STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2016-001938

THE STATE,

RESPONDENT

v.

WILLIAM TRAVIS CALVERT,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED TO THE COURT

Whether the Court of Appeals erred in holding the trial judge properly denied a motion for a directed verdict on the charge of burglary in the first degree, as the classification of a temporarily uninhabitable house as a "dwelling" pursuant to S.C. Code Ann. §16-11-311 was a question of fact for the jury.

STATEMENT OF THE CASE

William Calvert was indicted on May 27, 2015, by a Greenville County grand jury for first degree burglary. (Indictment) On September 3, 2014, Petitioner proceeded to a trial by jury before the Honorable D. Garrison Hill. (R, p. 1) Charles S. Propst, Esquire, represented Petitioner and Assistant Solicitor Austin F. Watts represented the State. (R, p. 1.) Petitioner was found guilty of burglary in the first degree and was sentenced to the mandatory minimum fifteen years' imprisonment. (R. p. 138, lines 2-5.) Petitioner subsequently sought appellate review arguing the trial court erred in denying his motion for a directed verdict because the victim's uninhabitable home was not a dwelling for purposes of S.C. Code Ann. § 16-11-311. In response, the State argued there was sufficient evidence of the victim's intent to return to the home and make it habitable again to survive a directed verdict motion and submit the question to the jury.

On June 29, 2016, the Court of Appeals affirmed Petitioner's conviction in an unpublished opinion. (Appendix pp. 1-2.) Petitioner sought rehearing and the Court of Appeals denied the petition for rehearing in an order dated August 18, 2016. (Appendix p. 14.) Petitioner now seeks certiorari in this Court.

WHY THE PETITION SHOULD BE DENIED

In summary, the State submits Calvert's petition, which merely disagrees with the Court of Appeals' analysis, fails to meet any of this Court's "Considerations Governing Review" as explained in Rule 242(b)(1-5), SCACR.[1] Calvert claims the decision of the Court of Appeals

[1] As this Court is well aware, Rule 242(b), SCACR's "Considerations Governing Review," while admittedly non-exclusive, provide examples of the type of issues amounting to the "special and important reasons" supporting a grant of certiorari and include: (1) "[w]here there are novel questions of law[;]" (2) "[w]here there is a dissent in the decision of the Court of Appeals[;]" (3) "[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court[;]" (4) "[w]here substantial constitutional issues are directly involved[;]" and (5) "[w]here a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court." Rule 242(b)(1-5), SCACR.

involves a novel question of law. However, the issue before the Court is simply the application of established law to novel facts. As the Court of Appeals correctly noted, the test of whether a building is a dwelling house for purposes of the burglary statute turns on whether the occupant has left with the intention to return, citing *State v. Evans*, 376 S.C. 421, 425, 656 S.E.2d 782, 784 (Ct. App. 2008). The jury may weigh the restrictive use of the property by the governmental entity in determining the victim's intent to return to the dwelling, much like the jury may also weigh the curative efforts made by the victim to pass the entity's re-certification process. Although the circumstances of the victim's absence, by both his incarceration and the prohibitions on his habitability of his home, are novel, the framework for determining whether the home is a dwelling is not.

Accordingly, the State respectfully asks certiorari be denied.

STATEMENT OF FACTS

Late in the evening of November 18, 2013, at approximately 11:00 pm, Petitioner and co-defendant Hannah Horne entered the home of Stephen Pepper (Pepper), who was incarcerated at the time. (R. p. 61-62; p. 63, lines. 9-17.) Petitioner intended to steal tools from the residence and sell them. (R. p. 66, lines. 15-17.)

Pepper asked his neighbor Christy Crawford (Crawford) to keep watch on his home during his period of incarceration. (R. p. 9, lines. 4-25.) The home was deemed temporarily uninhabitable due to Pepper's production of methamphetamine on site, but Crawford was allowed inside on an earlier occasion by the police, who were investigating another break in. (R. p. 12, lines 4-12.) Crawford placed a baby monitor inside Pepper's house so she could listen for unauthorized activity. (R. p. 9, lines 14-15.) Crawford testified voices of a man and woman woke her around 11:00 pm or 12:00 am on the night in question. (R. p. 10, lines 1-12.) She was scared

because she could hear the voices so clearly she thought the intruders were in her house. (R. p. 9, lines 20-21.) Crawford called the police to report the break in. (R. p. 10, lines 17-20.)

