STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

On Writ of Certiorari to Florence County
Perry H. Gravely, Post-Conviction Relief Judge
R. Lawton McIntosh, Trial Court Judge

Appellate Case No. 2018-001331

MCIVER FEAGIN,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief court err as a matter of law in finding probation revocation counsel was ineffective for failing to argue, at Feagin's probation revocation hearing, his original sentence was unlawful so the full sentence should not be revoked, where the original sentence had become the law of the case and, in any event, second-degree burglary (non-violent) existed in the pre-Omnibus code as section 16-11-312(A), and therefore, Feagin's fifteen-year sentence was correct?

STATEMENT OF THE CASE

Respondent McIver Feagin (Feagin) was indicted by the June 2010 term of the Florence County Grand Jury for first-degree burglary (2010-GS-21-681). William E. Grove, Esquire, represented Feagin on this charge. On September 21, 2010, Applicant entered a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), to second-degree burglary (non-violent). The Honorable Thomas A. Russo sentenced Feagin to confinement for fifteen years suspended upon time served (279 days) and five years' probation. On December 10, 2012, Feagin again appeared before Judge Russo for a probation violation, and Judge Russo revoked his probation in full. Feagin was represented by William E. Grove, Esquire, during his probation hearing.

A notice of appeal of the probation revocation was filed on Applicant's behalf, and an appeal was perfected pursuant to Anders v. California, 378 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal. State v. Feagin, Op. No. 2014-UP-460 (filed on December 17, 2014). The Remittitur was issued on January 13, 2015.

On January 8, 2015, Feagin filed an application for post-conviction relief alleging probation revocation counsel was ineffective. Petitioner made its Return on January 17, 2017, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on November 17, 2017, at the Florence County Courthouse. Feagin was present at the hearing and represented by Jonathan D. Waller, Esquire. Lindsey A. McCallister, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

The post-conviction relief court granted relief by order dated December 1, 2017, and filed December 4, 2017, was ineffective for failing to argue, at Applicant's probation revocation hearing, the sentence imposed at Applicant's guilty plea was unlawful, and therefore, Applicant's entire sentence should not be revoked. On December 18, 2017, Petitioner filed a

motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP. Through counsel, Feagin filed a response to the motion on January 3, 2018. On January 8, 2018, Respondent filed a reply. The post-conviction relief court denied Petitioner's motion to reconsider by written order filed July 5, 2018.

Respondent timely filed its notice of appeal on July 23, 2018. This petition for writ of certiorari follows.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court erred as a matter of law in finding probation revocation counsel was ineffective for failing to argue, at Feagin's probation revocation hearing, his original sentence was unlawful so the full sentence should not be revoked, where the original sentence had become the law of the case and, in any event, second-degree burglary (non-violent) existed in the pre-Omnibus code as section 16-11-312(A), and therefore, Feagin's fifteen-year sentence was correct, and his counsel was not ineffective for failing to argue otherwise.

At the evidentiary hearing, Feagin argued his fifteen-year sentence is invalid because second-degree burglary (non-violent) did not exist as an offense in South Carolina until the passage of the Omnibus Crime Reduction and Sentencing Reform Act ("Omnibus") on June 2, 2010. Feagin argued, and this Court found, probation revocation counsel was ineffective for failing to argue Feagin's original sentence was improper, and therefore, only up to ten years should be revoked, rather than the full fifteen.[1] App. p. 89.

A. The PCR court erred in finding probation revocation counsel ineffective because the fifteen-year sentence had become the law of the case by the time of revocation hearing.

At the evidentiary hearing, probation revocation counsel testified the time period to file a motion to reconsider Feagin's sentence or to appeal the guilty plea had long since run out by the time he represented Feagin on his probation violation in December 2012. App. p. 84. Further, Feagin did not argue or present any evidence he attempted to appeal the guilty plea or the fifteen-year sentence or make an allegations against his counsel for the plea itself. App. pp. 59-60, 71-74. The PCR court specifically found the probation revocation hearing was not the proper forum to make a challenge to the original sentence. App. p. 89. Feagin's sentence, therefore, was the law of the case by the time he was arrested for probation violations, and his probation revocation counsel cannot be ineffective for failing to argue the sentence was incorrect.

[1] Feagin did not argue probation revocation counsel should have contested the violation; the issue was solely one of mitigation as multiple violations were clearly established.

In State v. Lee, Lee pleaded guilty and was sentenced to ten years' imprisonment suspended to a five-year probationary period for ABWIK to begin upon his release from the sentence he was then serving for a separate resisting arrest-assault on an office charge. 350 S.C. 125, 128, 564 S.E.2d 372, 374(Ct. App. 2002). Lee was subsequently paroled and began serving his probationary sentence for the ABWIK on the same day. Id. After Lee's probation was revoked, he appealed and argued the plea court had no authority to issue his original sentence since it required him to be on probation and parole at the same time, and therefore, the circuit court lacked subject-matter jurisdiction to revoke his probation because his underlying, original sentence was erroneous. Id. at 132, 564 S.E.2d at 376. The Court of Appeals found this argument was without merit because "the statutory authority of the sentencing court to issue the underlying sentence could have been challenged in a motion to reconsider the sentence, on direct appeal, or as a defense to the probation revocation proceedings. Lee made no such challenge. Thus, the sentence [was] the law of the case." Id. at 132-33, 564 S.E.2d at 576.

