ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2013-000196

THE STATE, ...RESPONDENT

v.

JAMES E. WISE,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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Attorney General

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Did the lower court properly deny Appellant's Motion to Arrest Judgment when the untimely nature of the motion rendered it moot and when the court lacked jurisdiction to consider the post-trial motion submitted fourteen (14) years after conviction and sentence?

STATEMENT OF THE CASE

Appellant was indicted in **1997** in Newberry County for first degree burglary, assault and battery of a high and aggravated nature (ABHAN) and escape. In August 1998, Appellant was re-indicted for first degree burglary in a one-count indictment after a guilty plea in Magistrate's Court to simple assault and battery. (R. p. 335 and 347). Appellant proceeded to trial on October 8, 1998, before the Honorable Frank Eppes, and a jury. Appellant was represented by Eugene Griffith. Appellant was found guilty of first degree burglary and escape. The State sought life without parole under the state recidivist statute. (R. p.168-70). Appellant was sentenced to life imprisonment without parole for first degree burglary and six months, concurrent, for escape.

Appellant appealed. On appeal, Appellant presented the issue whether the trial court erred in refusing to quash the indictment for first degree burglary because the trial on that charge constituted a violation of his right against Double Jeopardy. The record on appeal established that Appellant moved to quash the burglary indictment on the ground his guilty plea to assault and battery as a lesser offense of the ABHAN charge was encompassed within the burglary charge and the subsequent trial for burglary violated his rights against Double Jeopardy. The appeal was dismissed by this Court after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Wise, Up. Op. No. 2000-UP-295 (S.C. Ct. App. Filed April 19, 2000). The remittitur was issued on May 5, 2000.

Appellant filed applications for post-conviction relief on July 12, 2000 and September 26, 2000. The applications were merged with the July 12, 2000 action surviving. In the action, Appellant alleged, *inter alia*, that the court of general sessions lacked subject matter jurisdiction for the first degree burglary charge because he entered

an earlier guilty plea to assault and battery arising from the same illegal transactions thus violating Appellant's rights against Double Jeopardy. (R. p.179-185). After an evidentiary hearing, the Honorable Wyatt T. Saunders issued an order in June 2002 denying the claim and dismissing the application. In pertinent part, Judge Saunders determined that Appellant raised the Double Jeopardy issue at trial and in his direct appeal following trial and that the claim was not cognizable in post-conviction relief.(R.p.350) Appellant appealed and a Johnson Petition for Writ of Certiorari was submitted on Appellant's behalf presenting an evidentiary question.(R.p.429-435). Appellant submitted a pro se petition in which he raised the issue whether the court of general sessions lacked subject matter jurisdiction to convict him of first degree burglary because it constituted a Double Jeopardy violation.(R.p.439-465). He also complained there was a variance between the indictment and evidence. The South Carolina Supreme Court denied the petition by order dated May 15, 2003 and issued the remittitur on June 3, 2003.(R.p.468-469).

Appellant also submitted another application for post-conviction relief which was filed on April 27, 2005 in which he alleged, *inter alia*, that the trial court lacked subject matter jurisdiction to proceed with the subsequent burglary indictment because Appellant entered a guilty plea in magistrate's court to a lesser included offense of assault and battery, contending the plea was part of the burglary charge.(R.p.406-412). The application was summarily dismissed by conditional order of dismissal dated August 29, 2005 and final order of dismissal dated April 3, 2006.(R.p.413-422). Appellant appealed. The South Carolina Supreme Court dismissed the appeal on the ground Appellant failed

to respond to the conditional order of dismissal.(R.p.424-425). The remittitur was issued on August 15, 2006. (R. p.423).

Appellant submitted a Motion to Arrest Judgment filed November 1, 2012 in the Newbery County Court of General Sessions. (R. pp.474-475) By order dated December 31, 2012, the Honorable Frank R. Addy, Jr., summarily denied the motion after reviewing the motion, attachments to the motion and the records of the clerk of court. The order was filed on January 7, 2013. (R. p. 472).

