THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT

V.

WILLIAM TRAVIS CALVERT,

APPELLANT

APPELLATE CASE NO. 2014-001930

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

Opinion No. 2016-UP-330

PETITION FOR REHEARING

On June 29, 2016, this Court affirmed Appellant's conviction and sentence in an unpublished opinion. State v. Calvert, 2016-UP-330 (S.C. Ct. App. filed June 29, 2016). Pursuant to Rule 221 (a), SCACR, Appellant respectfully requests this Court rehear the matter in light of the legal argument overlooked or misapprehended by the Court in arriving at its conclusion that the structure entered was a dwelling house where the structure was deemed unfit for human habitation.

In affirming Appellant's conviction for burglary in the first degree, this Court cited section 16-11-10 of the South Carolina Code for the definition of a dwelling house for purposes

of the burglary and arson statutes. This Court correctly explained that pursuant to statute, a dwelling house is "any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, or laborer or person who lodges there with a view to the protection of property." See S.C. Code Ann. § 16-11-10. Further, this Court correctly explained that according to case law, "the test of whether a building is a dwelling house turns on whether the occupant has left with the intention to return." See State v. Glenn, 297 S.C. 29, 32, 374 S.E.2d 671, 672 (1988). Finally, this Court cited State v. Evans, 376 S.C. 421, 425, 656 S.E.2d 782, 784 (Ct. App. 2008) for the proposition that "an occupant's temporary absence from a building is irrelevant when determining whether the building should be considered a 'dwelling' for the purposes of the burglary statute." Despite this Court's recitation of the applicable legal principles governing the issue on appeal, this Court determined the structure in which Appellant entered was a dwelling. Thus, it appears this Court misapplied the governing law or overlooked the undisputed facts that the structure was deemed unfit for human habitation because it contained dangerous substances associated with the manufacture of methamphetamine.

Late at night on November 18, 2013, the Greenville County Sheriff's Office received a call regarding individuals inside a condemned structure. R. 9, line 16 – R. 10, line 20. When the police arrived, they found Appellant and a second person in the structure. R. 17, lines 3-4; R. 20, line 18 – R. 21, line 21; R. 30, lines 2-4; R. 38, lines 16-18; R. 43, lines 2-3; R. 54, lines 8-10; R. 67, line 21 – R. 68, line 4. Appellant was charged with burglary in the first degree. R. 139.

The structure was owned by Stephen Pepper, who was sitting in jail, where he had been since at least November 13, 2013, awaiting disposition of his criminal charges related to manufacturing methamphetamine. R. 8, lines 17-21; R. 35, lines 4-11; R. 49, lines 23-25; R. 69,

lines 13-20; R. 76, lines 6-10. The structure he once occupied as a residence sat empty, having been condemned by Greenville County in light of the hazardous materials there.[1] These hazardous materials were in the structure due to Pepper's manufacturing of methamphetamine. The Greenville County Sheriff's Office posted signs warning of unsafe living conditions and threatened to prosecute anyone who entered the premises for trespassing. Despite the numerous signs warning of the dangerous materials and forbidding entry and occupation, people entered the structure daily. R. 9, lines 4-7; R. 12, line 18 – R. 13, line 22; R. 15, lines 13-14; R. 32, line 24 – R. 35, line 11; R. 58, line 25 – R. 59, line 20; R. 69, line 24 – R. 71, line 8; R. 76, lines 6-10. After Pepper's release from jail on bond, he went to the condemned structure:

> Q. And where did you go to live when you got out of jail?
>
> A. Well, I couldn't legally live in my house until it was reexamined by DHEC and certified. But, you know, I - - they tested it. And I moved back in thinking that they was [*sic*] going to turn that in. And they - - the officer went off to Myrtle Beach, whatever. And it - - they come out and fined me $500 for being there. And then it was cleared up. And the Judge dropped it to $150. And I'm legally now allowed to live in my house.

