STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from Richland County
The Honorable James R. Barber, III, Circuit Court Judge

Opinion No. 2016-UP-132 (S.C. Ct. App. Filed Mar. 9, 2016)
Appellate Case No. 2016-001534

WILLIS WEARY,

Petitioner-Respondent,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent-Petitioner.

RESPONDENT-PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

The Court of Appeals erred as a matter of law by finding Weary's two prior burglary convictions were so temporally connected that they should be considered one offense pursuant to S.C. Code Ann. § 17-25-50.

STATEMENT OF THE CASE

During its April 2006 term, the Richland County Grand Jury indicted Petitioner-Respondent Willis Weary for first-degree burglary, alleging Weary entered the victim's dwelling during the nighttime hours (2006-GS-40-00006). Thereafter, on January 25, 2007, the State amended the indictment to include that Weary had two or more prior burglary convictions. On February 28, 2007, Weary proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr. On March 2, 2007, the jury convicted Weary as indicted and the trial court sentenced Weary to eighteen years imprisonment.

Weary appealed his conviction. Following the submission of an Anders[1] brief, the South Carolina Court of Appeals dismissed Weary's appeal. State v. Willis Weary, Op. No. 2009-UP-559 (S.C. Ct. App. Filed November 23, 2009. The Remittitur was sent on December 9, 2009.

Thereafter, Weary filed an application for post-conviction relief on February 19, 2010. The State made its Return on May 20, 2010, requesting an evidentiary hearing. Weary, through his counsel, filed an amended application on August 22, 2011. An evidentiary hearing on was convened on August 31, 2011, at the Richland County Courthouse before the Honorable James R. Barber, III. Weary was present and was represented by counsel, Kristy G. Goldberg. The State was represented by Assistant Attorney General Brian T. Petrano. Testimony was presented from Weary and trial counsel.

By written order signed on September 27, 2001 and filed October 3, 2011, the post-conviction relief court found trial counsel was ineffective for failing to investigate and research whether Weary's prior burglary convictions should be considered a single incident in support of his for a directed verdict and argument the case should be submitted to the jury on the lesser-included offense of second-degree burglary. Rather than granting Weary a new trial, the post-

[1] Anders v. California, 386 U.S. 738 (1967).

conviction relief court ordered Weary be resentenced for the lesser-included offense of second-degree burglary, noting the "sufficient evidence" of Weary's guilt (including a confession and DNA evidence).

The State served its Notice of Appeal on October 20, 2011, followed by a petition for writ of certiorari on December 15, 2011. Weary filed his return to the State's petition for on May 14, 2012. Thereafter, this Court transferred this case to the South Carolina Court of Appeals pursuant to Rule 243(l), SCACR. On March 5, 2014, the Court of Appeals granted certiorari and requested briefing. The State filed its brief of petitioner on June 25, 2014. Weary filed his brief of respondent on December 19, 2014. On February 2, 2015, a three-judge panel of the Court of Appeals heard arguments in the case. On March 9, 2012, the Court of Appeals reversed the post-conviction relief court's grant of relief, finding Weary had not established requite prejudice entitling him to relief. However, the Court of Appeals affirmed the post-conviction relief court's finding that trial counsel was deficient. Both the State and Weary filed petitions for rehearing. Both petitions were denied on June 24, 2016.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief decision is whether "any evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The reviewing court should affirm if there is any evidence to support the post-conviction relief court's findings. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). However, the reviewing court should reverse the post-conviction relief court if its findings are controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624. Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court,

examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. 668.

ARGUMENT

The Court of Appeals erred as a matter of law by finding Weary's two prior burglary convictions were so temporally connected that they should be considered one offense pursuant to S.C. Code Ann. § 17-25-50.