This appeal by Appellant follows.

ARGUMENT

The lower court properly denied Appellant's motion to arrest judgment

More than fourteen years after Appellant's conviction and sentence, Appellant presented a Motion to Arrest Judgment for consideration by the Newberry Court of General Sessions in which he asked the court to "arrest his sentence" on the ground the trial court lacked subject matter jurisdiction to convict him of burglary because he entered a guilty plea to malicious injury to property in magistrate's court as lesser included offense. It is Appellant's position that the guilty plea to malicious injury to property precluded the prosecution and conviction for other related charges on jurisdictional grounds. The State submits that court of general sessions correctly denied the motion. The motion was rendered moot when not made before sentencing and the court lacked jurisdiction to consider the request because it was not timely made.

Appellant's case was called for trial on October 8, 1998 on the charges of first degree burglary and escape. (R. p.7). Prior to the swearing of the jury, Appellant moved to quash the indictment for first degree burglary on the ground he was originally indicted in a two-count indictment, 1997-GS-36-479, charging Appellant with first degree burglary and assault and battery of a high and aggravated nature (ABHAN). (R. p. 20- 21; see also R. p. 90; R. pp. 239; 366). Appellant, thereafter entered a guilty plea in magistrate's court to assault and battery as the lesser offense of ABHAN and received a sentence of time served. (R. p. 21). A new single-count indictment was returned for first degree burglary only. Appellant argued at trial that because assault and battery satisfied one of the elements of the burglary charge and because he resolved the assault and battery by prior guilty plea, prosecution for the burglary charge was prohibited by the

Double Jeopardy provision. (R. pp. 22-23). The State argued that the test for Double Jeopardy as pronounced in Blockburger did not preclude Appellant's prosecution for first degree burglary on the superseding indictment and the guilty plea disposed of the of ABHAN charge only. (R. p. 22; R. p. 242; 368). The motion was denied. Later during trial Appellant renewed his "motion regarding the sufficiency of the indictment and the subject matter jurisdiction of the trial court regarding the burglary offense. (R. p. 90). The motion was denied. (R. p. 92). The court's ruling on the Double Jeopardy issue was affirmed on affirmed on appeal from conviction and sentence.(R.p.427).

Appellant again presented the same issue in both post-conviction relief (PCR) applications initiated in 2000 and 2005 and the matter was specifically argued to the PCR judge at an evidentiary hearing held on February 4, 2002. (R. p. 257 – 269; 307-308; 329-330). In addition to the facts recited above, the PCR judge was advised by Appellant that, in addition to the assault and battery charge, he also entered a guilty plea in magistrate's court to malicious injury to property arising from damage done to a storm door when Appellant entered the home during the burglary. (R. p. 261). Appellant was not successful in circuit court or on PCR appeal thereafter (R. p. 269 – 274; p. 352; R.p.469).

In the Motion to Arrest Judgment and on appeal Appellant now contends that his plea to malicious injury to property was entered as a lesser offense of first degree burglary and that his trial attorney failed to make this point to the trial judge in support of the motion to quash the indictment at trial. He argues the subsequent burglary indictment and subsequent trial constituted a Double Jeopardy violation and that the judgment must be arrested on this ground.

Respondent submits that the lower court properly dismissed Appellant's Motion to Arrest Judgment. Under the federal rules, an arrest of judgment is the term used to describe the trial court's refusal to enter judgment on a verdict because of an error in the indictment, plea, verdict and sentence that renders the judgment invalid. 3 Fed. Prac. And Proc. Crim. § 601 (April 2013); See Rule 34, FRP.

