STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from York County
Certiorari to the Court of Appeals
Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

APPELLANT,

V.

JOHN KENNETH MASSEY, JR.

RESPONDENT

APPELLATE CASE NO 2019-000842

RETURN TO PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR RESPONDENT

INDEX

PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

1.

Did the Court of Appeals err by affirming the trial judge's ruling quashing the facially-valid first-degree burglary indictment after finding the State's argument the trial judge did not have the authority to quash that indictment on sufficiency-of-the-evidence grounds was not properly preserved for appellate review where the State's argument regarding the trial judge's lack of authority to quash the indictment based on the purported insufficiency of the evidence was fundamentally correct as a matter of law, was raised to the trial judge prior to the swearing of the jury, and was ruled upon and incorrectly rejected by the trial judge on the merits?

2.

Notwithstanding the fact the trial judge did not have the authority to quash the facially-valid indictment on sufficiency-of-the-evidence grounds, did the Court of Appeals err by affirming the trial judge's fact-based ruling quashing the first-degree burglary indictment where, when viewed in a light most favorable to the State as necessarily required, the evidence and testimony presented during the pre-trial hearing supported a conclusion the burglarized building, which was situated just a few yards from the victim's residence and was appurtenant to it, fell within the statutory definition of a "dwelling" such that a first-degree burglary charge was legally and factually appropriate in Massey's case?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES

1.

Where the State admits that the issue on which it seeks certiorari was not raised until a post-trial motion "which would have ordinarily meant the argument was not raised in a sufficiently timely manner to preserve the matter for appellate review" (State's Pet. Cert. at 12), should this Court excuse the State's procedural default?

2.

Whether the Court of Appeals properly affirmed the trial judge's quashing of 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 OF THE CASE

On March 20, 2014, a York County grand jury indicted respondent for criminal conspiracy, grand larceny, and first-degree burglary. R. 60-67. On April 17, 2014, the grand jury issued an amended indictment for first-degree burglary. R. 64-65. The State called the case to trial on January 26, 2015, before the Honorable Eugene C. Griffith, Jr. R. 4. T. Matthew Hogge and Jessica E. Holland represented the State. R. 4. Philip L. Smith represented respondent. R. 4. Judge Griffith quashed the State's first-degree burglary indictment and gave the State the opportunity to go forward on second-degree burglary. R. 51, l. 8 – 56, l. 17. The hearing concluded without any decision on whether the State would go forward. R. 55, l. 5 – 56, l. 21.

Nine days later, the State served its notice of appeal. R. 57. 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. 59. On February 6, 2015, the solicitor filed in circuit court a "Post-Trial Motion." R. 1. On November 9, 2015, Judge Griffith entered a written order denying the State's motion. R. 3. The next day, the State served another notice of appeal. R. 58. On February 27, 2019, the Court of Appeals affirmed. State v. Massey, 426 S.C. 90, 825 S.E.2d 717 (Ct. App. 2019). The State now petitions this Court for certiorari after rehearing was denied below.

STANDARD OF REVIEW

The issue of interpretation of a statute is a question of law for the Court, which it reviews *de novo*. Univ. of S. California v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005); see also Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007); