar issues. Appellant, in accordance with the requirements of State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), could have challenged the sufficiency of the indictment before his jury was sworn. Appellant unsuccessfully argued on direct appeal that the indictment did not afford him adequate notice of the charge against him. In his PCR action, Appellant unsuccessfully argued that the Trial Court lacked subject matter jurisdiction due to the solicitor's failure to indict him within ninety days of his arrest, and then abandoned that issue in the subsequent appeal. Finally, following Appellant's lack of success in arguing this identical issue in his motion for a new trial and a resulting appeal, he has now raised it in the form of a petition for a writ of mandamus. Respondent submits that Appellant's concern has been specifically addressed by our Supreme Court and others, and that Appellant has chosen to abandon the claim in earlier actions. This Court should take judicial notice that Appellant's petition can be precluded due to the doctrine of res judicata.

In summary, Appellant has not established that Respondent has the legal duty to release him from prison or to indict him anew in accordance with his preferred procedure. Appellant argues that the solicitor, a party distinct from Respondent, violated the prescribed procedure for obtaining an indictment, and that the Circuit Court should therefore compel Respondent to perform an act for which it has no duty. Appellant conflates the roles, authority, and acts of Respondent and the solicitor in an attempt to cobble together facts sufficient to satisfy the elements for the issuance of a

writ of mandamus. Appellant has failed to show that he is entitled to the writ, and the Circuit Court properly denied the petition.

The indictment afforded Appellant sufficient notice

“[S]ubject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts” *Id.* at 101, 610 S.E.2d at 499. “Circuit courts obviously have subject matter jurisdiction to try criminal cases.” *Id.* A defective indictment does not deprive a court of jurisdiction. *Id.* at 93, 99, 610 S.E.2d at 498 (citing United States v. Cotton, 535 U.S. 625, 422 S.Ct. 1781 (2002)). “Absent evidence to the contrary, . . . the regularity and legality of proceedings before a grand jury is presumed.” State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (internal citations omitted). A defendant must raise the issue of an insufficient or defective indictment before the jury is sworn and not afterwards. *Id.* at 102, 610 S.E.2d at 499.

Appellant’s petition takes contradictory positions on whether the Trial Court had jurisdiction to try his case. He states that he is not challenging the subject-matter jurisdiction of the Trial Court, yet he implies that he is challenging jurisdiction. For example, Appellant writes in his Initial Brief that the “illegally obtained indictment was then transferred to the trial court, supposedly conferring jurisdiction to it. But, instead thereof, it rendered both the ex parte grand jury proceeding and the criminal court whereupon the matter was tried, as ‘sham legal process’. Appellant also writes that the indictment was “no better than a blank sheet of paper. In South Carolina, there is **NO** jurisdiction that may be obtained with a blank sheet of paper” (emphasis in original). Since the circuit courts have the subject-matter jurisdiction to try criminal matters, and Appellant’s conviction involved a criminal charge in the Court of General Sessions, the Trial Court clearly had subject-matter jurisdiction. Appellant’s slights against the Trial Court’s exercising subject-matter jurisdiction are

not meritorious in light of Gentry's distinguishing between the circuit court's subject-matter jurisdiction in criminal cases and the sufficiency of an indictment.

As to the adequacy of notice give to Appellant by his indictment, he cannot avoid the plain requirement in Gentry that the sufficiency of the indictment must be challenged before the jury is sworn. Appellant alleges in his Initial Brief that he was unable to challenge the indictment because "there were not apparent defects in the indictment or the proceedings." Appellant cites State v. Richardson, 149 S.C. 121, 146 S.E. 676 (1928), in support of his position; however, his reliance upon Richardson is misplaced because the case is not instructive on the issue at hand. In Richardson, our Supreme Court denied Richardson's assertion of trial court error in that the trial court denied his motion to quash the indictment based upon alleged grand jury impartiality after Richardson was convicted by a jury after a change of venue. Id. 146 S.E. at 677. Likewise, Appellant's reliance upon State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972), is misplaced, as Funderburk concerned the validity of an indictment when a defendant timely requested a preliminary hearing, but where the indictment was true-billed and the defendant was tried in the Court of General Sessions before the preliminary hearing was held. Id. Contrary to Appellant's assertion that the alleged defect he is raising now was not apparent until June of 2008, Respondent would point out that the same public records that Appellant relies upon in his argument now, which includes an order of the Supreme Court and an order of the Chief Administrative Judge of a judicial circuit, were as available before the jury was sworn in Appellant's trial as they were in 2008. Cf. State v. Allen, 276 S.C. 412, 414, 279 S.E.2d 365, 366 (1981) (holding that evidence attainable from the public record cannot support a claim of newly discovered evidence). Appellant also seeks to excuse his thirteen-year delay in challenging the sufficiency of the indictment by arguing that he was unable to do so earlier because

the grand jury process is one that is ex parte. Respondent notes this argument is raised by Appellant for the first time in his Initial Brief, and he should not be allowed to raise it now.

