RECEIVED
Jan 20 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

William A. McKinnon, Circuit Court Judge

Case No. 2013-GS-46-02041
Appellate Case No. 2021-000226

State of South Carolina,…….. ……Respondent,

v.

Duane A. Harrison……... Appellant.

FINAL BRIEF OF APPELLANT

Glenn Walters, Sr., Esquire
1910 Russell Street (29115)
Post Office Box 1346
Orangeburg, SC 29116
Ph: 803 531-8844
Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities.....ii

Statement of Issue on Appeal 1

Statement of the Case 1

Standard of Review.....4

Facts 4

Arguments:

A. THE TRIAL COURT ERRED IN FAILING TO VACATE APPELLANT'S CONVICTION AND SENTENCE FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE IT DID NOT HAVE SUBJECT MATTER JURISDICTION TO ACCEPT THE PLEA TO THE LESSER QUANTITY OF DRUGS INVOLVED IN THE ALLEGED CONSPIRACY.....7

B. HARRISON DID NOT PLEA TO A LESSER INCLUDED OFFENSE IN THE INDICTMENT NOR DID HE WAIVE PRESENTMENT OF THE INDICTMENT.....17

Conclusion.....21

Certificate of Counsel.....23

Proof of Service.....24

Cases:

Anderson v. Anderson,
299 S.C. 110, 382 S.E.2d 897 (1989) 7

Baird v. Charleston County,
333 S.C. 519, 511 S.E.2d 69 (1999) 4

Carter v. State,
329 S.C. 355, 495 S.E.2d 773 (1998) 7

Clair v. State,
324 S.C. 144, 478 S.E.2d 54 (1996) 12

Evans v. State,
363 S.C. 495, 611 S.E.2d 510 (2005) 12

Fesmire v. Digh.
385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009) 4

Gordon v. State,
Memorandum Opinion No. 2004-MO-044 (Submitted February 19, 2004 – Filed August 16, 2004) 16

Granger v. State,
333 S.C. 2, 507 S.E.2d 322 (1998) 15

Harrell v. Pineland Plantation, Ltd.,
337 S.C. 3113, 523 S.E.2d 766 (1999) 4

Hopkins v. State,
317 S.C. 7, 451 S.E.2d 389 (1994) 10

Kelly v. State,
266 S.E.2d 417 (S.C. 1980) 16

Pierce v. State, 338 S.C. 139,
526 S.E.2d 222 (2000) 6

Porter v. Labor Depot,
372 S.C. 560, 643 S.E.2d 96 (Ct. App. 2007) 4

State v. Fennell,
263 S.C. 216, 209 S.E.2d 433 (1974) 14

State v. Funderburk,
259 S.C. 256, 191 S.E.2d 520 (1972) 7

State v. Gentry,
363 S.C. 93, 610 S.E.2d 494 (2005) 7

State v. Gosnell,
341 S.C. 627, 633 (S.C. Ct. App. 2000) 14

State v. Gunn,
313 S.C. 124, 437 S.E.2d 75 (1993) 10

State v. John,
489 S.E.2d 228 (S.C. 1997) 16

State v. Johnson,
333 S.C. 459 (S.C. 1990) 16

State v. Johnston,
333 S.C. 459, 510 S.E.2d 423 (1999) 17

State v. Lynch,
344 S.C. 635, 545 S.E.2d 511 (2001) 9

State v. Means,
367 S.C. 374, 386-388 (S.C. 2006). 8

State v. Myers,
313 S.C. 391, 438 S.E.2d 236 (1993) 10

State v. Riddle, 301 S.C.
211, 391 S.E.2d 253 (1990) 12

State v. Smalls,
364 S.C. 343, 613 S.E.2d 754 (2005) 10

State v. Sowell,
85 S.C. 278, , 67 S.E. 316 (1910) 10

State v. Towery,
300 S.C. 86, 386 S.E.2d 462 (1989) 19

Weinhauer v. State,
334 S.C. 327, 513 S.E.2d 840 (1999) 15

Statutes and Rules:

Statutes

S.C. Code Ann. § 17-19-10 (2003).....8

S.C. Code Ann. § 17-19-100 (1985).....19

S.C. Code of Law § 44-53-370(e)(2)(a) (200.....1,13

Rules

None.