Similarly, Feagin did not challenge his sentence in a motion to reconsider or on a direct appeal,[2] and the fifteen-year sentence became the law of the case. App. pp. 59-60, 74. Probation revocation counsel cannot be ineffective for failing to object to the revocation of fifteen years when, by that time, Feagin had waived any objections he may have had to such sentence. Accordingly, the PCR court's decision granting relief should be reversed.

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[2] The Court in Lee held the allegedly illegal sentence should have been raised as a defense to the probation violation because Lee argued his time on probation should not have started until his parole was finished. 350 S.C. at 132, 564 S.E.2d at 476. Here, Feagin's allegedly illegal sentence would not be a defense to his parole violations, which included having contact with the victim and failing to report to his parole officer, so probation revocation counsel cannot be ineffective for failing to raise the issue in that capacity either.

B. Regardless of whether Feagin had waived any objection to his allegedly illegal sentence by failing to file a motion to reconsider or appeal from the guilty plea, second-degree burglary (non-violent) existed in the pre-Omnibus code as section 16-11-312(A), and therefore, Feagin's fifteen-year sentence was correct, and his counsel was not ineffective for failing to argue otherwise.

Feagin contends, and the PCR court found, the crime of second-degree burglary (non-violent) did not exist prior to the enactment of the Omnibus Crime Reduction and Sentencing Reform Act (Omnibus) on June 2, 2010, and therefore, Feagin should have received only a ten-year sentence as a result of his guilty plea. App. pp. 86-88. However, the burglary statute in effect at the time of Feagin's plea *did* make a distinction between violent and non-violent offenses, when read in combination with the statute defining violent crimes for purposes of parole eligibility. Section 16-11-312 of the 2009 South Carolina Code of Laws read as follows:

> (A) A person is guilty of burglary in the second degree if the person enters a dwelling without consent and with intent to commit a crime therein.
> (B) A person is guilty of burglary in the second degree if the person enters a building without consent and with intent to commit a crime therein, and either:
> (1) When, in effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:
> (a) Is armed with a deadly weapon or explosive; or
> (b) Causes physical injury to any person who is not a participant in the crime; or
> (c) Uses or threatens the use of a dangerous instrument; or
> (d) Displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or
> (2) 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; or
> (3) The entering or remaining occurs in the nighttime.
> (C) Burglary in the second degree is a felony punishable by imprisonment for not more than fifteen years, provided, that no person convicted of burglary in the second degree shall be eligible

> for parole except upon service of not less than one-third of the term of the sentence.

This section clearly sets out two distinct set of criteria by which a person may be convicted of burglary second-degree. The first set is the baseline, contained in section 16-11-312(A), and the second set is contained in section 16-11-312(B), which includes all of the elements of (A) but adds additional aggravating factors. Those factors include acts of violence such as being armed with, using, or threatening to use a weapon; having a criminal history of two or more previous burglary convictions; and/or committing the burglary at night.

Combined with Section 16-1-60 of the 2009 South Caroline Code of Laws, which defined violent crimes to include "burglary in the second degree *(Section 16-11-312(B)*," the existence of two distinct subsections in section 16-1-312 clearly shows section 16-11-312(A) was meant to be classified as a non-violent offense. S.C. Code Ann. § 16-1-60 (2009) (emphasis added). However, prior to the enactment of the Omnibus, a conviction under either section was punishable by the same sentence of up to fifteen years' imprisonment. Feagin therefore *could* plead guilty to a non-violent second-degree burglary and still properly receive a sentence of fifteen years, even under the pre-Omnibus burglary statute. The amendments made to section 16-11-312 by the Omnibus did not create an entirely new offense, but rather simply reduced the maximum penalty for the non-violent version of the offense to ten years. Section 16-11-312(C) now reads:

> (1) Burglary in the second degree pursuant to subsection (A) is a felony punishable by imprisonment for not more than ten years.
> (2) Burglary in the second degree pursuant to subsection (B) is a felony punishable by imprisonment for not more than fifteen years. . . .

S.C. Code Ann. § 16-11-312(C) (2018).

However, Feagin argues because he pleaded guilty to a lesser-included offense after the Omnibus changes went into effect, then he was pleading guilty to the post-Omnibus non-violent second-degree burglary charge, which only carries up to ten years. App. pp. 61-63, 86-87. However, because the Omnibus included a savings clause, this argument is incorrect. Section 65 of the Omnibus specifically provided:

> The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, *does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law*, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, *all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any* pending or vested right, civil action, special proceeding, *criminal prosecution*, or appeal existing as of the effective date of this act, *and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws*.

(emphasis added). Feagin had already incurred criminal liability for this crime and his prosecution was pending at the time the Omnibus took effect, and therefore, the penalties existing under the 2009 statute remained in full force and effect as to him at the time of his plea.

