

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Newberry County
Court of General Sessions

Honorable Paul Burch, Circuit Court Judge

Appellate Case No. 2014-002320

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S.C. Supreme Court

THE STATE,

Respondent,

vs.

JAMES E. WISE,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner asks whether the Court of Appeals erred in affirming the circuit court's denial of his untimely motion to arrest judgment.

STATEMENT OF THE CASE

Petitioner James E. Wise 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, Petitioner 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. Petitioner was represented by Eugene Griffith. Petitioner was found guilty of first degree burglary and escape. The State sought life without parole under the state recidivist statute. (R. p.168-70). Petitioner was sentenced to life imprisonment without parole for first degree burglary and six months, concurrent, for escape.

Petitioner appealed. On appeal, Petitioner 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 Petitioner 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.

Petitioner 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, Petitioner 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 Petitioner'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 Petitioner 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) Petitioner appealed and a Johnson Petition for Writ of Certiorari was submitted on Petitioner's behalf presenting an evidentiary question. (R.p.429-435). Petitioner 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. This Court denied the petition by order dated May 15, 2003 and issued the remittitur on June 3, 2003. (R.p.468-469).

Petitioner 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 Petitioner 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). Petitioner appealed. This Court dismissed the appeal on the ground Petitioner failed to respond to the conditional order of dismissal. (R.p.424-425). The remittitur was issued on August 15, 2006. (R. p.423).

Petitioner submitted a Motion to Arrest Judgment filed November 1, 2012 in the Newberry County Court of General Sessions. (R. pp. 474-475). In an 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).

Petitioner appealed and after full briefing, the South Carolina Court of Appeals issued an opinion affirming the circuit court's denial of Petitioner's motion to arrest judgment. State v. James E. Wise, Up. Op, No. 2014-UP-224 (Ct. App. filed June 18, 2014). Petitioner submitted a petition for rehearing and request for rehearing en banc to the Court of Appeals dated June 24, 2014. The State submitted a return to the petition for rehearing on July 14, 2014. The petition for rehearing was denied by order of the Court of Appeals filed September 30, 2014.

Petitioner filed a Petition for Writ of Certiorari dated October 27, 2014, asking this Court to review the decision of the Court of Appeals. This Return by the State follows.

ARGUMENT

The Court of Appeals soundly affirmed the circuit court's denial of Petitioner's untimely motion to arrest judgment.

Petitioner asks this Court to review the order of the Court of Appeals affirming the circuit court's dismissal of his motion to arrest judgment asserting that the motion was appropriate because it was a challenge to the jurisdiction of the court of general sessions. Petitioner also argues the State should be barred from presenting any arguments on appeal that were not presented to the lower court. Respondent submits that the Court of Appeals properly affirmed the circuit court order denying Petitioner's motion and the petition for writ of certiorari should be denied.

First, the State submits the Court of Appeals correctly concluded that the motion to arrest judgment made more than fourteen (14) years after the conviction and sentence was properly denied by the circuit court as not timely made which rendered the matter moot. The record on appeal reflects that Petitioner'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, Petitioner 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 Petitioner 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). Petitioner 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. Petitioner 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 v. United States, 284 U.S. 299 (1932), did not preclude Petitioner'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 Petitioner 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 appeal from conviction and sentence. (R.p.427).

Petitioner 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 post-conviction relief judge was advised by Petitioner 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 Petitioner entered the home during the burglary. (R. p. 261). Petitioner was not successful in circuit court or on post-conviction relief appeal thereafter (R. p. 269 – 274; p. 352; R.p.469).

In the Motion to Arrest Judgment and on appeal to the Court of Appeals, Petitioner contended 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 argued 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 Petitioner's Motion to Arrest Judgment and that the Court of Appeals correctly affirmed the ruling. 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 has further 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, 352 S.C. 235, 573 S.E.2d 812. 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 when the defendant is sentenced. 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)

The State submits that the Court of Appeals properly concluded 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 Petitioner challenges was entered when Petitioner was sentenced in 1998. The request to stay entry of judgment fourteen (14) years after the sentence 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, Petitioner was required to make all post-trial motions in the court of general sessions within ten days after imposition of his sentence. Petitioner filed his motion more than fourteen (14) years after imposition of the sentence. The court of general sessions no longer had jurisdiction to consider the motion made more than fourteen years late.