Other Authorities:

S.C. Const. art. I, §11.....17

41 Am.Jur.2d Indictments and Informations § 174 (1995).....9

STATEMENT OF ISSUE ON APPEAL:

DID THE TRIAL COURT ERR IN FAILING TO VACATE APPELLANT'S CONVICTION AND SENTENCE FOR LACK OF SUBJECT MATTER JURISDICTION?

STATEMENT OF THE CASE:

On October 30, 2012, Defendant Duane Arness Harrison ("Defendant", "Appellant" or "Harrison") and a co-defendant were arrested, in the County of York, State of South Carolina, and charged with trafficking in cocaine. Harrison was originally indicted at the May 2013 term of the York County Grand Jury for Trafficking in Cocaine over 400 grams (2013-GS-GS-46-2041). On May 29, 2014, the indictment was amended[1] by the York County Grand Jury, and the said amended indictment was filed on April 30, 2015, alleging violation of *S.C. Code of Law, § 44-53-370(e)(2)(a). Record on Appeal, p. 43 (subsequent references to the Record on Appeal are abbreviated as "RA", followed by the page number).*

On September 02, 2014, Harrison pled no contest to trafficking in cocaine, 28 to 100 grams, before the Honorable Lee S. Alford. A copy of the Transcript of Record (hereinafter referred to as the "Sentencing Transcript") for the sentencing hearing is attached to the Motion to Vacate Sentence and Conviction as *Exhibit 3. RA, pp. 11-41.*

[1]Counsel does not have a copy of the original indictment, but counsel is advised and believes that the amended indictment changed only the duration of the alleged conspiracy, with all else remaining the same.

Based upon a thorough review of the Sentencing Transcript, no indictment reflecting the reduced drug amount was used to effectuate the Defendant's no contest plead to the reduced drug amount. *See, RA, p. 15.* Defendant was sentenced to the South Carolina Department of Corrections ("SCDC") to a determinate term of twelve and one-half (12.5) years. *RA, p. 39.*

Defendant was represented at the sentencing hearing by Attorney Todd Rutherford, of the Richland County Bar. No appeal was filed on Harrison's behalf. Defendant is currently incarcerated at SCDC's prison in the County of Kershaw. Defendant was taken into custody on the date of sentencing, and he has remained incarcerated since September 02, 2014.

Defendant filed a PCR Application which was dismissed by the Honorable Letitia Verdin by written order dated September14, 2016, in the matter captioned as *Duane Harrison vs. State of South Carolina, County of York, Court of Common Pleas, Case No. 2015-CP-46-1244.* The issues raised by the current Motion before the Court were not raised in the PCR Application. Thereafter, Harrison appeals Judge Verdin's Order of Dismissal to the Supreme Court of South Carolina ("SC Supreme Court"), which was docketed as *Appellate Case No. 2016-002384.* The SC Supreme Court dismissed Harrison's *pro se* petition by written order dated April 23, 2018, with the remittitur being issued on May 09, 2018. The issues raised by the current Appeal before the Court were not raised in the appeal/petition before the SC Supreme Court.

On August 27, 2018, Harrison, represented by counsel, filed a Petition for *Writ of Habeas Corpus*, in the District Court for South Carolina, captioned as *Harrison vs. Stirling et., Case No. 4:18-cv-02373-CMC*. A review of the PACER System shows that counsel was allowed to withdraw from the case on April 29, 2019, and Harrison was required to respond to the proceedings *pro se*. The district court summarily dismissed the *Writ of Habeas Corpus* on May 24, 2019, and it did not issue Harrison a certificate of appealability. The issues raised by the current Appeal before the Court were not raised in the writ before district court.

Harrison filed a *pro se* Notice of Appeal of the district court's order of dismissal on July 26, 2019, bearing appeal number 19-7100. The Fourth Circuit Court of Appeals dismissed Harrison's Notice of Appeal by unpublished *per curiam* opinion on November 19, 2019, and the mandate issued on December 16, 2019. The issues raised by the current Appeal before the Court were not raised in the appeal before the Fourth Circuit Court of Appeals.

On November 05, 2020, Harrison filed a Motion to Vacate Sentence and Judgment in the in the trial court in York County, where he was convicted. The Motion was heard by the Honorable Judge William A. McKinnon, who took the matter under advisement and subsequently issued an order denying the Motion on February 18, 2021. *See, RA, pp. 78-80.* Appellant received written notice of entry of this order on February 18, 2021. Counsel for Appellant received Notice of the Order giving rise to this appeal on February 18, 2021. A timely notice of Appeal

was filed on March 05, 2021, and this Court granted Appellant an extension of time until and including May 5, 2021, to file this initial brief.

STANDARD OF REVIEW:

This appeal challenges the subject matter jurisdiction of a trial court. "The question of subject matter jurisdiction is a question of law." *Porter v. Labor Depot*, 372 S.C. 560, 567, *643 S.E.2d 96, 100 (Ct. App. 2007)*. "This Court reviews all questions of law de novo." *Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009) ; see also Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999)* ("[T]his Court has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence."). "[A]ffidavits and other evidence outside the pleadings may, in certain circumstances, be considered in support of a motion to dismiss based on lack of jurisdiction." *Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999)*.

FACTS:

The facts necessary to resolve this appeal are probably not in dispute. The following facts are relevant to the resolution of this Appeal:[2]

1. By an Amended Indictment dated May 29, 2014, Harrison was indicted for Trafficking in Cocaine, in violation of S.C. Code 44-53-

[2]The relevant facts can best be understood by sequentially stating them rather than depicting them in a prose format.

370(e)(2)(a). The CDR Code for the indicted offense is 0281 [hereinafter referred to as the "Indictment"]. *See, RA, p. 23.*[3]

2. The indictment basically follows the language contained in S.C. Code 44-53-370(e)(2)(a), to wit:

   "Between the dates of September 30, 2012 through October 30, 2012, the Defendant…did knowingly sell, manufacture, cultivate, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession or knowingly attempted to become in actual or constructive possessive of four hundred (400) grams or more of cocaine . . . all in violation of 44-53-370, Code of Laws of South Carolina, (1976, as amended). *See, Id.*

3. On September 02, 2014, Defendant entered a "no contest plea" to the Indictment under a negotiated plea where the amount of the drugs in the Indictment was reduced to twenty-eight (28) to one hundred (100) grams. *See, RA, p. 15, Lines 22-25.*

---

[3]Cites of this nature refers to Exhibits that were submitted in support of the Motion before the trial Court. As required by the applicable appellate court rules, the cites will be changed in the final brief to cite to the Record on Appeal.

4. A fair reading of the Sentencing Transcript establishes that the State was relying upon a theory that Defendant conspired to traffic cocaine because the evidence never showed that the Defendant was ever in possession of the package that was intercepted by law enforcement and delivered to the co-defendant after replacing the cocaine with the "fake drugs".

5. Moreover, Judge Alford, the trial judge, expressly stated several times during the sentencing hearing that the Defendant was pleading to conspiracy to trafficking cocaine.

6. Judge Alford's Sentencing Sheet states that the Defendant was committed for "Drugs/Conspiracy to Traffick in Cocaine 28 g or more, but less than 100 grams, 1st offense" in violation of S.C. Code § 44-53-0370(e)(2)(b)1 [hereinafter referred to as the ["the Conviction"]. The CDR Code listed on the Sentencing Sheet is 0281. Additionally, the Sentencing Sheet also states that the Defendant was convicted of a "Lesser Included Offense".

7. During the sentencing hearing, Judge Alford found more than one conspiracy. *See, RA, p. 20, Lines 9-10.*

8. The essence of State's case against Harrison is the allegations that he was the roving lookout for a delivery of drugs to the lookout.

There are no credible allegations that Harrison committed any substantive drug possession offenses. *RA, pp. 14- 42.*

ARGUMENTS:

A. THE TRIAL COURT ERRED IN FAILING TO VACATE APPELLANT'S CONVICTION AND SENTENCE FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE IT DID NOT HAVE SUBJECT MATTER JURISDICTION TO ACCEPT THE PLEA TO THE LESSER QUANTITY OF DRUGS INVOLVED IN THE ALLEGED CONSPIRACY.