R. 78, lines 10-19; R. 80, line 16 – R. 81, line 11.

The crime of burglary in the first degree requires the person (1) enter a dwelling (2) without consent (3) with the intent to commit a crime in the dwelling and (4) the existence of an enumerated aggravating circumstance. S.C. Code Ann. § 16-11-311(A). The primary issue before this Court is what structures are deemed "dwellings" for purposes of the burglary statute. As noted by this Court, the South Carolina Code defines a dwelling house as "any house, outhouse, apartment, building, erection, shed or box in which there sleeps a proprietor, tenant, watchman, clerk, laborer or person who lodges there with a view to the protection of property." S.C. Code Ann. § 16-11-10.

[1] The inside of the house was ransacked - "items [were] everywhere." These conditions corroborated the signs warning of inhabitability. R. 27, lines 21-23; R. 35, lines 12-18; R. 59, line 24 – R. 60, line 9; R. 71, lines 9-20.

Further, a dwelling "also means the living quarters of a building which is used or normally used for sleeping, living, or lodging by a person." S.C. Code Ann. § 16-11-310(2). As required by the rules of statutory construction, courts must strictly construe the criminal statutes *against* the state. State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993).

Burglary is "a crime against possession, not against property." State v. Brooks, 277 S.C. 111, 112, 283 S.E.2d 830, 831 (1981). "The law of burglary is primarily designed to secure the sanctity of one's home, especially at night time when peace, solitude, and safety are most desired and expected." Id. "Thus, at the heart of burglary law is protection of the individual and family from unlawful intrusion while home at night." Id. at 113, 283 S.E.2d at 831. "[B]urglary is an offence against the *habitation* of some other person." State v. Trapp, 17 S.C. 467, 471 (1882) (emphasis in original); see also State v. Singley, 392 S.C. 270, 274, 709 S.E.2d 603, 605 (2011)("We have maintained consistently for well over one hundred years that burglary is a crime against possession and habitation, not a crime against ownership"). "[T]he core of a dwelling constituting one's home for burglary purposes is the expectation of peace and security therein. Mere ownership does not automatically confer this status on a person. That ownership interest must be examined in light of who possesses that expectation of sanctity in the dwelling." Singley, 392 S.C. at 276, 709 S.E.2d at 606.

South Carolina's first degree burglary statute serves to protect occupants inside a dwelling who could be harmed when intruders break in with intent to commit a crime inside. See Id. at 274, 709 S.E.2d at 605. Other jurisdictions have held accordingly when examining common law burglary, which is most akin to South Carolina's first degree burglary statute. See generally, People v. Davis, 958 P.2d 1083, 1088 (Cal. 1998)(explaining "[t]he interest sought to be protected by the common law crime of burglary ... was the sanctity of a person's home during the night hours

when the resident was most vulnerable"); State v. Rooney, 862 N.W.2d 367, 373 (Iowa 2015)(explaining "the common law purpose of burglary was an offense against security of occupancy"); State v. Lozier, 375 So.2d 1333, 1337 (La. 1979)(stating that "[b]urglary laws are not designed primarily to protect the inhabitant from unlawful trespass and/or the intended crime, but to forestall the germination of a situation dangerous to the personal safety of the occupants"); State v. White, 330 P.3d 482, 485 (Nev. 2014)(describing common law burglary as "a crime against habitation and occupancy" that "clearly sought to protect the right to peacefully enjoy one's own home free of invasion")(internal quotation omitted); State v. Holt, 352 P.3d 702, 705 (N.M. Ct. App. 2015)(noting that the purpose of burglary statutes is to protect possessory rights); Rash v. Commonwealth, 383 S.E.2d 749, 751 (Va. Ct. App. 1989)(explaining that "[b]urglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation – the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion").

In State v. Steadman, 257 S.C. 528, 541, 186 S.E.2d 712, 716, (1972), the defendant was charged with burglary in the first degree at South of the Border, a motel. The prosecuting witness maintained an apartment on the second floor of the office building where he resided "from time to time." Id. He used the adjacent area for business purposes. Id. At the time of the burglary, the prosecuting witness was in the business office adjoining the living area. Id. The South Carolina Supreme Court found no error in a trial judge instructing the jury "that it was not necessary that the entire building be devoted to dwelling purposes, nor that the dwelling area entered be constantly inhabited every day or night of the year; and that the dwelling area might be in a building a portion of which is devoted to business purposes." The Court noted, in

approving the jury instructions, that "[i]t was made clear that the area entered must be devoted to dwelling purposes." Id.

