STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari From Greenwood County
Thomas A. Russo, Circuit Court Judge

Lakendrick K. Leverette, PETITIONER,

V.

State Of South Carolina, RESPONDENT,

Appellate Case No. 2012-212506

Petitioner Pro Se Writ Of Certiorari

Lakendrick K. Leverette 276349
MCI/SMB-121
386 Redemption Way
McCormick, S.C. 29835

Petitioner Pro Se Writ Of Certiorari,

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Issues Presented

Did the PCR court error in failing to find trial counsel ineffective for not objecting to the trial judge charging the jury on the lesser charge of Strong armed robbery because this gave the jury an option to armed robbery although there was insufficient evidence for the Strong armed robbery?

Did the PCR court error in failing to find trial counsel ineffective for failing to move to quash the indictments pre-trial because the indictments were not true-billed nor did they contain indictments numbers nor were they signed off by a foreman of a grand jury?

Statement

In August 2006, the Greenwood County grand jury indicted Lakendrick Kentrell Leverette on the charges of armed robbery, kidnapping and possession of a firearm during the commission of a violent crime. On April 7, 2008, Leverette preceeded to trial before the honorable J. Ernest Kinard Jr. Petitioner was represented by Chad Bettis, and the State was represented by Demetrios G. Andrews. The jury found Leverette not guilty of kidnapping, and possession of a firearm during the commission of a violent crime. However, the jury did find Petitioner guilty of the lesser included offense of strong armed robbery. Judge Kinard sentenced Leverette to a period of fifteen years imprisonment. App. 176, 1-23. Leverette filed a notice of direct appeal and the office of appellate defense filed a brief pursuant to Anders V. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). On February 23, 2010, the South Carolina Court of Appeals dismissed His appeal. State V. Leverette, Op. No. 2010-UP-143 (Ct. App. Filed February 23, 2010). Supp. App. 15-16.

On January 24, 2010, Leverette filed an application for post-conviction relief (PCR).

The State filed a return on January 27, 2011. Leverette filed an amended PCR application on September 16, 2011. On June 5, 2012, an evidentiary hearing was held before the honorable Thomas A. Russo. Petitioner was represented by Robert W. Cone, and the State was represented by J. Rutledge Johnson. On June 28, 2012 Judge Russo issued an order denying Petitioner's PCR application and dismissing it with prejudice. App. 293-301. Leverette's Attorney filed a notice of appeal.

On February 28, 2013, the Petitioner Counsel of Appellate Defense office filed a brief pursuant to Johnson V. State, 294 S.C. 310, 364 S.E. 2d 201 (1988).

Petitioner Pro Se for Writ of Certiorari follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not objecting to the trial judge charging the jury on the lesser charge of strong armed robbery, because this gave the jury an option to armed robbery although there was insufficient evidence for the strong armed robbery.

At trial, State's witness Bobby Caton testified that he were shooting pool at the getaway bar in Greenwood. On June 9, 2006, when he received an offer inside from Petitioner and his co-defendant, Zavius Jones, to exit and somke marijuana. Caton explained that he agreed to do so, but that when they all went outside the bar to smoke, the next thing he realized was that he went blank and felt a lump on the back of his head. Caton testified that they forced him inside a car and drove off. Caton stated that Jones drove while appellate held the gun and demanded money from him. Caton testified that he gave up cash money, wedding band, sunglasses and cigarette lighter. Then, according to Catons testimony, they took Caton to a deserted area and made him strip naked presumably to ensue that he was not hiding any moneg. During that time, Caton

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Stated that appellant took the gun and forced it down his throat. Then the three of them returned to the getaway for Caton to get more money. App. 22, line 17- App. 23, line 25.

However, as they entered the bar, Caton began yelling people he was being robbed and to call the police which they did. The police arrived and arrested Levere-Le. Allegedly, they found a gun on him which turned out to be a pellet gun. Blood on the muzzle of the gun matched Bobby Caton where the gun was put into his mouth. Petitioner, was charged with Armed Robbery, Kidnapping and Possession of a firearm during the commission of a violent crime. App. 24, line 1-18.

The trial judge charged the jury on armed robbery. App. 156, line 22- App. 159, line 6. The judge also charged the jury on the lesser charge of strong armed robbery. App. 159, line 7- App. 160, line 6. The judge then charged the jury on kidnapping and possession of a firearm during the commission of a violent crime. App. 160, line 7- App. 162, line 13. The jury sent four notes out to the trial judge. App. 164, line 11- App. 169, line 15. Furthermore, the jury were hung. App. 169, line 16- App. 170, line 21. There

was no objection to the Jury charges from the defense Counsel or the State. App. 162, line 7- App. 164, line 10.