1. Subject matter jurisdiction post-Gentry:

The jurisdiction of a court over the subject matter of a proceeding is fundamental. *Anderson v. Anderson, 299 S.C. at 115, 382 S.E.2d at 900.* "Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court." *Id.* It is well-settled that issues related to subject matter jurisdiction may be raised at any time, including for the first time on appeal. *Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998); State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972).* Furthermore, "[t]he acts of a court with respect to a matter as to which it has no jurisdiction are void." *Funderburk, 259 S.C. at 261, 191 S.E.2d at 522.*

In 2005, our jurisprudence concerning the role indictments play in conferring subject matter jurisdiction in our state was drastically changed in many respects when our highest state court decided the seminal case of *State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).*

First, *Gentry* carried forward the principle that "[s]ubject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong." *Gentry, 363 S.C. at 100, 610 S.E.2d at 498; see also Pierce v. State, 338 S.C. 139, 150, 526 S.E.2d 222, 227 (2000).* Further, *Gentry* held that "subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts, and the blending of these concepts serves only to confuse the issue." *Gentry, 363 S.C. at 101.* Therefore, to alleviate the confusion concerning subject matter jurisdiction and sufficiency of the indictment, *Gentry* espoused the following standards by stating the following:

> To end the confusion that was created by [prior precedent], we now conclusively hold that if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards. See S.C. Code Ann. § 17-19-90 (2003) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."). However, a defendant may for the first time on appeal raise the issue of the trial court's jurisdiction to try the class of case of which the defendant was convicted.

Gentry, 363 S.C. at 101-102. Additionally, under *Gentry*, our state "returned to our earlier view that an indictment is a 'notice document', 'albeit one required by our state constitution and statutes," and the Court stated the following standard:

> [A] presentment of an indictment or a waiver of presentment is not needed to confer subject matter jurisdiction on the circuit court. However, an indictment is needed to give notice to the defendant of the charge(s) against him. See S.C. Const. Art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed . . ."); 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 indictment by a grand jury. . . ."). A defendant must object if he is not presented with the indictment or if he has not waived his right to presentment. If the defendant does not object, he is deemed to have waived the right to presentment. *See State v. Pollard, 255 S.C. 339, 179 S.E.2d 21 (1971)* (individual may waive any provision of the Constitution intended for his benefit).

Gentry, 363 S.C. at 93, footnote number 6.

In sum, *"Gentry* is the seminal case in our jurisprudence that deals in concert with subject matter jurisdiction and the sufficiency of an indictment." *Id. at 93*. The state statutory and constitutional standards that "[n]o person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed . . ."). *See, S.C. Const. art. I, § 11 and art. V, § 22; 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 indictment by a grand jury. . . ."). Moreover, post-*Gentry*, an amendment to an indictment that changes the nature of the offense charged or charges a different offense divests the trial court of subject matter jurisdiction. *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."); *State v. Lynch, 344 S.C. 635, 640-41, 545 S.E.2d 511, 514 (2001)* (holding the nature of the offense changed when an indictment for first-degree burglary was amended to change the aggravating circumstance from entering during darkness to causing physical injury because "the proof required for each aggravating circumstance

[was] materially different"); *Hopkins v. State, 317 S.C. 7, 9, 451 S.E.2d 389, 390 (1994)*, overruled in part by *Gentry*, *supra,* (holding the nature of the offense changed because the amendment to the indictment increased the maximum penalty for the crime); *State v. Riddle, 301 S.C. 211, 212, 391 S.E.2d 253, 253 (1990)* (holding the nature of the offense was changed when an indictment was amended from assault with intent to commit third-degree criminal sexual conduct to assault with intent to commit first-degree criminal sexual conduct because the punishment for the amended offense was different from the punishment for the original offense); *State v. Sowell, 85 S.C. 278, 283-84, 67 S.E. 316, 317-19 (1910)* (holding when an amendment to an indictment substituted a different and distinct offense from the one charged, the trial court is divested of subject matter jurisdiction because the grand jury had not indicted the defendant on the substituted offense); *see also State v. Gunn, 313 S.C. 124, 132-36, 437 S.E.2d 75, 80-82 (1993)* (holding the scope of the jurisdiction conferred by an indictment is limited to the charged offense).