The South Carolina Supreme Court analyzed the meaning of "dwelling" in the seminal case of State v. Ferebee, 273 S.C. 403, 257 S.E.2d 154 (1979). The Court concluded that the statutory definition of dwelling required that the structure "have an identifiable occupant sleeping or residing therein for it to qualify as a dwelling house." Id. at 405, 257 S.E.2d at 155. The Court explained that although "temporary absence of occupants will not prevent a residence from becoming the subject of a burglary, it is required that such occupants leave with the purpose of returning in order for breaking and entering during their absence to constitute burglary." Id. According to the Court, "the mere fact that a building is suitable for use as a dwelling is insufficient." Even a house furnished as a dwelling house "loses its character as such for the purpose of burglary, if the occupant leaves it without the intention to return." Id. (internal citation omitted). This finding rested upon the centuries-old rationale that burglary is an offense against habitation, and not against property. Id. at 406, 257 S.E.2d at 155.

Ferebee was accused of burglarizing a vacant apartment. Id. at 404, 257 S.E.2d at 155. The issue before the Court was "whether the apartment was being used as a dwelling house *at the time* of the alleged offense." Id. (emphasis added). The apartment was owned by a doctor and leased through a local real estate agency. "The building was a duplex containing two separate living units which had been utilized as rental property for the past three years." Id. Although one unit remained occupied, the unit alleged to have been burglarized was vacant because the former tenants had moved out the prior week. Id. at 405, 257 S.E.2d at 155. The unit was partially furnished and available for rent at the time of the break-in. Id. The Court found "there was clearly no occupant or inhabitant against him the offense could have been

committed" where the "former tenant had permanently abandoned the premises without the intention of returning." Id. at 406, 257 S.E.2d at 155. Based on this reasoning, the Court reversed Ferebee's conviction for burglary. Id. at 406, 257 S.E.2d at 156.

Relying upon the test in Ferebee, the Court found a mobile home was a dwelling house based upon evidence showing the occupant intended to return. State v. Glenn, 297 S.C. 29, 32, 374 S.E.2d 671, 672 (1988). Glenn and her husband purchased a mobile home in 1985. Id. at 30, 374 S.E.2d at 671. The following year, Glenn's husband died. Id. Shortly after the funeral, Glenn learned that she would have to surrender the mobile home or it would be repossessed. Id. Within a week of the funeral, Glenn stopped by the mobile home to retrieve a Bible. Id. at 31, 374 S.E.2d at 671. Shortly after Glenn left the mobile home, a passerby noticed it was on fire. Id. at 31, 374 S.E.2d at 671-672. The only issue before the appellate court was whether the mobile home was a dwelling house at the time of the fire. Id. at 31, 374 S.E.2d at 672. The Court found the mobile home was a dwelling house because Glenn had $10,000 worth of personal possessions in the mobile home and had returned to the home many times after her husband's death to gather possessions, evidencing her intent to return. Id. at 32, 374 S.E.2d at 672.

This Court found a vacation home to be a dwelling in State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (Ct. App. 2008). The owner of the home burglarized, Charles Shaw, testified that he had owned the home for the past ten years as a secondary residence. Id. at 424, 656 S.E.2d at 783. The home was set on heavily wooded, mountainous, and secluded terrain. Id. The family had lived in the home "off and on" for years until three years before the break-in when Shaw's wife became ill preventing the family from spending significant amounts of time at the property. Id. Nevertheless, Shaw went to the home "once every two weeks or once a month." In fact, he

had been at the home just weeks prior to the break-in. Id. This Court found "sufficient evidence of the Shaws' intent to return to the mountain property." Id. at 425, 656 S.E.2d at 784.