The Jury returned verdicts of guilty of the lesser included charge of Strong armed robbery; not guilty of kidnapping; & not guilty of possession of a firearm during the commission of a violent crime. App. 171, line 12- App. 172, line 7. The Judge then sentenced Leverette to fifteen years. App. 176, line 1-23.

At his PCR hearing, Petitioner Leverette, testified that his trial Counsel was ineffective because he did not object to the Judge charging the Jury on the lesser included charge of SAR. Leverette argued that the outcome of the trial would have been different if the Judge had not offered that lesser included. Leverette Stated there was no evidence to support a SAR charge and the Jury found him innocent of the AR charge. App. 228, line 8-16; App. 244, line 16- App. 245, line 7. Leverette explained that SAR was taking of Something, and AR was taking at gunpoint. He Stated the testimony at trial focused on a gun and the police allegedly found a gun on him. Therefore, there were no grounds for a SAR charge. App. 245, line 18- App. 246, line 17.

Trial Counsel testified he did not object to the SAR charge because he wanted to give the Jury another option Since there was "Considerable evidence" being presented against Leverette. Leverette was there with Jones through the entire incident so the Jury still could have convicted Leverette of all charges. He said this was not an "all or nothing" case. App. 276, line 8 - App. 278, line 15.

The PCR Judge ruled that he found Leverette's testimony to not be credible while finding trial counsel's testimony credible. App. 298. The Judge wrote that where counsel acticulates valid reasons for employing a certain strategy, Counsel's choice of tactics will not be deemed ineffective assistance. App. 298. The Judge wrote that although Leverette argued that since the Jury found him not guilty of the AR charge, then they would not have found him guilty of anything if the Judge had not charged SAR that was not true. The Jury could easily have found him guilty of AR. The PCR Judge stated that the SAR charge was a benefit to Leverette because it gave the Jury another option besides AR. App. 299.

The law to be charged must be

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determined from the evidence presented at trial. State V. Cooley, 536 S.E.2d 666, 342 S.C. 63 (2000). A trial court's decision regarding jury charges will not be reversed, where the charges as a whole properly charged the law to be applied. State V. Rye, 375 S.C. 129, 651 S.E.2d 321 (2007).

To warrant eliminating lesser included offense charge, it must clearly appear that there is no evidence whatsoever tending to reduce crime from greater offense charged to lesser offense. State V. Heyward, 350 S.C. 153, 564 S.E.2d 379 (S.C. App. 2002).

In State V. Brandt, 393 S.C. 526, 713 S.E. 2d 591 (2011), the Supreme Court held that in reviewing jury charges for error, the Supreme Court must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.

The Supreme Court held in State V. Day, 341 S.C. 410, 535 S.E.2d 431 (2000), that the failure to tailor jury instructions to adequately reflect the facts and theories presented by the defendant constituted reversible error.

Where ineffective assistance of

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Counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland V. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Butler V. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland V. Washington, supra; Butler V. State, supra.

A two pronged test is used in evaluating allegations of ineffective assistance of Counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norm; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry V. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

Trial counsel was ineffective in failing to object to the jury charge on strong armed robbery. Because the jury found Levere not guilty of armed robbery and possession of a weapon during the commission of a violent crime, and kidnapping, there was a

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reasonable probability Leverette would have walked out of court as an innocent person but for the charge of strong armed robbery.

Leverette maintained his innocence at his PCR hearing. App. 228, line 1-10.

The PCR court erred in failing to find trial counsel ineffective for failing to move to quash the indictments pre-trial because the indictments were not true-billed, nor did they contain indictments numbers, nor were they signed off by a foreman of a grand jury.

At Leverette's PCR hearing, Petitioner Leverette testified that his trial counsel were ineffective because he should have challenged the indictments before the jury was sworn in pursuant to State V. Gentry. The indictments are to be challenged before the jury is sworn in. App. 231, line 18-24. Petitioner testified he received the indictments from his trial counsel as part of his discovery. App. 231, line 5-15. Leverette explain that the indictments he received was blank. They were never signed off by a foreman of a grand jury, never true-billed; no indictment numbers or nothing. App. 229, line 12-24. Leverette stated they're also the same indictments used at trial. App. 231, line 16-17; App. 257, line 13-19. Leverette also explained that something was not right with the indictments. App. 232, line 9- App. 233, line 9; 235, line 17- App. 236, line 25.

The Petitioner were able to present a copy of all three irregular indictments to the PCR court for the record. App.229, line 25- App.230, line 9.