Deputy Lovelace (Lovelace), with the Greenville County Sherriff's department, was the first to arrive on scene. (R. p. 17, lines. 23-24.) Lovelace approached Crawford's house and then drove toward Pepper's home with the lights on his vehicle extinguished. (R. pp. 17-19.) Lovelace heard multiple voices inside, so he waited for back up. (R. p. 18, lines 1-6.) Once the other officers arrived, they surveyed the perimeter of Pepper's house and discovered the point of entry was a window on the rear side of the house, where Petitioner had removed a window air conditioning unit to gain access. (R. p. 19, lines. 15-22.) The officers shined their lights on the house and called out, identifying themselves and commanding anyone inside to exit the home. (R. p. 20, lines 15-17.) Lovelace spotted Horne in one of the windows and instructed her to leave through the front door. (R. p. 20, lines 18-22.) Horne attempted to comply but the door was barricaded. (R. p. 19, lines 23-25.) Upon further instruction, Horne exited the back door and was detained. (T. p. 21, lines 18-21.) Horne informed the officers only Petitioner remained in the house. (R, p. 21, lines 22-25.)

Petitioner refused to exit the home or respond in any way, despite further commands in which he was addressed by his first name. (R. p. 22, lines. 1-14.) Two officers entered the back door while others remained outside, calling out for Petitioner to show himself. (R. pp. 22-24.) Because the officers knew Petitioner was inside but unresponsive, they became concerned for their safety. (R. p. 24, lines. 20-25.) The officers held their positions while waiting for a K9 unit to arrive to assist in the search of the house. (R. p. 26, lines 1-5.) Officers warned Petitioner the K9 unit was en route. (R. p. 26, lines 2-3.) The officers called the detention center holding Pepper and confirmed he did not know Petitioner or Horne, or give them permission to be in his

home. (R. p. 77, lines 2-9.) The officers also requested Pepper's permission to enter the home with the K9 and detain Petitioner. (R. p. 77, lines 2-9.) Once the K9 unit arrived, the officers advised Petitioner he would be bitten by the police dog if he did not exit the home. (R. p. 26, lines. 14-20.)

Petitioner was not found on the first search of the dwelling, (R. p. 28, lines 4-5.) Officers did notice tools gathered together in tubs, however, which seemed out of place in an otherwise ransacked and disordered home. (R. p. 52, lines. 14-23.) On the secondary search, an officer noticed a pair of boots sticking out from under a pile of clothing on a bed. (R. p. 28, lines. 6-21.) All the officers then entered the room to aid in the arrest. (R. p. 28, lines 17-25.) The officers shouted to Petitioner to show his hands, but he still did not comply with their commands. (R. p. 29, lines 12-13.) An officer engaged his K9 partner Kroc onto the bed to detain Petitioner. (R. p. 29, lines 12-15.) Petitioner revealed his left hand but not the other, so the dog bit him on his left arm. (R. p. 29, lines 15-16.) Petitioner was arrested and taken to the hospital for treatment before booking. (R. p. 30, lines. 2-15.)

ARGUMENT

The Court of Appeals correctly found the trial judge properly denied a motion for a directed verdict on the charge of burglary in the first degree, as the classification of a temporarily uninhabitable house as a "dwelling" pursuant to S.C. Code Ann. §16-11-311 was a question of fact for the jury.

Petitioner argues the trial court erred in failing to grant a directed verdict on the charge of burglary in the first degree, as Pepper's house should not have been considered a "dwelling" within the context of S.C. Code Ann. §16-11-311 because it was "condemned by Greenville County." (Petitioner's Brief p. 4.) Petitioner's statement of the law is in error and his argument is without merit.

"In criminal cases, the appellate court sits in review of errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). An appellate court, reviewing the denial of a directed verdict motion is concerned with the existence, or nonexistence of evidence, not its weight. State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (2008). "On appeal from the denial of a motion for directed verdict, the evidence must be viewed in the light most favorable to the state." State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)). Stated more strongly: "unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776-77 (2011).

The sole issue on appeal is whether Mr. Pepper's house was a "dwelling" per the burglary statute, or merely a "building." That distinction is the difference between burglary in the first and second degree. For purposes of the burglary statute, a "dwelling" is defined 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 (1976). Further, a dwelling can also mean "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) (1976). Alternatively, a "building" is defined as "any structure, vehicle, watercraft, or aircraft: where any person lodges or lives; or where people assemble for purposed

of business, government, education, religion, entertainment, public transportation, or public use or where goods are stored." S.C. Code Ann. § 16-11-310(1) (1976).

