

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County

Larry B. Hyman, Jr., Circuit Court Judge  
\_\_\_\_\_

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MAR 19 2012

S.C. Supreme Court

Opinion No. 2011-UP-572 (S.C. Ct. App. filed 12/20/2011)

08-GS-46-1888, 1889, 1890  
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THE STATE,

RESPONDENT,

V.

REICO LAMONT WELCH,

APPELLANT

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS  
\_\_\_\_\_

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 1/26/2012.

## QUESTION PRESENTED

Whether the South Carolina Court of Appeals erred when it found that the trial court judge did not err when he allowed the solicitor to use a North Carolina “consolidation” of breaking and entering charges as the predicate for enhancing petitioner’s offense to burglary first degree and when the state failed to prove that the “consolidation” was appropriate for the enhancement when it only provided the trial court with a document entitled Judgment and Commitment, and when the state failed to prove these events did not constitute “one offense” under S.C. Code Ann. §17-25-50 (1976)?

## STATEMENT OF THE CASE

Reico Lamont Welch was indicted by the York County grand jury for burglary, 1<sup>st</sup> degree, grand larceny, and criminal conspiracy. He was tried before the Honorable Larry B. Hyman, Jr. and a jury between March 9- 11<sup>th</sup>, 2009. He was represented by Steven D. Schusterman, Esquire. He was convicted and sentenced to 20 years for burglary, and 5 years for grand larceny and conspiracy; the sentences were ordered to run concurrently.

Petitioner timely appealed his sentence and conviction, and after oral argument, the South Carolina Court of Appeals affirmed the sentence and conviction by unpublished opinion, State v. Welch, No. 2011-UP-572, filed December 20, 2011.

Petitioner then filed a petition for rehearing, which was denied on January 26, 2012.

This petition for writ of certiorari timely follows.

## ARGUMENT

The South Carolina Court of Appeals erred when it found that the trial court judge did not err when he allowed the solicitor to use a North Carolina “consolidation” of breaking and entering charges as the predicate for enhancing petitioner’s offense to burglary first degree and when the state failed to prove that the “consolidation” was appropriate for the enhancement when it only provided the trial court with a document entitled Judgment and Commitment, and when the state failed to prove these events did not constitute “one offense” under S.C. Code Ann. §17-25-50 (1976).

This Court should grant petitioner’s petition for writ of certiorari because the Court of Appeals erred in its unpublished, per curiam, decision affirming his conviction and sentence. Specifically, the Court of Appeals overlooked the fact that the state *failed to prove* that the use of the out-of-state “consolidation” was appropriate for enhancing petitioner’s charge to Burglary 1<sup>st</sup> degree since the only thing it provided the Court was a document entitled Judgment and Commitment which purported to show that several events were consolidated into one judgment. Additionally, as a prior conviction is an element of Burglary 1<sup>st</sup> degree, the state *failed to prove* that these events did not constitute “one offense” under S.C. Code Ann. §17-25-50 (1976). This statute provides: Considering closely connected offenses as one offense: In determining the number of offenses for the purpose of imposition of sentence, the court shall treat as one offense any number of offenses which have been committed at times **so closely connected in point of time that they may be considered as one offense**, notwithstanding under the law they constitute separate and distinct offenses. In short, the state failed to prove an element of the offense because it failed to offer the trial court anything more than a single document, and it failed to prove that use of the Judgment and Commitment was appropriate under South Carolina law. The Court of Appeals erred when it affirmed Welch’s conviction for Burglary, 1<sup>st</sup> degree.

Petitioner is serving 20 years in prison for participating, along with another person, in a day-time burglary of a judge's house in Rock Hill, South Carolina. Petitioner's co-defendant, who had previously spent 17 years in prison and who had been convicted of burglary in the past, received 18 months for his participation. Amended ROA p. 51, ll. 4-20; 53, ll. 8-25. Petitioner's prior record consisted of a cocaine offense for which he received probation, and he had previously spent 8-10 months incarcerated for three breaking and entering which were consolidated into one judgment in Charlotte, North Carolina. Amended ROA p. 72, ll. 3-6. The state used this Mecklenburg County consolidation for enhancing petitioner's charge to burglary-1<sup>st</sup> degree.

