STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

APPELLANT,

V.

JOHN K. MASSEY,

RESPONDENT

APPELLATE CASE NO 2015-000431

INITIAL BRIEF OF RESPONDENT

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ISSUE PRESENTED

Appellant's Statement of the Issue

Did the circuit court judge abuse his discretion and commit a reversible legal error by dismissing the indictment for first-degree burglary prior to trial when the grand jury issued a facially-valid indictment for first-degree burglary in Respondent's case, and Respondent's actions supported an indictment for first-degree burglary in violation of S.C. Code Ann. § 16-11-311?

Respondent's Counterstatement of the Issue

Whether the trial judge properly quashed the indictment for first-degree burglary because, as a matter of law, the shed allegedly burglarized by respondent was not appurtenant to the dwelling because it was located on a different parcel of land owned by someone other than the victim?

STATEMENT

On March 20, 2014, a York County grand jury indicted respondent for criminal conspiracy, grand larceny, and first-degree burglary. R. ___. On April 17, 2014, the grand jury issued an amended indictment for first-degree burglary. R. ___. The State called the case to trial on January 26, 2015, before the Honorable Eugene C. Griffith, Jr. Tr. 1. T. Matthew Hogge and Jessica E. Holland represented the State. Tr. 1. Philip L. Smith represented respondent. Tr. 1. Judge Griffith quashed the State's first-degree burglary indictment and gave the State the opportunity to go forward on second-degree burglary. Tr. 82, l. 8 – 87, l. 17. The hearing concluded without any decision on whether the State would go forward. Tr. 86, l. 5 – 87, l. 21.

Nine days later, the State served its notice of appeal. R. ___ (Notice of Appeal dated Feb. 5, 2015). The next day, the Attorney General sent a letter to the Court of Appeals stating the solicitor had filed a post-trial motion and asking this Court to hold all deadlines in abeyance. R. ___ (Letter from Salley W. Elliott dated Feb. 6, 2015). On February 6, 2015, the solicitor filed in circuit court a "Post-Trial Motion." R. ___ (State's Post-Trial Motion). On November 9, 2015, Judge Griffith entered a written order denying the State's motion. R. ___ (Order Denying State's Post-Trial Motion). The next day, the State served another notice of appeal. R. ___ (Notice of Appeal dated Nov. 10, 2015).

ARGUMENT

The trial judge properly quashed the indictment for first-degree burglary because, as a matter of law, the shed allegedly burglarized by Respondent was not appurtenant to the dwelling because it was located on a different parcel of land owned by someone other than the victim.

In this case, the Court must decide how far the State may stretch the meaning of the word "dwelling" in our first-degree burglary statute. See S.C. Code Ann. § 16-11-311(A). The definition of "dwelling" turns on the meaning of "appurtenant." See S.C. Code Ann. § 16-11-310(2) (defining "dwelling") and § 16-11-10 (defining "dwelling house"). Judge Griffith concluded, as a matter of law, that the State could not overextend the meaning of "dwelling" to include a shed owned by someone other than the alleged victim and situated on a separate parcel of land from the house where the alleged victim slept. Tr. 78, l. 25 – 79, l. 19. Tr. 82, l. 8 – 83, l. 10. As a result of his ruling, Judge Griffith quashed the indictment for first-degree burglary but offered the State the opportunity to proceed on second-degree burglary. Tr. 83, l. 22 – 87, l. 21. The State declined and filed a notice of appeal. R. ___ (Notice of Appeal dated Feb. 5, 2015).

The Only Question Before This Court is One of Statutory Interpretation

In its brief, the State attempts to move the discussion away from Judge Griffith's interpretation of "dwelling" and describes his ruling as passing on the sufficiency of the evidence. This Court should ignore this portion of the State's argument. First, Judge Griffith's ruling is a legal interpretation and the only facts necessary to his decision were those available in the public records of land ownership, of which there was no dispute by the State. The defense provided the court with the land records showing the burgled shed was on a different parcel than the house where the alleged victim slept. R. ___ (Defendant's Ex. 2, 4). At no point did the

State dispute that someone else owned the shed, but made a legal argument that ownership did not matter. Tr. 76, l. 25 – 77, l. 13.

At the hearing, the State never contended that the question was not one of legal interpretation. Tr. 78, l. 25 – 87, l. 20. Judge Griffith asked, "Does anybody suggest it's a factual question?" Tr. 79, ll. 8 – 9. The defense replied that it was not. Tr. 79, l. 10. The State did not make any argument that it was a factual question and after Judge Griffith announced that he was reading the cases cited by the parties, the solicitor told the court, "That's all the state has, Your Honor." Tr. 79, ll. 8 – 19.

The next morning, the solicitor made a legal argument that the shed was "appurtenant" to the house. Tr. 81, l. 8 – 82, l. 7. Judge Griffith disagreed, and ruled that the shed could not be appurtenant to the house because it was owned by somebody else and on a different parcel from the residence. Tr. 82, l. 8 – 83, l. 10. During his ruling, Judge Griffith noted that he asked the parties whether it "was a factual question" and stated his conclusion that it was a "legal issue." Tr. 82, ll. 18 – 21.