The State disagrees with Petitioner's interpretation of relevant case law. Historically, burglary has been viewed as "an offense against habitation rather than against property," despite the fact that it is codified under chapter 11, "Crimes against Property." State v. Ferebee, 273 S.C. 403, 406, 257 S.E.2d 154, 155 (1979). However, it would be inequitable to prevent an occupant's property from being the subject of a burglary simply because he is not home. State v. White, 349 S.C. 33, 562 S.E.2d 305 (2002) (see also People v. Fleetwood, 171 Cal.App.3d 982, 217 Cal. Rptr. 612 (1985) (holding that "dwelling" status is not affected by the temporary absence of occupant)). Consistent with this view, the Supreme Court of South Carolina has repeatedly held that a dwelling remains a dwelling, when there is an identifiable occupant, regardless of temporary absences, as long as the occupant leaves with the intent to return. See State v. Phillips, 393 S.C. 407, 712 S.E.2d 457 (2011); State v. Glenn, 279 S.C. 29, 374 S.E.2d 671 (1988).

For purposes of the burglary statute, a second home, which had not been "lived in" for three years was held do be a dwelling because of sufficient evidence of intent to return by the occupants. State v. Evans, 376 S.C. 421, 656 S.E.2d 782 (2008). In Evans, a neighbor noticed suspicious activity at the vacation home of the Shaw family and called the police. Id. Shaw owned the home for the previous ten years, but had been unable to spend any significant time there in the last three years because of his wife's medical condition. Id. at 423, 656 S.E.2d at 783. The court found Shaw's efforts to maintain the property as "ready to be lived in" were sufficient evidence of a dwelling. Id. at 425, 656 S.E.2d at 784. Likewise, the court in Phillips found intent to return exists when an occupant leaves personal or valuable belongings on the

property. State v. Phillips, 393 S.C. 407, 712 S.E.2d 457 (2011); see also State v. Glenn, 279 S.C. 29, 374 S.E.2d 671 (1988) (leaving over $10,000 worth of personal possessions in mobile home proved occupant did not vacate the home but rather left with an intention of returning). In Phillips, the occupant packed most of his belongings in his vehicle and told his neighbor he was leaving town. Phillips, at 410, 712 S.E.2d at 459. The court held, however, because Phillips left his animals, his golf club, and his lawnmower behind, he demonstrated an intent to return. Id. at 413, 712 S.E.2d at 460.

In the case at hand, Pepper was only absent from his home for a period of about two months during his incarceration. (R. p. 78, lines 20-25.) Pepper even asked his neighbor to look after his house and protect it from intruders in his absence. (R. p. 9, lines. 1-15.) Unlike the occupants in Phillips and Glenn, Pepper did not pack up his possessions in the process of a move; he was taken away from his house and taken to jail, leaving all of his belongings behind. Though the home was ransacked, presumably from prior break-ins, no evidence suggests Pepper left the home in that condition. He clearly stored valuable tools in the home, which is what Petitioner attempted to steal. (R. p. 66, line 17.) The vandals may not have left home "live in ready" by Evans standards, but the nature of the house at the time of the burglary in not indicative of Pepper's lack of intent to return. Finally, Pepper actually returned to his home when he was released on bond, which is prima facie evidence of his intent to return. Pepper testified he mistakenly believed the final approval of occupancy had been filed with DHEC when he returned home. (R. p. 78, lines 12-19.) He received a fine, which was later reduced. (R. p. 78, lines 17-19.)

Conceding intent to return is the proper test to characterize a place as a dwelling, Petitioner primarily argues "Pepper could have no intent to return to the structure because doing

so was illegal." (Petitioner's Brief p. 16.) The argument does not follow. The legality of his return has nothing to do with his intent to return. Criminals frequently intend illegal actions. If illegality negated intent, then crimes such as the one charged in this case, which states, "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* . . .," would be null and void. S.C. Code Ann. § 16-11-311(A) (1976) (emphasis added). Petitioner argues incomplete logic, emphasizing that Pepper could not have intent to go home because it was illegal to live there. (Petitioner's Brief p. 9.) Pepper returned home, regardless, just as Petitioner entered the home, regardless, despite the fact that both actions were illegal.

Petitioner cites State v. Ferebee, 273 SC 403, 257 S.E.2d 154 (1979) in support of his argument. In Ferebee, a partially furnished apartment was burglarized a week after it was abandoned by its tenants. The apartment was deemed a building rather than a dwelling, and the defendant's conviction for burglary in the first degree was overturned because the owner never occupied or intended to occupy the unit. Id. The case at hand is clearly distinguishable from Ferebee because Pepper was neither a renter nor had he abandoned his home.