Although he argues that it was improper for the Anderson County Grand Jury to convene on January 5, 1999, due to the Order issued by Chief Justice Finney, Appellant fails to give consideration to Chief Justice Finney's Order. That December 1, 1998, Order did not deny the judicial circuits to tend to their own administrative affairs as necessary. Additionally, the Supreme Court periodically issues orders providing for the convening of the grand jury as is required in the public interest. For example, the Court recently ordered that it is a duty of the Chief Judge for Administrative Purposes in each judicial circuit:

To consult with the circuit solicitor as soon after the effective date of this order to determine the dates for the convening of the grand jury in the various counties within the judicial circuit for the ensuing six-month period. Where feasible, the grand jury shall be convened at times other than the opening day of a term of the court of general sessions in order to maximize the effective use of each term of the court of general sessions.

S.C. Sup. Ct. Order dated June 29, 2019.

Respondent submits that, if the Chief Judge for Administrative Purposes in a judicial circuit has the authority to direct that the grand jury be convened on a given date, and has the Supreme Court's encouragement to convene the grand jury outside of the opening day of a term of General Sessions, the fact that the standard, preprinted language on an indictment indicates that the grand jury was convened during a term of General Sessions surely does not affect the presumed regularity of the indictment process under James. Appellant is fixated on a technicality that did not infringe upon his ability to be aware of the allegations against him in his criminal case, as our Supreme Court's denial of his pro se petition for a writ of certiorari concerning this Court's affirmation of his murder conviction indicates. As Appellant has wholly failed to demonstrate the existence of any irregularity

in the indictment process affecting his ability to have sufficient notice of the allegations against him, the Circuit Court's denial of the petition should be affirmed.

Appellant's petition should be barred by laches

Appellant's unreasonable delay in bringing this claim has affected Respondent's ability to refute his claim. Our courts require reasonable diligence in pursuing collateral relief. See State v. Appleby, 25 S.C. 100, 1886 WL 2478 (1886) (affirming the trial court's denial of a petition for a writ of mandamus when the petitioner did not assert his legal rights in the proper manner until eight years after the wrong had allegedly occurred); see also McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981) (affirming a PCR court's finding that laches barred an applicant from seeking post-conviction relief more than twenty years after his conviction). In this matter, Appellant was indicted in January of 1999 and was convicted and sentenced in July of 1999. Appellant filed his Petition for Writ of Mandamus on March 14, 2012, which was more than thirteen years after he was indicted and a little under fourteen years after his conviction. Whether it stems from neglect or an intention to skirt the prohibition against successive post-conviction relief actions and the applicable one-year statute of limitations, Appellant's filing of the petition after thirteen years have passed from the date of his conviction constitutes an unreasonable delay, particularly when, as has been mentioned elsewhere in this Brief, Appellant has questioned the sufficiency of the indictment and the jurisdiction of the trial court on numerous occasions since his trial.

CONCLUSION

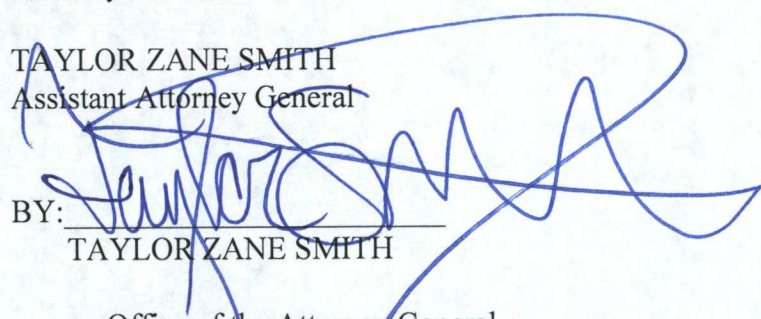
Appellant is not entitled to a writ of mandamus because Respondent is not a public official who can be compelled to release Appellant from his lawful imprisonment and does not have any duty to indict him anew, Appellant received sufficient notice from his indictment, and is bringing his

petition decades after he was indicted. Judge Maddox properly denied Appellant's petition for a writ of mandamus. This Court should affirm.

Respectfully submitted,

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January 17, 2020

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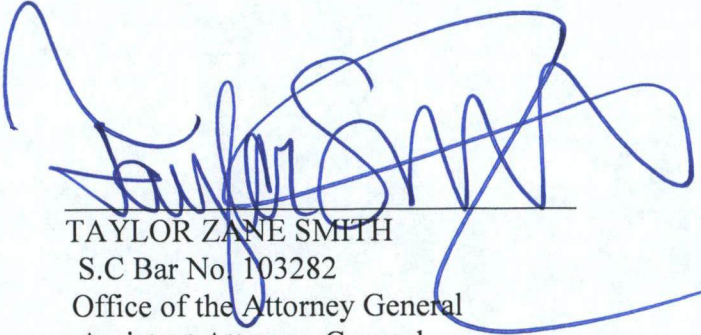
THE STATE,

Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed January 14, 2020, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings, 375 S.C. 56, 650 S.E.2d 462 (2007)(requiring redaction of social security numbers, names of minor children, financial account numbers, and home addresses).

This 14th day of January, 2020.



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CERTIFICATE OF COUNSEL

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