There are two motions available to a defendant following a guilty verdict in a criminal case. He may move for arrest of judgment to prevent entry of judgment on the grounds of the insufficiency of the indictment or some other fatal defect appearing on the face of the record, or he may move for a new trial upon the facts. State v. Taylor, 348 S.C. 152, 558 S.E.2d 917 (Ct. App. 2002)."A motion for arrest of judgment is a post-verdict motion made to prevent the entry of a judgment where the charging document is insufficient or the court lacked jurisdiction to try the matter." State v. Follin, 352 S.C. 235, 573 S.E.2d 812 (2002), citing State v. Taylor, 348 S.C. 152, 558 S.E.2d 917 (Ct. App 2001). "It has been held that a motion in arrest of judgment is distinguishable from a motion to quash an indictment, and that the reason sufficient to sustain the quashing of an indictment may be insufficient to sustain a motion in arrest of judgment. However, it has also been held that a motion in arrest of judgment is a post-trial motion to quash an indictment" *id.* It is also been determined that "when ruling on a motion in arrest of judgment, the trial court is limited to rectifying trial errors, and cannot make a redetermination of the credibility and weight of the evidence." State v. Follin, *Supra.* The motion follows a guilty verdict in a criminal case and is made to prevent entry of judgment. State v. Miller, 287 S.C. 280, 337 S.E.2nd 883 (1985). Judgment is entered in a criminal case with sentencing of the defendant. State v. Miller, 289 S.C. 426, 346 S.E.2d

705(1986) "Arrest of judgment occurs before a sentence is imposed." 23A C.J.S. Criminal Law § 1984 (2013). "Arrest of judgment is the act of staying or withholding judgment for errors appearing on the face of the record; and a motion in arrest of judgment is one seeking such action. A motion for arrest of judgment is a motion to be heard by the trial judge. State v. Taylor 348 S.C. 152, 159, 558 S.E.2d 917, 920 (Ct. App. 2001)

Respondent first submits that the motion to arrest was not timely made which rendered the matter moot. The motion is one that must be made to prevent entry of the judgment. It is made after the verdict but before sentencing. The judgment was entered when Appellant was sentenced in 1998. The request to stay entry of judgment fourteen (14) years after sentencing comes too late. The judgment has been entered and the matter is moot.

Second, Respondent submits the court of general sessions lacked jurisdiction to consider the merits of the motion. Under Rule 29(a), SCRCrimP, Appellant was required to make all post-trial motions within ten days after imposition of his sentence. Appellant filed his motion more than fourteen (14) years later. The court of general sessions no longer has jurisdiction to consider this motion made more that fourteen years after the time for such motion to be properly made.

Moreover, Appellant also presented a related issue in his prior post-conviction relief application and at the hearing held to resolve the claims raised. He could have raised this specific claim in that PCR proceeding twelve (12) years ago but did not do so. He now claims his trial attorney failed to properly make the argument he presents in the

motion to arrest. To the extent Appellant is seeking relief based upon trial counsel error that is a matter for PCR and not general sessions. Unfortunately, Appellant failed to pursue the issue of counsel's action or inaction in a timely PCR and will be precluded from doing so at this late date. Nevertheless, PCR pre-empts the general sessions court on the claim of ineffective counsel Appellant sought to have considered in the motion to arrest that he filed in general sessions court. See S.C. Code Ann. §§ 17-27-20(b); 17-27-90.

Moreover, Respondent notes Appellant's admission through counsel at the prior PCR hearing that the malicious injury plea resolved damage to a storm door. It was never alleged and clearly did not serve as disposition of the first degree burglary charge.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that order of the lower court be affirmed.

Respectfully submitted,

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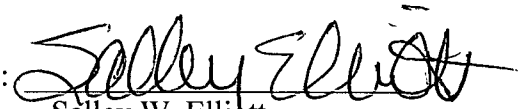
BY: 
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August 6, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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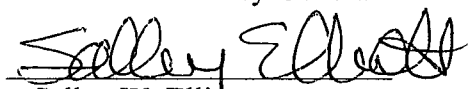
BY: 
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PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated August 6, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

James E. Wise, #250411
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I further certified that all parties required by Rule to be served have been served. This 6th day of August, 2013.

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