Before trial started, the court held a hearing on whether the state would be allowed to use the consolidated judgment in North Carolina to enhance petitioner's charge to burglary, first degree. The state relied on a true copy of petitioner's conviction issued by Mecklenburg County, Clerk of Superior Court. It appears the conviction sheet was filed January 31, 2006 and reflects petitioner's breaking and entering charges, with offense dates of June 6, 2005, May 26, 2005, and May 10, 2005. The breaking and entering charges appear to be pursuant to North Carolina statute 14 -- 54A. The charges also appear to be class H felonies.

Under South Carolina Code Ann. §16-11-311, a person is guilty of burglary in the first degree 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. (emphasis added). The issue in this case is whether the consolidation of charges in North Carolina constitutes one conviction or three.

North Carolina has a determinate sentencing framework that is embodied in North Carolina Gen. Statutes Article 81B. Structured sentencing of persons convicted of crimes. The North Carolina statute section 15 A-- 1340.15 Multiple convictions-- allows a judge to consolidate

sentences if there are multiple offenses. It appears to be a different type of sentence than those available in South Carolina. The statute states:

(a) Consecutive sentences. -- This article does not prohibit the imposition of consecutive sentences. Unless otherwise specified by the court, all sentences of imprisonment run concurrently with any other sentences of imprisonment.

(b) Consolidation of sentences. -- If an offender is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. The judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense, in its minimum sentence of imprisonment shall be within the ranges specified for that class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment.

According to the certified conviction record for North Carolina, petitioner's offenses were consolidated and the single judgment imposed was an 8 month to 10 month period of incarceration, with credit for 197 days that petitioner had already spent in confinement. In other words, North Carolina has treated petitioner's criminal acts as **one consolidation**. The state's position is that the certified consolidation reflects three separate convictions. Amended ROA p. 3-20.

The state did not call anyone from North Carolina to interpret the conviction sheet. Nor did the state enter the actual indictments into the record or otherwise use them during this hearing. For purposes of this hearing, the State believed that it could simply divine what had occurred in North Carolina by looking at a conviction sheet that offered no details regarding the actual events themselves, nor offered any reasoning as to why the sentencing judge in this matter determined that a consolidation was the appropriate sentence to pass. As the statute makes clear, the judge could have sentenced petitioner without consolidating the judgment.

Additionally, section 15 A-- 1340.14(d) Prior record level for felony sentencing, states:

Multiple prior convictions obtained in one court week. -- For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single Superior Court during one calendar week, only the conviction for

the offense that the highest point total is used. If an offender is convicted of more than one offense in a single session of the District Court, only one of the convictions is used (emphasis added).

Given that the official conviction sheet only reflects a file date of January 31, 2006, it is unclear when petitioner pleaded to these charges. After all, the official sheet contains two pages, and it is unclear whether or these charges were resolved on one day or possibly two. In any event, the North Carolina statute makes clear that only one conviction should be used to determine prior record level, under their structured sentencing scheme. In other words, North Carolina treats as one conviction what the State of South Carolina may regard as three separate convictions.

Also, it appears from the North Carolina statute that class H felonies are not generally used for enhancement purposes. See North Carolina Gen. Statutes § 15 A. -- 1340.16 A. Enhanced sentence if defendant is convicted of a class A, B1, B2, C, D, or E felony and the defendant used, displayed, or threaten to use or display of firearm or deadly weapon during the commission of the felony; §15 A. -- 1340. 16 B. Life imprisonment without parole for a 2nd or subsequent conviction of a class BI felony if the victim was 13 years of age or younger and there are no mitigating factors. But see § 15 A. -- 1340. 16. Enhanced sentence if defendant is convicted of a felony and the defendant was wearing or had in his or her immediate possession a bulletproof vest during the commission of the felony.

The trial court judge erred by allowing the North Carolina consolidation to be used for enhancement purposes.

THE COURT: I understand that. But this is a question that I have, as I see it: can you point me to any indication in the statute that the Legislature intended that any consolidation or combination of charges would exclude those charges were combined as charges for the purposes of 16 -- 11 -- 311? I mean, what we have to do is look at the legislative intent here. . . .

