STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Beaufort County

R. Scott Sprouse, Circuit Court Judge

SHERMAN MYERS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-002054

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Trial counsel erred in failing to explain to petitioner the elements and nature of the offense of first degree burglary charged against him.

STATEMENT

Petitioner Sherman Myers pled guilty to first degree burglary during the November 2014 term of the Beaufort County General Sessions Court before Judge W. Thomas Cooper, and was sentenced to imprisonment for a period of fifteen years. App. 1-15. Attorney Jessica Saxon represented appellant at the plea proceeding, and Assistant Solicitor Julie Kate Keeney appeared on behalf of the state. Petitioner did not enjoy the benefit of a direct appeal in the case.

On April 6, 2015, petitioner filed a PCR application with the Beaufort County Office of the Clerk of Court. App. 17-31. The respondent completed a Return that was served and filed on February 3, 2016. App. 32-37.

A PCR hearing in the case was held on February 13, 2017, at the Beaufort County Courthouse before Judge R. Scott Sprouse. App. 38-61. Petitioner was present at the hearing and represented by James K. Falk, and Assistant Attorney General Ruston Neely appeared on behalf of the state.

On September 14, 2017, Judge Sprouse signed an Order of Dismissal in the case. App. 63-68.

Petitioner appealed Judge Sprouse's Order of Dismissal. This petition follows.

ARGUMENT

Trial counsel erred in failing to explain to petitioner the elements and nature of the offense of first degree burglary charged against him.

During the plea proceeding, the solicitor apprised the plea judge of the facts of the case by explaining that on March 30, 2011, petitioner went to the homeowner's residence located in Beaufort County and took a pressure power washer that was "on the side of the garage" [from] "sitting in the garage." App. 9, lines 5-13. Apparently, the state secured two confessions from petitioner in the case. App. 9, l. 16-17. Also, petitioner had two prior burglary convictions at the time of the plea proceeding. Ap. 9, l. 18 -20.

During the PCR hearing held in the case, petitioner testified in effect that he never received clarity with respect to whether he was truly guilty of first degree burglary based on where the item (pressure power washer) that was allegedly attempted to be taken was located, i.e., outside the garage, of the Moss dwelling in question, which in turn meant that petitioner did not "enter" a "dwelling." Petitioner's PCR testimony follows:

> A: I didn't get the fully understanding about the first degree, what was put on by charging me with the first degree, because I never entered [the homeowner's] garage. The pressure washer was at the garage...breaking up outside of the garage door. And she never... explained it to me fully. App. 42, l. 19-23.

Petitioner was adamant about the fact that "[he] never entered in the garage or the residence, because the pressure washer was outside of the garage door...[and that his charge was] ...then enhanced the charge to make it first degree burglary." App. 43, l. 4-9. Petitioner stated that it was his understanding "that [he had to] go inside the plane of the house to get charged with first degree burglary." App. 43, l. 10-16; App. 44, l. 13-18. Petitioner believed there was some significance attached to whether the pressure washer was located inside the

garage or outside the garage, and that this should have had some bearing on which degree of burglary that he should have been charged with in the case because according to petitioner's position, the item was outside the garage and he claimed did not enter the garage. App. 45, l. 8-19; App. 47, l. 5-6; Ap. 43, l. 4-9.

Trial counsel testified at the hearing and explained that she informed petitioner that the item was in the garage, which "was attached to the home with a door from the garage into the dwelling...as a portion of the dwelling," and that the homeowner alleged the power washer was in the garage. App. 55, l. 15-23; App. 58, l. 13-18.

The PCR judge ruled that the plea judge reviewed the burglary elements with petitioner at the plea proceeding and that "[a]ny error of counsel to properly advise petitioner of an element of burglary first degree requir[ing] entrance into a dwelling was cured by the plea judge's colloquy." App. 66-67.