Moreover, Petitioner 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 post-conviction relief 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 judgment. To the extent Petitioner is seeking relief based upon trial counsel error, the State submits that a claim respecting ineffective assistance is not a matter for the court of general

sessions. Unfortunately, Petitioner failed to pursue the issue of counsel's action or inaction in a timely post-conviction relief action and will be precluded from doing so at this late date.

Nevertheless, post-conviction relief procedure pre-empts the general sessions court on the claim of ineffective counsel that Petitioner sought to have considered in the motion to arrest presented in general sessions court. See S.C. Code Ann. §§ 17-27-20(b); 17-27-90. Petitioner is simply attempting to circumvent the bar to successive post-conviction relief actions.

Moreover, Respondent notes Petitioner's admission through counsel at the prior post-conviction relief 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. Nevertheless and contrary to Petitioner's contention, Petitioner's double jeopardy rights were not violated. The same elements test pronounced by our United States Supreme Court in Blockburger v. U.S., 284 U.S. 299 (1932) is the only test for determining whether a government's prosecution of a defendant for more than one offense based on the same act or transaction constitutes a double jeopardy violation, in both multiple punishments and successive prosecution cases. State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). "An indictment will sustain a conviction for a lesser offense if the lesser offense is included within the greater charged offense. The test for determining when a crime is a lesser included offense of the crime charged is whether the greater offense includes all of the elements of the lesser offense." Id. at 44-45, 448 S.E.2d at 570.

To be guilty of first degree burglary a person must enter a dwelling without consent and with intent to commit a crime therein combined with the existence of at least one aggravating circumstance of which malicious injury to property is not included. See S.C. Code Ann. Section 16 -11-311 (A) (2003); State v. Cross, 323 S.C. 41, 448 S.E.2d 569 (Ct. App. 1994). A person is

guilty of malicious injury to property, in pertinent part, if he or she willfully, unlawfully, and maliciously cuts, mutilates, defaces or otherwise injures any house. S.C. Code Ann. Section 16-11-520 (2003 & Supp. 2013); State v. Lewellyn, 281 S.C. 199, 314 S.E.2d 326 (1984). The guilty plea in magistrate's court to destruction of the victim's storm door did not preclude Petitioner's prosecution for first degree burglary. (See R. p. 39, lines 1 – p. 41, line 4; 56, lines 9 – 24; p. 58, lines 1 – 14; p. 63, lines 9 – p. 64, line 5; p. 149, lines 9 - 25). First degree burglary did not require proof of all of the elements of malicious injury to property and malicious injury to property does not require any of the elements of first degree burglary. Accordingly, there is no double jeopardy violation. Any argument by Petitioner that the trial court lacked jurisdiction on the basis of a double jeopardy violation is misplaced.

As to Petitioner's claim that this Court may not consider any argument made by the State which was not presented to the circuit court, Respondent submits that Petitioner confuses his obligation as the appealing party to preserve all issues he presents to the appellate court for review with the role of the responding party and the ability of this Court to affirm the circuit court ruling or order on any ground appearing in the record. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal). The argument is without merit.

Respondent submits that the Court of Appeals applied the correct legal precedent governing the issues and properly affirmed the circuit court's order. The Petition for Writ of Certiorari must be denied.

CONCLUSION


The South Carolina Court of Appeals applied the correct law, properly resolved the question presented, and that resolution is supported by the record. This Court should decline to exercise its discretionary review.

Respectfully submitted,

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November 26, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Honorable Paul Burch, Circuit Court Judge

Appellate Case No. 2014-002320

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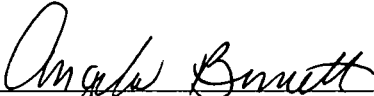
Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Return to Petition for Writ of Certiorari on petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to petitioner at James E. Wise, #250411, Lieber Correctional Inst. P.O. Box 205, Ridgeville, SC 29472.

I further certify that all parties required by Rule to be served have been served.

This 26th day of November, 2014.



ANGELA BENNETT
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November 26, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
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RECEIVED

NOV 26 2014

S.C. Supreme Court

Re: The State v. James E. Wise
Appellate Case No: 2014-002320

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari along with proof of service in the above-referenced case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab
Enclosures

cc: James E. Wise, #250411
Ms. Trisha Allen