The question in this case is whether the structure, which had been deemed unfit for human habitation by the local authorities, was a dwelling as that term is used in the burglary statutes. Therefore, an examination of the relevant statutes and ordinances concerning property unfit for human habitation is useful. According to the South Carolina Code, the governing body of a county may "exercise its police powers to repair, close, or demolish" any dwellings that are unfit for human habitation due to "conditions rendering such dwellings unsafe or insanitary, dangerous or detrimental to the health, safety, or morals or otherwise inimical to the welfare of the residents of the county." S.C. Code Ann. § 31-15-320. Under this portion of the Code, a dwelling is "any building or structure, or part thereof, used and occupied for human habitation or intended to be so used and includes any outhouses and appurtenances belonging thereto or usually enjoyed therewith." S.C. Code Ann. § 31-15-310(5). In accordance with the state statute, Greenville County authorized the codes administrator to exercise the powers to declare dwellings unfit for human habitation. Greenville County, S.C., Code of Ordinances, § 5-53. The Greenville County codes administrator "may cause to be posted on the main entrance of any dwelling so closed, a placard with the following words: 'This building is unfit for human habitation; the use or occupation of this building for human habitation is prohibited and unlawful.'" Greenville County, S.C., Code of Ordinances, § 5-55(c). Thus, under the state statutory scheme and corresponding county ordinances, a structure deemed unfit for human habitation is the antithesis of a dwelling.

Additionally, while South Carolina has not addressed this novel issue, other jurisdictions have discussed whether condemned properties or those deemed unfit for human habitation are

dwellings or similar structures under their burglary statutes. Those cases provide relevant persuasive authority for this Court to rehear the present matter.

The Iowa Supreme Court held a soon-to-be demolished, dilapidated house was not an "occupied structure" as required in order for the defendant's burglary charge to stand. State v. Rooney, 862 N.W.2d 367, 377 (Iowa 2015) According to the Iowa Supreme Court, its burglary statute expanded the common law by replacing the term "dwelling house" with the more expansive term "occupied structure." Id. at 371. In order for a structure to be considered "occupied" it had to be "adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value." Id. at 373 (internal citation omitted). The Court emphasized that the house was "boarded up" "to keep people out," there was "no electricity or running water," "[i]t was falling apart," and "[t]he city had determined to demolish the structure," which was "imminent." Id. at 377.

The Ohio Court of Appeals concluded a condemned house was not a "permanent or temporary dwelling" as required by its burglary statute. State v. Anderson, 975 N.E.2d 556, 560 (Ohio Ct. App. 2012). The court rejected the argument that the continuing purpose of the house was residential because "it [could] no longer be said that that such [was] the house's purpose when no one [could] lawfully reside in the house." Id. Additionally, the court was not persuaded by testimony that the homeowner continued to store her personal items at the residence because the court concluded she was not maintain the home as a permanent or temporary dwelling in light of the city condemning the home. Id. at 561.

In the present case, the trial judge erred in finding the structure burglarized to be a dwelling and this Court erred in affirming that ruling. Appellant's entrance into the home could

not have been an offense against possession because no one had a possessory right to the house. Greenville County had declared the house uninhabitable due to the hazardous materials contained in the house as by-products of the methamphetamine laboratory that Pepper was running. The county forbade not only occupation, but entry onto the property by everyone, including Pepper. When Pepper entered the property, he was cited by the county for illegal conduct – trespassing. Certainly, he could not have been fined for trespassing on his own property if he had a possessory interest at the time. In light of the county's actions of condemning the property and prohibiting entry and occupation, no one, including Pepper, had a possessory interest in the property. The structure was akin to the vacant apartment in Evans, supra. Although the apartment bore all the hallmarks of a dwelling, including furnishings, it was not a dwelling because no one had a possessory interest in the vacant apartment at the time of the break-in. Pepper could have no intent to return to the structure because doing so was illegal – as evidenced by the undisputed evidence presented at trial, including the signs posted by the county prohibiting entry and occupation and ticket and fine Pepper received when he returned to the structure.

Based on the foregoing reasons, Appellant respectfully requests this Court rehear the matter.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

This 14th day of July, 2016.

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Susannah R. Cole, Esquire, at Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and William Travis Calvert, #323038, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 14th day of July, 2016.

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Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this
14th day of July, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.