In the case at bar, there were conflicting recollections on the issue of whether the item removed was located in the garage or sitting outside by the garage, which was admitted to by the solicitor at the plea proceeding at App. 9, lines 10-12, and noted by petitioner, who stated he never entered the garage. Whether the side of the garage constituted a "dwelling" that could be "entered" within the meaning of the burglary statute; and whether counsel, who carelessly characterized the case as an entrance into the garage was accurate, became the chief issue at PCR. The question arose as to whether counsel was aware of and/or explained to petitioner how the distinction of outside the garage versus or inside the garage mattered with respect to proof of the elements of the first degree burglary charge lodged against him.

In State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002), where the Court held that a screened porch met the statutory definition of a dwelling, the meaning of a dwelling was described as follows:

> Under S.C. Code Ann. § 16-11-311(A)(Supp.2001), 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 entering is accompanied by an aggravating circumstance.
>
> For the purpose of burglary, a "dwelling house" is defined by S.C. Code Ann, § 16-11-10 (1985) as follows:
>
> 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 or 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.

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 (Supp. 2001). See State v. Stone, supra. Furthermore, in Stone, the Court cited to People v. Ingram, 40 Cal. App. 4th 1397, 48 Cal. Rptr2d 256 (5th Dist. 1995) and People v. Moreno, 158 Cal. App.3d 109, 204 Cal. Rptr 17 (1984), for the finding that a garage, which is under the same roof and functionally interconnected with and immediately contiguous to other portions of the house would lend credence to the conclusion that it (a garage) is part of a house and thus defined as a dwelling. However, the question remains as to whether any space outside the garage qualifies as a dwelling for which petitioner could have been found guilty of entering within the meaning of the statute. Hence, the problem here arose as to whether the elements of burglary were satisfied and whether

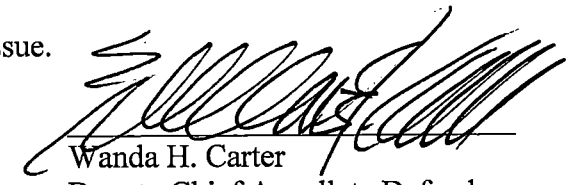
counsel explained how the elements of burglary (dwelling and entering) might not have been satisfied in the case. The prosecution must prove all elements of the offense charged beyond a reasonable doubt. Jackson v. Virginia, 403 U.S. 307 (1979).

Clearly, it appeared that counsel erred in failing to explain to petitioner that if the item was removed from outside the garage, the elements of burglary might not have been met as there was no "entering" into a "dwelling" because the outside the garage is not a dwelling; and without this information, petitioner could not have made an informed decision as to whether he desired to challenge the offense charged against him via a trial on this issue or enter a guilty plea regardless of this potential challenge on the "dwelling" and entering "elements" on the burglary charge. A plea is valid only if it represents a voluntary and intelligent choice among alternative courses of action open to a defendant. North Carolina v. Alford, 400 U.S. 25 (1970). Without an awareness of the option of a trial to challenge the charge of first degree lodged against him based on proof of the elements discussed above, then petitioner's plea was uninformed and thus involuntarily given, and counsel's representation prior to the plea proceeding in failing to bring the elements of burglary matter to petitioner's attention constituted deficient representation in violation of the Sixth Amendment guarantee to competent counsel in a criminal (plea proceeding) case. (See also Hill v. Lockhart, 484 U.S. 52 (1984).

In order to qualify one's plea as given voluntarily and intelligently, a defendant must be aware of the nature and crucial elements of the offense charged. See Pittman v. State, 337 S.C. 597, 524 S.E.2d 623 (1999); Barnett v. State, 352 S.C. 589, 576 S.E.2d 144 (2003). Here, trial counsel erred in failing to explain to petitioner the elements of the offense of burglary charged against him and but for the omission, a reasonable probability exists that petitioner might have opted for a trial by jury rather than agreeing to enter a guilty plea in the case.

CONCLUSION

Based on the foregoing argument, counsel for petitioner would request that this Court grant the petition on the above-raised issue.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Honorable R. Scott Sprouse, Circuit Court Judge

SHERMAN MYERS,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Christian Saville, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Sherman Myers, #300067, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 29th day of May, 2018.

Wanda H. Carter
Deputy Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 29th day of May, 2018.

ATTORNEY FOR PETITIONER

(L.S)
Notary Public for South Carolina
My Commission Expires: 10/30/2022.