On March 9, 2016, the Court of Appeals reversed the post-conviction relief court's grant of relief to Petitioner-Respondent Willis Weary in an unpublished opinion. Willis Weary v. State, Op. No. 2016-UP-132 (Ct. App. filed March 9, 2016). In reaching this result, the Court of Appeals held the post-conviction relief court erred in granting Weary resentencing for the lesser-included offense of second-degree burglary because Weary failed to show the necessary prejudice required for relief. The Court of Appeals specifically found although the post-conviction relief court correctly found trial counsel deficient for failing to investigate Weary's prior burglary convictions, it erred in finding Weary was prejudiced by his counsel's deficient performance. The Court of Appeals found although the post-conviction relief court's finding that Weary's two prior burglary convictions were so closely connected as to constitute one offense was supported by the evidence, the post-conviction relief court erred in failing to consider Weary's third prior burglary conviction not closely related to the other two convictions. The Court of Appeals determined Weary therefore did not suffer the requisite prejudice needed for relief because had trial counsel investigated the two prior burglaries and argued they should be considered one offense, the State would have introduced the third prior burglary conviction. The Court of Appeals "reverse[d] the PCR court's finding that Weary's two prior burglary convictions did not satisfy the requirements for a subsequent first-degree burglary conviction based on the 'two or more prior convictions' element." Weary v. State, Op. No. 2016-UP-132. Pursuant to Rule 221(a), SCACR, Respondent-Petitioner, the State of South Carolina, petitioned the Court of Appeals for rehearing, arguing the Court of Appeals misapprehended or overlooked

several critical points—particularly in respect to the determination Weary's two prior second degree burglary offenses should be considered one offense. The Court of Appeals denied the State's petition for rehearing; this petition for a writ of certiorari follows.

Error in Finding Two Prior Burglary Convictions Constituted One Offense

In petitioning for certiorari, the State respectfully submits the Court of Appeals overlooked its argument regarding the post-conviction relief court's error as a matter of law in determining Weary's two prior burglary convictions from November 24, 2000, should be considered one offense when used to satisfy the elements of first-degree burglary pursuant to S.C. Code Ann. § 16-11-311(A)(2). In reversing the lower court, the Court of Appeals found the post-conviction relief court erred in "finding that Weary's two prior burglary convictions did not satisfy the requirements for a subsequent first-degree burglary conviction based on the 'two or more prior convictions' element." However, in reaching this result, the Court of Appeals relied exclusively on the use of a third prior burglary conviction not closely related in time to the other two prior convictions.[2] Regarding the State's argument that Weary's two prior burglary convictions satisfied the requirements for a subsequent first-degree burglary conviction pursuant to S.C. Code Ann. § 16-11-311(A)(2) regardless of temporal connection, the Court of Appeals found "despite the fact that the November 24, 2000 burglaries involved different victims . . . the PCR court's determination that Weary provided sufficient evidence that burglaries occurred within a single crime spree and were so closely connected in point of time that they may be considered as one offense is supported by the evidence." The State respectfully submits the

[2] The State agrees with the Court of Appeals' ultimate determination that Weary suffered no prejudice from trial counsel's failure to investigate Weary's prior burglary convictions because the third, wholly unrelated burglary conviction could, and would, have been used by the State to satisfy the elements of S.C. Code Ann. § 16-11-311(A)(2). However, the State respectfully submits the Court of Appeals overlooked the State's argument as to the post-conviction relief court's error of law in finding Weary's two prior burglary convictions could not be used to satisfy S.C. Code Ann. § 16-11-311(A)(2) because they were temporally connected and constituted a crime spree.

Court of Appeals overlooked the post-conviction relief court's error of law in determining the two prior burglary offenses did not satisfy the requisite elements for a subsequent burglary pursuant to S.C. Code Ann. § 16-11-311(A)(2).

The issue before this Court (and previously before the Court of Appeals and the post-conviction relief court) is the meaning of "two or more convictions" under our first-degree burglary statute, S.C. Code Ann. § 16-11-311(A)(2). The State respectfully submits the Court of Appeals and the post-conviction relief court improperly interpreted "two or more convictions" and erroneously applied the recidivist offender statute (S.C. Code Ann. § 17-25-50) to its meaning, an error of law that warrants this Court's reversal.

The basic rule of statutory construction is that a court must ascertain and give effect to the legislature's intention as expressed in the statute. State v. Zulfer, 345 S.C. 258, 262, 547 S.E.2d 885, 887 (Ct. App. 2001) (citing State v. Ramsy, 311 S.C. 555, 430 S.E.2d 511 (1993)). In construing a statute, a court cannot read into the statue something not within the manifest intention of the legislature as gathered from the statue itself. Id. If a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion of employing rules of statutory interpretation and the court has no right to look for or impose another meaning. Id.