After *Gentry*, "[a]mendments to an indictment are permissible if: (1) they do not change the nature of the offense; (2) the charge is a lesser included offense of the crime charged in the indictment; or (3) the defendant waives presentment to the grand jury and pleads guilty. *State v. Myers, 313 S.C. 391, 438 S.E.2d 236 (1993); S.C. Code Ann. § 17-19-100 (2003)* (trial court "may amend the indictment

. . . if such amendment does not change the nature of the offense charged").[4] *State v. Means, 367 S.C. 374, 386-388 (S.C. 2006).*

Considering *Gentry*, *Means* provided a three-prong steps the Court must use to determine whether a prosecutor can amend an indictment previously issued as a "true bill". *Id.* "First [the court] should determine whether the existing indictment is sufficient to place the defendant on notice of a particular offense and identify the nature of that offense. *Id.* "Second, the court should determine whether the amended indictment would be sufficient to place the defendant on notice of a particular offense and, if so, identify the nature of that offense. *Id.* Under the third step, the court must:

> Determine whether the proposed amendment changes the nature of the offense set forth in the original indictment. If it does, the motion to amend must be denied unless the amended indictment states a lesser included offense of the crime charged in the original indictment or the defendant chooses to waive presentment of the amended indictment to the grand jury and plead guilty. To rule otherwise would violate the defendant's statutory and constitutional right to demand that a properly constituted grand jury consider his case and decide whether to issue a sufficient indictment.

Id [cites omitted]. In essence, if an indicted under circumstances that change the name of the offense charged, without waiver of presentment, the Court is divested of subject matter jurisdiction. *State v. Lynch, 344 S.C. at 640-41, 545 S.E.2d at 514* (holding the nature of the offense changed when an indictment for first-degree

[4]Under S.C. Code Ann. § 17-19-100 an indictment may be amended, and the trial may proceed as if the amended indictment had been originally returned by the grand jury, if the amendment does not change the nature of the offense charged.

burglary was amended to change the aggravating circumstance from entering during darkness to causing physical injury because "the proof required for each aggravating circumstance [was] materially different").

Even after Gentry, in a case involving a trafficking in cocaine, amending the amount of the drugs in the indictment changes the nature of the offense, and such amendment is not allowed unless there is a waiver of presentment and such change involves subject matter jurisdiction, not sufficiency of the indictment. *Clair v. State*, 324 S.C. 144 (1996) (affirming grant of post-conviction relief where defendant was indicted for trafficking in cocaine weighing more than 100 grams and less than 200 grams, and defense counsel consented to an amendment of the indictment to an amount more than 200 grams, which changed the nature of the offense charged by increasing the penalty).

A trial court has subject matter jurisdiction to accept a guilty plea without an indictment if the defendant waived presentment of the indictment by signing a sentence sheet. *State v. Smalls, 364 S.C. 343, 346-48, 613 S.E.2d 754, 756-57 (2005)* (applying Gentry and Evans to hold that the circuit court had subject matter jurisdiction to accept a guilty plea where the defendant had not been indicted for the charge to which he pled guilty, but signed a sentencing sheet which constituted a written waiver of the right to have the charge presented to a grand jury and also signified the defendant had been notified of the charge to which he pled guilty).

Admittedly, *Gentry* created a lot of confusion in the jurisprudence for challenging indictments in our trial courts. Amid all its confusion, *Gentry* made two things unequivocally clear: (1) if an indictment is challenged as insufficient or deficient, the defendant must raise that issue before the jury is sworn and not afterwards and (2) that a defendant may still raise the issue of the trial court's subject matter jurisdiction at any time. *Gentry, 363 S.C. at 101-102.*

Harrison, as the movant in the matter before the trial court, was not challenging the insufficiency or deficiency of his indictment. Instead, he asserted that the sentencing Court did not have subject matter jurisdiction to even accept his plea on September 02, 2014, because the amount of the drugs was prohibitively changed without amending the indictment or without the acceptance of a waiver of presentment.