Nine days after the conclusion of the hearing, the State filed its notice of appeal. R. ___ (Notice of Appeal dated Feb. 5, 2015). The next day, the Attorney General wrote a letter to this Court asking that its deadlines be placed in abeyance because the solicitor filed a post-trial motion. R. ___ (Letter from Salley W. Elliott dated Feb. 6, 2015). That same day, February 6, 2015, the solicitor filed in circuit court a "Post-Trial Motion." R. ___ (State's Post-Trial Motion). In its post-trial motion, for the first time, the State contended that Judge Griffith had improperly ruled on the sufficiency of the evidence. R. ___ (State's Post-Trial Motion). The State admitted in the post-trial motion that the shed sat on a parcel owned by someone else other than the alleged victim. R. ___ (State's Post-Trial Motion).

At the hearing, it was the State, not respondent, who called Callahan to testify about whether the shed was used as a business. Regardless, whether the shed was used as a business is irrelevant to Judge Griffith's ruling that the shed could not be appurtenant because it was on a separate piece of property. R. ___ (Order Denying State's Post Trial Motion). Tr. Tr. 82, l. 8 – 83, l. 10. Accepting the State's argument that Judge Griffith improperly passed on the sufficiency of the evidence would unecessarily avoid a legal ruling on uncontested facts and force the defendant to defend a much more severe charge that is not legally cognizable. This Court should ignore the State's diversionary arguments concerning the sufficiency of the evidence and focus squarely on the purely legal question concerning interpretation of the first-degree burglary statute.

"Dwelling" and "Appurtenant"

Judge Griffith correctly recognized that whether the State's indictment was sufficient turned on the definitions of "dwelling" and "appurtenant." The first-degree burglary statute requires entry of a "dwelling." S.C. Code Ann. § 16-11-311(A). Defining "dwelling," the burglary statute incorporates the ancient definition of "dwelling house" found in the general provisions of Title 16, Chapter 11. S.C. Code Ann. § 16-11-310(2). S.C. Code Ann. § 16-11-10. The definition of "dwelling house" found in section 16-11-10 controls the outcome of this case.

Section 16-11-10 states in full:

> With respect to the crimes of burglary and arson and to all criminal offenses which are constituted or aggravated by being committed in a dwelling house, 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 shall be deemed a dwelling house, and of such a dwelling house or of any other dwelling house **all houses, outhouses, buildings, sheds and erections which are within two hundred yards of it and are appurtenant to it or to the same establishment of which it is an appurtenance shall be deemed parcels.**

S.C. Code Ann. § 16-11-10 (emphasis added). For an outbuilding, like the one at issue here, to qualify as part of a dwelling house, it must meet two requirements. Id. First, it must be within 200 yards of the property where the victim sleeps. Id. Second, the outbuilding must be "appurtenant" to the property where the victim sleeps. Id. No dispute exists that the outbuilding in this case is within 200 yards of where the alleged victim sleeps; therefore, the scope of "appurtenant" controls. State v. Evans, 18 S.C. 137, 139 (1882) (holding that distance requirement and appurtenance requirement are distinct and both must be met). In Evans, the Court's interpretation of the statute was that it "required two things as essentially necessary to constitute the new statutory offense; the out-house in which the offense is committed must be within two hundred yards of the dwelling-house **and appurtenant to it.**" Id.

Respondent agrees with the State's conclusion from its research that South Carolina's courts have never addressed the issue of whether an outbuilding on a separate parcel belonging to another owner meets the definition of "appurtenant." Brief of Appellant at 10. In Evans, the Court described the codification of the common law offense of burglary which used the term "curtilage." Id. at 139-40. The Court noted that the statute dropped the word "curtilage" in favor of the distance requirement and the appurtenance requirement. Id.

The closest case to the one at bar appears to be State v. Sampson, 12 S.C. 567 (1880). In Sampson, the defendant was charged with burglarizing a mill-house located 75 yards from the dwelling house. Id. at 568. The mill-house was "on the opposite side of a public road, and was not inclosed. No one slept in it." Id. Applying the burglary statute, the Court said:

> Now, in order to bring this mill-house within the terms of this statute, it is not sufficient to show that it is situated within two hundred yards of the dwelling-house, but it must also appear that it is an appurtenance of the dwelling-house, or of the establishment of which the dwelling-house is itself an appurtenance. Of this there is no evidence whatever. It does not appear that the dwelling-house of the

> prosecutor was the appurtenance of a farm or plantation of which the mill was a part and parcel, nor does it appear what the character of the mill was, whether a merchant-mill or an ordinary mill attached to and forming a parcel of a farm or plantation.

Id. at 569-70.