At the defense request, the irregular indictments were marked as applicant's exhibit No.1. There were no objection from the State. App.233, line 10-20. See Supplemental Appendix, p.17-22. Plaintiff's Exhibit #1, armed robbery, Exhibit #2. kidnapping, Exhibit #3. Possession of a fire arm during the commission of a violent crime. Which are marked on the top left side of the body and the face as exhibits, which are the original irregular indictments.

Moreover, When the petitioner received his Supplemental Appendix alone with the Appendix, Leverette recognized that the irregular face of all three indictments had been alter on the record of Appendix. App.203, 205 and 207. Compare to Supplemental Appendix, p.18, 19 and 21.

At Leverette's PCR hearing, Trial counsel testified that the discovery he received did have indictments, and those indictments were

similar to what Lakendrick, I think, has presented today. They didn't have any notation on them from the foreman or true-billed marked on them, the ones initially received App.264, line 18-App.265, line 4.

Trial counsel testified, actually, that's the first motion he made. App.266, line 25-App.266, line 2.

Nevertheless, the evidence of the entire record are insufficient to show that trial counsel made a motion at trial challenging the indictments. See, Appendix.

Trial counsel also testified that he don't know if he ever received a true-billed indictments, but that he know he saw them. App. 265, line 5-7.

Trial counsel then testified that there were no issue that he saw from the indictments when he received them, nothing irregular about them. App. 265, line 11-15. See, Supplemental Appendix, p. 17-22.

The PCR Judge ruled that he found Lever-Yes testimony to not be credible while finding trial counsel's testimony credible. App. 297. The Judge wrote that the indictments in this case were in fact true-billed by Greenwood County Grand Jury on September 29, 2006. Counsel testified he did not move to quash the indictments because he had no reasonable basis as there were no issues with the indictments. App. 298. The Judge wrote that no prejudice resulted as the indictments were clearly true-billed by the grand jury and contained the necessary information to give notice to applicant of the charges against him and to confer Subject Matter Jurisdiction on the trial court. App. 298.

Brown V. State, 465 S.E.2d 358 (S.C. 1995) Holding, Issues related to Subject Matter Jurisdiction may be raise at any time.

Except for certain minor offenses, the Circuit Court does not have Subject Matter Jurisdiction to convict a defendant Unless there has been an indictment of the offense, a waiver of indictment, or Unless the charge is a lesser included offense of the crime

charged. State V. Elliott, 335 S.C. 512, 517 S.E.2d 713 (Ct. App. 1991); Murdock V. State, 308 S.C. 143, 417 S.E.2d 543 (1992). Absent evidence to the contrary, proceedings in a court of general jurisdiction will be presumed regular, Pringle V. State, 287 S.C. 409, 339 S.E.2d 127 (1986).

The Supreme Court held in State V. Williams, 552 S.E.2d 54 (S.C. 2001), that when faced with an irregularity in an indictment and the evidence of the record is insufficient to show the action taken by the grand jury, it is proper for the appellate court to remand for an evidentiary hearing to determine whether the trial court had subject matter jurisdiction. State V. Grim, 341 S.C. 63, 533 S.E.2d 329 (2000); Anderson V. State, 338 S.C. 629, 527 S.E.2d 398 (Ct. App. 2000).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that counsel's conduct so undermined the proper functioning of the adversarial process that trial cannot be relied upon as having produced a just result." Strickland V. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler V. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland V. Washington, supra; Butler V. State, supra.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsels performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsels unprofessional errors, the result would have been different. Cherry V. State, 300 S.C. 117-118, 386 S.E. 2d 624 (1989).

Trial counsel was ineffective in failing to move to quash the irregular indictments pre-trial. Because the indictments received in the petitioners discovery, were not true-billed indictments, nor did they contain indictments numbers, nor were they signed off by a foreman of a grand jury. There was a reasonable probability that the outcome of Leverette's direct appeal would have been different if this issue would had been perserved for appellate review.

CONCLUSION

Based on the above, Certiorari should be granted, the conviction and sentence reversed, and this case remanded for a new trial.

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Certificate Of Service

I certify that a true copy of the Petitioner Pro Se Writ Of Certiorari has been Served on Daniel E. Shearouse, The Clerk Of Court of the Supreme Court Of South Carolina. At P.O. Box 11330 Columbia, S.C. 29211. On this day Of April, 2013.

Lakendrick Leverette
Lakendrick K. Leverette

SWORN TO BEFORE ME
On this 17 Day Of April, 2013
& Franklin

Notary Public for South Carolina
My Commission Expires. 12.16.2019