Before delving into the crux of the legal arguments, Harrison must first review the undisputed procedural facts that led to his Alford plea on September 02, 2014. A trial court acquires subject matter jurisdiction to hear a criminal case by way of a legally sufficient indictment or a valid waiver thereof. *State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 424 (1999).* Harrison came before the Court on the Amended Indictment that was originally true-billed at the May 2013 term of the York County Grand Jury for Trafficking in Cocaine over 400 grams (2013-GS-46-2041). The Amended Indictment was true billed on May 29, 2014, was filed on April 30, 2015, alleging violation of *S.C. Code of Law, § 44-53-370(e)(2)(a). RA,*

pp. 43-44. This Amended Indictment was sufficient, and it charged a specific sentencing parameter by designating an amount of over 400 grams of cocaine.

On September 02, 2014, Harrison agreed to plead no contest to trafficking in cocaine, 28 to 100 grams. Of importance, no new indictment was prepared by the assistant solicitor. Instead, the assistant solicitor verbally stated in the record Harrison was pleading to trafficking in cocaine, 28 to 100 grams. *See, RA, p. 17, Lines 2-25.* From the record, it appears that the sentencing court did not use an indictment. The Court completed a Sentencing Sentence, and the trial judge checked the space "lesser included offense", which intended to communicate that Harrison was pleading to a lesser-included offense. Harrison did not sign the Sentencing Sheet. There is nothing even to remotely suggest that Harrison waived presentment of the "verbal indictment" to the Grand Jury. There is no colloquy in the Sentencing Transcript to suggest that Harrison waived presentment of the new charge to the Grand Jury. Harrison did not plead to the Amended Indictment. Instead, he was sentenced to 12.5 years for pleading no contest to the assistant solicitor's "verbal indictment".

2. The Court did not have subject matter jurisdiction to accept Harrison's plea.

The Court did not have subject matter jurisdiction to accept Harrison's plea. Undisputedly, the trial court initially had subject matter jurisdiction in the case on the morning that Harrison walked into the Court—because the Amend Indictment

was sufficient. However, the case law, which survived *Gentry*, is clear that when the assistant solicitor amended the drug amount in the Amended Indictment and the Court interpreted Harrison's plea as a plea to a lesser-included offense, subject matter jurisdiction was divested.

Under *Clair v. State, 324 S.C. at 144, 478 S.E.2d at 54*, our state supreme court ruled that a drug indictment which charges a specific sentencing parameter by designating an amount within a particular sentencing level cannot be amended before trial because it changes the nature of the offense. An indictment may be amended provided such amendment does not change the nature of the offense charged. *State v. Lynch, 344 S.C. at 635, 545 S.E.2d at 511; see also Granger v. State, 333 S.C. 2, 507 S.E.2d 322 (1998).*[5] For example, an amendment which changes an offense to one with increased punishment deprives the Circuit Court of subject matter jurisdiction. *Lynch, 344 S.C. at 639, 545 S.E.2d at 513; Hopkins v. State, 317 S.C. at 7, 451 S.E.2d at 389; State v. Riddle, 301 S.C. at 211, 391 S.E.2d at 253.* Moreover, an amendment may deprive the Circuit Court of jurisdiction even if it does not change the penalty. *See, Lynch, 344 S.C. at 639, 545 S.E.2d at 514; Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999).*

Harrison's reliance upon *Clair* is not misplaced post-*Gentry*. In support of this position, Harrison shows the Court that *Clair* was decided by our state supreme

---

[5]Counsel realizes that *Gentry* overruled many aspects of the cited cases that stood for the proposition that the insufficiency of the indictment could be raised at any time as a subject jurisdiction matter. Harrison is not relying upon these cases for such proposition. However, the legal principles extrapolated from the cases for the stated purposes are still good law.