Where in the statute or anything related to the statute do we find a similar intent on the part of the Legislature to exclude charges that may have been combined for the purposes of the plea, and that's just judicial expediency that results in that. We all know that. You bring them altogether and it's to your client's benefit if you can wrap up all up and get it before one sentencing judge. We've all been there. We know that.

MR. SHUSTERMAN: I don't have anything. I'm not going to make a representation to the court. My argument would be -- and I certainly respect the court's position. My argument would be show me where the legislature said that one disposition shall be counted multiple times. I mean, that's the flip side of that argument, with all due respect to the court.

Amended ROA p.10-11.

The trial court judge erred because **it is the State's burden** to prove that the North Carolina consolidation reflects three separate convictions as understood under the South Carolina statutory scheme since they have the burden to prove that element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970).

The issue arose again as the parties discussed a possible closing arguments. Amended ROA p. 28-50. Ultimately, the judge determined that petitioner would not be allowed to argue consolidation to the jury, even though the prior convictions are an element of the offense. State v. Hamilton, 327 S.C. 440, 486 S.E. 2d 512 (Ct. App. 1997). Again, the judge placed the burden on the defense to prove that the state should not be allowed to go forward with their burglary first degree indictment:

“Certainly, I would think that under the burglary, first degree, statute, which does not put any condition at all upon which convictions may be used, under that statute, I believe that any two convictions, whether the convictions were obtained on the same day were not, could be used.

Now, tell me, here's what I'm looking for from you: if you want to argue consolidation, tell me where there is any authority in this state whatsoever that consolidation of charges under a recidivist -- type analysis, recidivist statute -- type analysis, would prevent the state from going forward on a first degree burglary or an

enhanced burglary where there are two or more convictions for burglary or housebreaking? Just give me something.”

Amended ROA p.41, ll. 3-15.

The judge again directed his questioning to defense counsel:

THE COURT: Let me ask you this: has this Court ever made the distinction, the South Carolina Supreme Court or Court of Appeals, ever made any distinction about separate and distinct offenses, the fact that they are plead (sic) on the same day, having any bearing on whether they are separate and distinct? Ever? Has there ever been any issue addressed? Has there ever been any situation where –

I think under Koon<sup>1</sup> and Gordon<sup>2</sup>, they say the opposite. It doesn't make any difference if you plead on the same day or on separate days. That's not what's in control here. And that seems to be the only thing that ties the prior B&E together, that they were plead (sic) on the same day. They're almost a month apart. Okay?

Amended ROA p.44, ll. 10-22.

Trial counsel continued to assert that petitioner received one consolidation and not multiple convictions. Amended ROA p.47-48. Counsel objected when the state moved the certified conviction record into evidence. Amended ROA p.54, ll. 12-19. The lead detective testified, before the jury, that petitioner had two prior convictions for breaking and entering. Amended ROA p.63 4 – 9.

The trial court judge erred by attempting to analyze the situation under Koon, supra, and Gordon, supra. The state did not provide any factual information to the judge regarding the offenses resolved in North Carolina. Neither the judge (nor anyone else) was capable of analyzing these events as being “separate and distinct” since the state failed to provide any of the necessary information to the court. Even so, it was improper for the state to use a North Carolina state court consolidation as three “convictions” for purposes of enhancement. The state, simply, failed to meet

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<sup>1</sup> Koon v. State, 372 S.C. 531, 643 S.E.2d 680 (2007).

<sup>2</sup> State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003).

their burden of proof on an essential element of the offense. State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002). The Court of Appeals erred when it affirmed petitioner's conviction when the state failed to meet its burden. Respectfully, petitioner asks this Court to grant his petition for writ of certiorari.

CONCLUSION

For the preceding reason, petitioner respectfully asks this Court to grant his petition for writ of certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'EAF-Best', written over a horizontal line.

Elizabeth A. Franklin-Best  
Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of March, 2012

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to York County  
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THE STATE,

RESPONDENT,

V.

REICO LAMONT WELCH,

APPELLANT

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CERTIFICATE OF SERVICE

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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on David Spencer, Esquire, and the S.C. Court of Appeals this 19th day of March, 2012.




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Elizabeth A. Franklin-Best  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day  
of March, 2012.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: May 16, 2021