Petitioner maintains that because the house was condemned by the county, "no one had possessory right to the house." (Petitioner's Brief p. 16.) Petitioner argues although the house, like the partially furnished apartment in Ferebee, possessed some of the "hallmarks" of a dwelling; it was not a dwelling due to the lack of possessory interest at the time of the burglary. (Id.) However, the plain language of S.C. Code Ann. § 16-11-10, which defines a "dwelling house" with respect to the crime of burglary, contains no requirement of possessory interest or legal habitability. Other jurisdictions have interpreted a dwelling for purposes of the burglary statute broadly. *See People v. Aguilar,* 104 Cal. Rptr. 3d 420 (2010) (apartment damaged by fire

was dwelling pursuant to burglary statute even though victim had been ordered to leave and was allowed to return only to retrieve personal belongings at time of burglary); *People v. Rojos* (1995) 31 Cal.App.4th 611, 614–615 (occupant need not have possessory right to premises to render residence "inhabited dwelling house" and dispute over right to occupy premises, even if a matter for law enforcement, makes no difference as far as application of burglary statutes.); *Paul v. State*, 769 S.E.2d 396, 398 (Ga. 2015) (unauthorized entry into a vacant dwelling house of another may still constitute burglary.)

Further, Petitioner's argument lacks evidentiary support from the record, however. Petitioner provided no clear evidence of exactly what prohibitions were placed on Pepper's use of the property by Greenville County, or if, in fact, condemnation proceedings were commenced. Pepper testified he was ordered to pay a fine because DHEC had not yet certified the house as habitable, but the record is unclear whether he lacked property or possessory rights to the premises. According to Pepper, the house had been inspected by the time he returned, but the inspection had not yet been filed with the State. Certainly one could argue that once the house passed inspection, any suspended possessory rights returned. The inspection may have occurred before the break in; the record does not say.

As shown in trial testimony, however, even law enforcement recognized Pepper's property rights. Pepper had the interest and power to enlist Crawford's help to survey the property while he was in jail. In fact, the police allowed her entry to the home to place the monitor for Pepper. (R. p. 12, lines 4-12.) The officers who responded to the scene that night called Pepper in jail before they entered his house to ask if he knew Petitioner or if he had given anyone permission to be in the home. When Pepper responded in the negative, the officer asked

permission to move forward with the investigation and to bring in a K9 to conduct a search. (R. pp. 77-78).

Pepper is the title owner and occupant of the home broken into on November 13, 2013. (R. p. 9, lines 8-15.) Pepper's possessory interest was acknowledged and preserved by the deputies who responded to the scene when they called and asked his permission to enter the home. (R. p. 77, lines 2-9.) Despite his temporary absence from the home and the county's temporary prohibition of occupancy of the property, Pepper maintained his intent to return home. His intent is evidenced by his ownership of the home, his storage of his personal belongings in the home, his involuntary removal from the home, his request to his neighbor to watch over the house during his incarceration, and finally, his actual return to the home when we was released on bond.

In viewing the evidence in the light most favorable to the State, the record reflects more than enough competent evidence to support jury's finding the homeowner had intent to return to the property, regardless of the pending DHEC certification, thereby satisfying all the elements of S.C. Code Ann, §16-11-311, burglary in the first degree.

CONCLUSION

In conclusion, the State requests this Court deny certiorari. In particular, and for the reasons discussed above, the Court of Appeals was correct when it applied established case law concerning the definition of a dwelling house and the occupant's intent to return. For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
October 26, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2016-001938

THE STATE, ...RESPONDENT

v.

WILLIAM TRAVIS CALVERT, ... PETITIONER.

PROOF OF SERVICE

I, Pam Cooper, Legal Assistant, hereby certify that I have served the within Return to Petition for Writ of Certiorari, dated October 26, 2016, on Petitioner by depositing two copies of the same via interagency mail, addressed to Susan B. Hackett, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201-3332.

I further certify that all parties required by Rule to be served have been served. This 26th day of October, 2016.

Pam Cooper
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

October 26, 2016

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: The State v. William Travis Calvert
Appeal from Greenville County
Appellate Case No. 2016-001938

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the ***Return to Petition for Writ of Certiorari***, along with proof of service, which we submit for filing in the above-referenced case.

Sincerely,

Susannah R. Cole
Assistant Attorney General
S.C. Bar No. 68383

SRC/pjc
Enclosures

cc: Susan B. Hackett, Esquire, Appellate Defender
Honorable Jenny A. Kitchings
The Honorable W. Walter Wilkins, III, Solicitor, 13th Circuit
Trisha Allen, Victim Services