court before the jurisprudential metamorphosis of *Gentry,* but it has been cited with approval from our state supreme court even after Gentry was decided in 2006. *See, State v. Means 367 S.C. at 387 , 367* [citing Clair and other pre-Gentry cases for the following propositions: *Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999)* (granting post-conviction relief where prosecutor verbally amended indictment for second-degree burglary to state that the burglary occurred at nighttime; amendment changed the nature of the offense charged by changing the classification from nonviolent to violent), *overruled on other grounds, Gentry, 363 S.C. 93, 610 S.E.2d 494; Clair v. State, 324 S.C. at 144* (affirming grant of post-conviction relief where defendant was indicted for trafficking in cocaine weighing more than 100 grams and less than 200 grams, and defense counsel consented to an amendment of the indictment to an amount more than 200 grams, which changed the nature of the offense charged by increasing the penalty)[emphasis added; *Hopkins v. State, 317 S.C. at 10, 451 S.E.2d at 389* (granting post-conviction relief and new trial where original indictment for felony DUI causing great bodily injury was amended to indictment for felony DUI causing death; amendment, which increased potential penalty from ten to twenty-five years, changed the nature of the offense charged), *overruled on other grounds, Gentry, 363 S.C. 93, 610 S.E.2d 494.*[6]

[6]Counsel cited all the pre-*Gentry* case that were relied upon in State v Means, *infra*, to show that even though that many cases were overruled in part by Gentry, the remainder of those cases upon which Harrison relies is still good law.

In sum, by changing the amount of the drugs charged in violation of the *Clair* line of cases, the trial court was divested of subject matter jurisdiction in the case before the court, which, consequently, makes Harrison's conviction and sentence void as a matter of law. *State v. Funderburk, 259 S.C. at 261* ["We think it elementary, with no need for citation of authority, that the acts of a court with respect to a matter as to which it has no jurisdiction are void]."

B. HARRISON DID NOT PLEA TO A LESSER INCLUDED OFFENSE IN THE INDICTMENT NOR DID HE WAIVE PRESENTMENT OF THE INDICTMENT.

Post-Gentry, an indictment is no longer needed in our state to give the Court subject matter jurisdiction in a criminal matter. *Gentry, infra.* "However, an indictment is needed to give *notice* to the defendant of the charges against him." *Gentry*, 363 S.C. at 102 n. 6, 610 S.E.2d at 499 n. 6. (Emphasis added). An indictment is a "notice document." *See S.C. Const. art. I, § 11* ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed. . . ."); *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 indictment by a grand jury "). Despite the impact of *Gentry*, an indictment is still important because due process requires that a criminal defendant be properly served with a valid indictment. The indictment is a notice

document that is required by our state constitution and statutes. *Evans v. State, 363 S.C. at 495, 611 S.E.2d at 510.*

Post-Gentry, the original indictment can be sufficient if the charge is a lesser included offense of the crime charge in the indictment or the defendant waive presentment o the grand jury and pleads guilty. *State v. Means, 367 S.C. at 386.* There is a high probability that the State will argue that they were not required to obtain a new indictment because either the charge was a lesser included offense or because Harrison waived presentment of the indictment. Neither of these two arguments will give the State refuge for the following reasons:

1. *The charge in which Harrison pled is not a lesser included offense of the crime charged in the Amended Indictment.*

The general principle is that "an indictment will sustain a conviction for a lesser offense if the lesser offense is included within the greater charged offense. *State v. Gosnell, 341 S.C. 627, 633 (S.C. Ct. App. 2000)[citing, State v. Fennell, 263 S.C. 216, 209 S.E.2d 433 (1974)].* The test for determining when a crime is a lesser included offense of the crime charged is whether the greater offense includes all the elements of the lesser offense. *State v. Suttles, 279 S.C. 87, 302 S.E.2d 338 (1983).* If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater. *Id.*

To determine whether the charge at issue is a lesser included offense in the Amended Indictment, the analysis of two distinct line of cases will be required by this Court. In the context of a drug trafficking case with a graduated sentencing category, a charge that reduces the amount of the drugs from the original indictment is always a lesser included offense if the amount of the drugs in the indictment charges trafficking without specifying in a weight range or in a range more than a certain weight. For example, the indictment may state that trafficking in cocaine was "in excess of 10 grams to 100 grams". *Granger v. State, 333 S.C. at 2, 507 S.E.2d at 322; see also State v. Towery, 300 S.C. 86, 386 S.E.2d 462 (1989).* Then say for example, the indictment is amended to allege 15 grams. Under this scenario, the amended indictment for `15 grams would be a lesser included offense of the large charge. *See, Granger, Id.* and *Gosnell, Id.* This first line of cases is referred to in this brief as the "Granger" or "Gosnell" line of cases.