In Sampson, even though the victim owned the dwelling house and the mill-house, they were not appurtenant because of the physical separation of a public road, which of course includes a legal boundary or legal separation because of the public's right of way in the road. Here, the dwelling-house and the shed were separated by the legal boundaries demarcating ownership. They were on separate parcels. If, as in Sampson, a dwelling-house and a mill-house separated by a public highway, but owned by the same person, were not appurtenant, then here a shed owned by somebody else and on a separate parcel cannot be appurtenant.

The State argues that Judge Griffith's "clearly erroneous" approach "would lead to an absurd result where residences and their adjoining buildings could be burglarized without significant consequence, so long as the possessor was not the titled owner." Brief of Appellant at 14. Respondent replies that it will be the rare case that an owner of a home will not also own the adjoining buildings where he keeps his belongings. The absurd result would be a defendant convicted of first-degree burglary for robbing a business without realizing that the owner lived on a separate nearby parcel.

The PCR case of Padgett v. State supports the proposition that separate parcels means that second-degree burglary is the proper offense. 324 S.C. 22, 484 S.E.2d 101 (1997). In Padgett, the first-degree burglary indictment alleged the defendant broke into the dwelling of a man named Richardson. Id. at 28-29, 484 S.E.2d at 104. In fact, the building was a barn where no one lived. Id. The opinion notes that "there were no other buildings on the premises." Id. The Court held trial counsel ineffective for failing to challenge the indictment, stating that

"counsel did not recognize a distinction between Richardson's barn and a dwelling for first degree burglary purposes." Id. Like in Padgett, without any other buildings where the victim slept on the same parcel, the charge should have been second-degree burglary. Padgett also supports the trial court taking action in a motion to quash because the Court held trial counsel ineffective for failing to challenge the indictment.

While the State is correct that one does not have to be the titled property owner to be a victim of burglary, here we are not dealing with whether Mr. Callahan was a victim of burglary, but whether the scope of the first-degree burglary statute includes parcels legally separate from the victim's dwelling. None of the cases cited by the State for the proposition that ownership is irrelevant dealt with the question of separate parcels. In State v. Singley, the defendant claimed he could not be charged with burglary of a home in which he jointly owned. 392 S.C. 270, 272-73, 709 S.E.2d 603, 604 (2011). In State v. Brooks, the defendant challenged the indictment because it did not say which felony he intended to commit in the house. 277 S.C. 111, 112-13, 283 S.E.2d 830, 831 (1981). In State v. Clamp, the defendant was charged with breaking into a house, not an outbuilding, and raised on appeal that the State failed to prove the victim owned the premises. 225 S.C. 89, 101, 80 S.E.2d 918, 923-24 (1954). The Court ruled that the victim's ownership of the house was irrelevant because she clearly occupied the premises. Id. In State v. Alford, the defendant was charged with housebreaking, not burglary, for breaking into a storehouse and the Court reversed because of a variance between the indictment and the proof at trial. 142 S.C. 43, 140 S.E.2d 261 (1927). In State v. Trapp, a case from 1882, the defendant claimed that even though the indictment alleged he burgled the house of Mrs. Trapp who was property's legal owner, it was insufficient because it should have alleged that her husband was the legal owner because of sexist notions of property existing at the time. 17 S.C. 467 (1882).

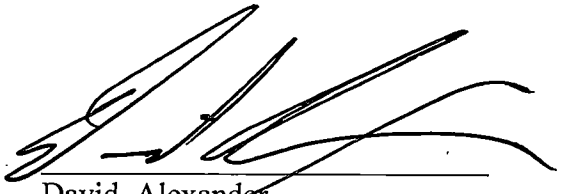
Even in 1882, this argument was rejected. Id. None of these cases expand the definition of "appurtenant" in the manner suggested by the State.

The State likely realized its case was problematic when it obtained an amended indictment. R. ___ (April 17, 2014, Indictment). The State's original indictment for first-degree burglary alleged respondent "did . . . willfully and unlawfully enter the outbuilding appurtenant to and within 200 yards of the dwelling of Kristopher Callahan. . . ." R. ___ (March 20, 2014, Indictment). The State reworded its second indictment to say respondent "did . . . willfully and unlawfully enter the dwelling of Kristopher Callahan, when he entered without consent the outbuilding appurtenant to and within 200 yards of the dwelling house establishment of Kristopher Callahan." R. ___ (April 17, 2014, Indictment). The rewording of the indictment demonstrates that, before trial, the State already had concerns about whether its indictment was legally sufficient.

Judge Griffith properly recognized that an outbuilding cannot be appurtenant to a dwelling if it is situated on a distinct and separate parcel owned by someone other than the victim. Penal statutes must be strictly construed against the State. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) ("Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant."). This Court should not expand the definition of first-degree burglary to include buildings owned by people other than the victim and located on a separate parcel of land.

CONCLUSION

For the foregoing reasons, this Court should affirm.



David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

This 26th day of January, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Respondent and Designation of Matter in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Respondent and Designation of Matter have been served on John Kenneth Massey, Jr., #305341, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 26th day of January, 2017.

David Alexander
Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 26th day of January, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.