Pursuant to S.C. Code Ann. § 16-11-311(A)(2), "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." Under Section 16-11-311(A)(2), "two or more convictions" is plain and unambiguous, requiring two or more judicial findings of guilt for prior burglaries or housebreakings, or a combination thereof. This Court has explained that S.C. Code Ann. § 16-11-311(A)(2) "allows the State to punish Defendant's

recidivism by using his previous convictions to elevate actions that would normally constitute a charge to a charge of burglary, first degree." State v. Washington, 338 S.C. 392, 396, 526 S.E.2d 709, 711 (2000). The State is required to prove all elements of first-degree burglary beyond a reasonable doubt, and therefore, the jury must be informed of a defendant's prior convictions for burglary or housebreaking because it is an element of the offense. State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002). In Simmons, the Court of Appeals held:

> To ensure that the defendant is not convicted on an improper basis while allowing the State to prove the elements of first degree burglary, the trial court should limit the evidence to the prior burglary and/or housebreaking convictions. Detailed, particular information about the prior burglaries and/or housebreaking convictions should not be admitted. In addition, the trial court should, on request, instruct the jury that the information should only be considered for the limited purpose of proving one of the elements of first degree burglary.

Id. at 357, 864 (internal citations omitted). The requirement for two or more prior convictions for burglary or housebreaking is an element of the offense pursuant to Section 16-11-311(A)(2). See State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (holding prior burglary convictions are elements of charged burglary in the first-degree offense, not merely a sentencing consideration for the court to consider); State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1998) (same). There is no such requirement that the two prior offenses not be closely connected in time.

In the present case, the Court of Appeals and post-conviction relief court disregarded the plain and ordinary meaning of "two or more prior convictions" and improperly superimposed the requirements of S.C. Code Ann. § 17-25-50 that the two or more prior convictions be not so closely connected in time as to be considered one offense. This improper application of Section

17-25-50 to the plain and ordinary reading of our first-degree burglary statute constitutes an error of law requiring reversal of the Court of Appeals and post-conviction relief court.

Through the enactment of S.C. Code Ann. § 17-25-50, the South Carolina General Assembly instructed:

> **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.

(emphasis added). Notably, under the plain language of the statute, this section's applicability is limited solely to situations where it is necessary for the sentencing judge to determine the number of **offenses** for **sentencing purposes**, which is required under S.C. Code Ann. § 17-25-45, our recidivist offender statute. Accordingly, contrary to the findings by the Court of Appeals and post-conviction relief court, Section 17-25-50 applies only in limited situations where it is necessary for a sentencing judge to make such a determination and in no way inhibits a sentencing judge's broad discretion in imposing sentences for individual offenses and in determining whether separate sentences should be served concurrently or consecutively. See State v. Legare, 333 S.C. 275, 282-283, 509 S.E.2d 472, 476 (1998) (recognizing S.C. Code Ann. § 17-25-50 "is a recidivist statute" and finding a sentencing judge can properly impose concurrent or consecutive sentences for each count for which a defendant is convicted).

A review of Section 17-25-50 clearly shows the post-conviction relief court's application of it to the present case was an error of law. Section 17-25-50 explicitly states that it is exclusively applicable for the purpose of imposition of a sentence. Under the plain language of this statute, this section's applicability is limited solely to situations where it is necessary for the sentencing judge to determine the number of offenses for sentencing purposes as required under

Section 17-25-45, our recidivist offender statute. Therefore, it logically follows that Section 17-25-50 is only applicable in the limited situations where it is necessary for a sentencing judge to make such a determination, not for the jury's use when determining whether the requisite number of **convictions** has been proven **to establish an element** of first-degree burglary pursuant to Section 16-11-311(A)(2).