The second line of cases are represented by *Clair v. State, 324 S.C. at 144.* We refer to this line of cases as the "Clair Line" of case. A trafficking indictment under this scenario will allege that a defendant committed trafficking in cocaine in a fixed, certain amount. For example, an indictment under this scenario would allege that the defendant trafficked in cocaine in 400 grams or more. The quantity of drugs represented under the Clair line of cases charges a specific parameter by designating a quantity of drugs within a sentencing level. Under this scenario, the indictment cannot be amended before trial pursuant to S.*C. Code Ann. § 17-19-100*

(1985) to charge an amount within and changed sentencing level because to do so changes the nature of the offense by increasing or decreasing the penalty involved. *Clair v. State, Id.*

Harrison's case falls under the *Clair* line of cases. The Amended Indictment now before this court alleged a fix sum of 400 grams or more. Under this scenario, the solicitor had no authority to verbally amend the indictment unless he obtained a new indictment or a waiver from Harrison—and he did neither. Therefore, the reduced quantity of drugs is not a lesser included offense, and by amending the drug amount, the assistant solicitor usurped the subject matter jurisdiction from the court by proceeding without a new indictment or waiver.

By way of testing this analysis, Harrison directs the Court's attention to the *Gosnell* case. The *Gosnell* case, a case decided by this Court, specifically cited *Clair vs. State*, a decision decided by our state supreme court, and the Gosnell panel found a way to distinguish its facts from the facts in *Clair,* and the panel crafted an opinion that co-existed with the *Clair v. State*. Unlike Gosnell, *Clair*, has been cited in numerous cases by our state supreme court year after year, even after *Gentry*. *See, State v. Johnson, 333 S.C. 459 (S.C. 1990); Weinhauner, 513 at 840 (1999); State v. John, 489 S.E.2d 228 (S.C. 1997); Kelly v. State, 266 S.E.2d 417 (S.C. 1980); and post-Gentry, State vs. Means, 626 S.E.2d at 348.* To the contrary, Gosnell has been relied upon once by a divided panel who issued a Memorandum,

unbinding opinion. *See, Gordon v. State, Memorandum Opinion No. 2004-MO-044 (Submitted February 19, 2004 - Filed August 16, 2004).*

2. *Harrison did not waive presentment of the amended charges to the Grand Jury.*

The Sentencing Sheet and Sentencing Transcript will show unequivocally that Harrison did not waive presentment of the reduced charges. The Sentencing Sheet in this case did not check the box that presentment was waived. *See, Sentencing Sheet.* Harrison did not sign the sentencing sheet. Moreover, the colloquy in the Sentencing Transcript does not even come close to being a dialogue between Harrison and the Court that represents a waiver of presentment. *See the full sentencing Transcript.*

In sum, the Court did not have subject matter jurisdiction because the reduced charge was not a lesser included offense, and Harrison did not waive presentment of the reduced charge. Therefore, Harrison's conviction and sentence are void as a matter of law.

CONCLUSION:

Based upon the reasoning and citation of authority provided in this Brief, and any arguments of counsel invited by this Court, Harrison requests this Court to issue an order vacating his sentence and conviction, and for an order granting him any other relief that is just and proper.

At Orangeburg, SC

Dated: January 20, 2022

/s/ Glenn Walters

GLENN WALTERS, Esquire
1910 Russell Street (29115)
Post Office Box 1346
Orangeburg, SC 29116
Phone: 803 531-8844
Fax: 803 531-3628
glennwalterspa@gmail.com

Attorney for Appellant

RECEIVED
Jan 20 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

William A. McKinnon, Circuit Court Judge

Case No. 2013-GS-46-02041
Appellate Case No. 2021-000226

State of South Carolina, Respondent,

v.

Duane A. Harrison Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCAC.

January 20, 2022

/s/ Glenn Walters, Sr., Esquire
GLENN WALTERS, SR.