STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Lancaster County
Hon. William Jeffrey Young, Circuit Court Judge
Appellate Case Tracking No. 2013-000087

The State, Respondent,

v.

Michael Donahue, Petitioner.

Opinion No. 5052 (S.C. Ct. App. filed November 21, 2012)

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF QUESTIONS PRESENTED

The Court of Appeals correctly found Appellant's prior conviction in Georgia subjected him to punishment for third degree burglary second offense.

STATEMENT OF THE CASE

The State agrees with Petitioner's procedural Statement of the Case.

ARGUMENT

I. The Court of Appeals correctly found Appellant's prior conviction in Georgia subjected him to punishment for third degree burglary second offense.

The Court of Appeals correctly found the statutory language of section 16-11-313(B) (Supp. 2010) contains no limiting language and, therefore, a prior out-of-state conviction could be used for sentence enhancement purposes. The plea court properly sentencing Petitioner after his guilty plea to third degree burglary based on a second conviction when the first conviction occurred in Georgia. As a result, this Court should deny the Petition for Writ of Certiorari.

The Court of Appeals correctly held the language of the statute allows for the enhancement of the sentence based on his conviction in Georgia. The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Pittman, 373 S.C. at 561, 647 S.E.2d at 161.

The relevant portion of the third degree burglary statute provides: "Burglary in the third degree is a felony punishable by imprisonment for not more than five years for conviction on a first offense and for not more than ten years for conviction of a second

offense according to the discretion of the Court." S.C. Code Ann. §16-11-313(B) (Supp. 2010).

The language does not restrict the offense to one which occurred in South Carolina or under any particular statute. The statutory language merely reads second offense. In not providing a limitation, the statute unambiguously allows an enhancement of the offense based on a prior offense occurring in South Carolina or outside this jurisdiction.

As the Court of Appeals concluded, this case is similar to that of State v. Zulfer, 345 S.C. 258, 547 S.E.2d 885 (Ct. App. 2001). In Zulfer, the appellant maintained an out of state conviction could not be used to meet the element of first degree burglary which indicated One may be convicted "if the person enters a dwelling, without consent and with intent to commit a crime in the dwelling and . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." S.C. Code Ann. § 16-11-311(A)(2) (Supp. 2010). The Court of Appeals found the language "a prior record of two or more convictions for burglary or housebreaking or a combination of both" contained no limiting provision restricting its application to only South Carolina offenses. As a result, the Court found:

> Nowhere does the language of the statute limit a prior record of convictions for burglary or housebreaking to only those that occurred within South Carolina. In not so limiting a prior record of convictions, the plain language of our burglary statute permits an enhancement of the offense based on a prior record of out-of-state convictions for burglary or housebreaking or a combination of both. To restrict the predicate offenses for a first-degree burglary charge to acts occurring within South Carolina would give the statute a meaning that the legislature clearly did not intend. Indeed, had the legislature intended that a prior record of out-of-state convictions for burglary or

> housebreaking could not be used for purposes of enhancement, it could easily have limited the statute to only South Carolina offenses.

Zulfer, 345 S.C. at262-263, 547 S.E.2d at 887.

As the Court of Appeals correctly noted, if the Zulfer analysis is not followed and instead Petitioner's interpretation is accepted, it would lead to an absolutely absurd result. Petitioner contends only a prior third degree burglary conviction in South Carolina could apply to enhance the sentence. The purpose of the sentence enhancement is to punish repeat offenders. However, someone who previously was convicted of first degree burglary, even if in South Carolina, could not be punished for his recidivism because his prior crime was more serious than the third degree burglary conviction Petitioner asserts is required to trigger the enhanced sentence. This is an absurd result and clearly not one intended by the Legislature in drafting the language used. See State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention."); Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (finding courts will reject an interpretation of a statute leading to an absurd result clearly unintended by the legislature).

Additionally, Appellant never objected to or contended the Georgia conviction would not apply to enhance his sentence if out of state convictions were allowed. He never argued the elements of the conviction did not qualify as a prior offense or object to its use. As a result, he cannot now raise the issue on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing that in order for an issue to be

preserved for appellate review, it must have been raised to and ruled upon by the trial court); see also, State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (finding appellant cannot argue an issue on appeal when he argued a different issue at trial). Accordingly, this Court should find the Court of Appeals correctly affirmed Petitioner's conviction and sentence, and the Court should deny the Petition for Writ of Certiorari.

Further, an as an additional ground upon which Certiorari can be denied, the issue is not properly before the Court because Petitioner waived the issue at his guilty plea. Appellant waived his right to challenge whether the Georgia offense constituted a second offense when he specifically acknowledged it did as part of his guilty plea. "The general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of non-jurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea." Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975).

In the instant case, prior to his plea Appellant asserted his Georgia conviction for burglary should not be considered in determining whether his current conviction will be a conviction for a second offense resulting in a possible sentence of ten years in prison under section 16-11-313. (T.3-5; R.3,5). During his guilty plea, however, the following colloquy occurred:

Court:	Now it's my understanding that you're wanting to plead guilty to burglary in the third degree second offense; is that correct?
Appellant:	Yes, sir Your Honor.
Court:	In fact, have you been convicted of burglary in the State of Georgia?
Appellant:	Yes, Your Honor.

(T.8; R.8). The colloquy continued:

Court:	And are you, in fact, guilty of the charge of burglary in the third degree second offense?
Appellant:	Yes, Your Honor, I am.
Court:	All right. Now, you understand with that charge, and I have ruled earlier concerning the enhancement, that you could receive up to ten years up in jail?
Appellant:	Yes, Your Honor.

(T.10-11; R.10-11).

The Court of Appeals relied on the case of Easter v. State, 355 S.C. 79, 81-82, 584 S.E.2d 117, 119 (2003) ("Sentencing, although often combined with the admission of guilt in a hearing, is a separate issue from guilt and a distinct phase of the criminal process. Therefore, when Easter entered his guilty plea but objected to his sentence he did not enter an invalid, conditional guilty plea." (citation omitted)). However, Appellant, by his admissions during his guilty plea, acknowledged he was guilty of a second offense and voluntarily pled guilty to third degree burglary with the understanding he would be sentenced based on a second offense. As a result, this case is clearly distinguishable from Easter where he maintained throughout his objection to the sentencing. Accordingly, he waived his right to contest his sentence based on a second offense on appeal and this Court should deny the Petition for Writ of Certiorari on this basis.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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May 30, 2013

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PROOF OF SERVICE

I, JEAN R. INDRIAGO, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
1330 Lady Street, Suite 401
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I further certify that all parties required by Rule to be served have been served. This 30th day of May, 2013.

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