Despite this clear purpose stated in the statutory language, the post-conviction relief court improperly applied Section 17-25-50 to an element of the first-degree burglary statute. It is clear that "two or more convictions" is an element of the charged offense under Section 16-11-311(A)(2) through opinions such as Hamilton and Benton from both the Court of Appeals and this Court. Accordingly, it is the jury's role to determine if the number of prior convictions meets the two or more threshold as set forth in Section 16-11-311(A)(2). The jury is not responsible for sentencing a defendant and therefore, applying Section 17-25-50—a statute explicitly intended for use exclusively during sentencing under the recidivist offender statute—to an element of the offense for jury consideration is an error of law requiring reversal.

Additionally, Section 16-11-311(A)(2) does not place any limitations on the prior convictions to be used to meet the requisite two convictions. In State v. Zulfer, the Court of Appeals rejected the appellant's argument that the legislature intended to limit the prior burglary convictions to only those occurring in South Carolina. 345 S.C. 258,262, 547 S.E.2d 885, 887 (Ct. App. 2001). The Court of Appeals held that "[t]o restrict the predicate offenses for a first-degree burglary charge . . . would give the statute a meaning that the legislature clearly did not intend." Id. at 262, 547 S.E.2d at 887. See also State v. Donahue, 400 S.C. 604, 607, 735 S.E.2d 547, 549 (Ct. App. 2012) (holding "nothing in the language of subsection 16–11–313(B) limits a circuit court to considering only South Carolina offenses"). The Court of Appeals further held

that "[t]o shift the focus to the fact that a defendant's prior offenses may have occurred in different jurisdictions would thwart the objective of requiring heightened accountability from repeat offenders for their subsequent crimes." Id., at 263-64, 547 S.E.2d at 887-88. It is clear that the legislative intent of Section 16-11-311(A)(2) is heightened accountability from repeat offenders, and therefore, the only logically conclusion is that Section 17-25-50 is not applicable.

Similarly, adopting Weary and the post-conviction relief court's interpretation of "two or more convictions" would reach an absurd result not intended by the legislature that would greatly expand the efficacy of Section 17-25-50 beyond its intended applicability.[3] By precluding the possibility of an enhanced punishment for committing a subsequent burglary following a string of prior burglaries, Weary's proposed statutory construction would effectively incentivize the commission of multiple burglaries in close succession because the offender could avoid the enhanced punishment for all but a single burglary in his chain of crimes. This proposed result is entirely inconsistent with the purpose for which Section 17-25-50 was enacted, was clearly not intended by our General Assembly, and would serve no legitimate goal or purpose related to sentencing. See Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ("[A] court must reject a statute's interpretation leading to absurd results not intended by the Legislature."). Therefore, the statutory interpretation Section 17-25-50 adopted by the Court of Appeals and the post-conviction relief court constitutes and error of law.

[3] Notably, Section 17-25-50 was not applied in the manner Weary asked the Court of Appeals to apply it in any of the cases he has relied upon on appeal, which all involved the imposition of a sentence under the recidivist offender statute. See Bryant v. State, 384 S.C. 525, 533, 683 S.E.2d 280, 284 (2009) (finding multiple armed robberies committed over the course of three days did not constitute a single offense under Section 17-25-50 for purposes of sentencing under the recidivist offender statute); Koon v. State, 372 S.C. 531, 534, 643 S.E.2d 680, 682 (2007) (finding crimes committed two weeks apart constituted separate offenses under Section 17-25-50 for purposes of sentencing under the recidivist offender statute); State v. Woody, 359 S.C. 1, 4, 596 S.E.2d 907, 908 (2004) (finding two offenses committed at the same time constituted one offense under Section 17-25-50 for purposes of sentencing under the recidivist offender statute).

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this petition for a writ of certiorari and reverse the Court of Appeals finding that counsel's performance was deficient. In requesting this relief, counsel for the State certifies a petition for rehearing was made and ruled upon by the Court of Appeals.

Respectfully submitted,

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August 24, 2016

STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to the Court of Appeals
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The Honorable James R. Barber, III, Circuit Court Judge

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PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Respondent-Petitioner's Petition for Writ of Certiorari and Supplemental Appendix on Petitioner-Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense – Appellate Division
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I further certify that all parties required by Rule to be served have been served.
This 24th day of August, 2016.

Megan Harrigan Jameson

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