A plea to a lesser-included charge cannot change the fact Feagin incurred liability for this criminal act at the time it was committed in December 2009. This Court has interpreted the Omnibus savings clause at issue here and found "[t]he General Assembly's inclusion of a savings clause demonstrates clear legislative intent to avoid disrupting pending or ongoing criminal prosecutions. To read the savings clause in any other way would result in a prohibited alteration of the statute's operation. . . . [The defendant] clearly incurred liability. . . at the time he committed the crime." <u>State v. Brown</u>, 402 S.C. 119, 127-28, 740 S.E.2d 493, 497 (2013).

At the PCR hearing, Feagin also relied on the CDR code listed on his sentencing sheet (#0080), which corresponds to "burglary, second-degree (non-violent)," as support for his argument he had pleaded to the ten-year, post-Omnibus offense because that CDR code did not exist until the enactment of the Omnibus in June 2, 2010. App. p. 62. The CDR code listed on a sentencing sheet, however, is not the controlling authority as to the offense or penalty for sentencing purposes. "Because the South Carolina Code of Laws is the controlling authority for classifications, definitions, and penalties for criminal offenses, a statute listed on a sentencing sheet, and not a CDR code, will dictate a criminal's sentence." State v. Bennett, 375 S.C. 165, 174, 650 S.E.2d 490, 495 (2007).

The statute listed on Feagin's sentencing sheet is simply 16-11-312; it does not specify subsection (A) or (B). This is consistent with the State's argument Feagin pleaded to the pre-2009 statute because both subsections were punishable by up to fifteen years without needing to specify. In the post-Omnibus version of the statute wherein different maximum sentences are incurred depending on whether the offense falls under subsection (A) and subsection (B). S.C. Code Ann. §§ 312(C)(1)-(2) (2018). The sentencing sheet further names Feagin's offense as "Burglary (Non-Violent) (After June 20, 1985) – Second degree." As discussed above, a non-violent second-degree burglary offense existed under the pre-Omnibus statute as section 16-11-312(A), which was in effect at the time of Feagin's arrest. However, the enactment of the Omnibus necessitated a new, distinct CDR code because a new penalty was created for the non-violent subsection of the offense. Because Feagin's plea was accepted and the sentence imposed after the enactment of the Omnibus, the inclusion of CDR code #0080 was most likely a mere scrivener's error. Regardless, pursuant to the rule of Bennett, the CDR code does not trump the statute listed on the sentencing sheet.

Therefore, because Feagin incurred liability for this crime at the time it was committed in December 2009, and because second-degree burglary (non-violent) existed as a potential lesser-included offense to first-degree burglary under the pre-Omnibus statutes, the fact the State offered Feagin a plea to a lesser-included offense does not change the potential sentence he was facing nor does a scrivener's error in the CDR code. As discussed above, the burglary statute in effect at that time, read in conjunction with the statute defining violent offenses, clearly made a distinction between a non-violent offense in section 16-11-312(A), and a violent offense in section 16-11-312(B), though it punished both offenses with a fifteen year maximum sentence. S.C. Code Ann. § 16-11-312(C) (2009). Therefore, Judge Russo properly sentenced Feagin to fifteen years, and his probation revocation counsel was not ineffective in failing to raise this argument during the revocation hearing.

CONCLUSION

For all the foregoing reasons, the State requests this Court grant this petition for a writ of certiorari and reverse the post-conviction relief court's decision finding probation revocation counsel ineffective and granting relief.

Respectfully submitted,

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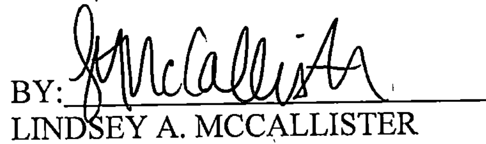
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General
S.C. Bar No. 79054



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2/15, 2019

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas
The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2018-001331

MCIVER FEAGIN, Petitioner,

v.

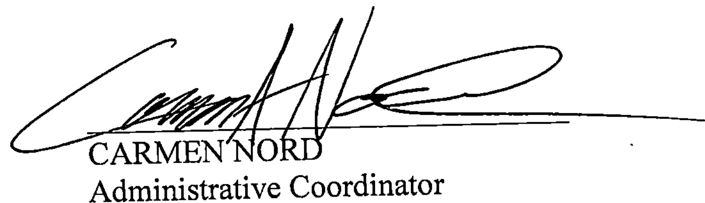
STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Writ of Certiorari** and the **Appendix**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Mr. Robert Michael Dudek
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 15th day of February, 2019



CARMEN NORD
Administrative Coordinator

ALAN WILSON
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February 15, 2019

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

Re: **<u>McIver Feagin v. State of South Carolina</u>**
Appellate Case No. 2018-001331
Lower Court Case No. 2015-CP-21-0055

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Petition for Writ of Certiorari and the appendix. By copy of this letter we are serving opposing counsel today.

Sincerely,

Lindsey McCallister
Assistant Attorney General
SC Bar No. 79054

LAM/can
Enclosures

cc: Robert Dudek, Esquire (2 copies)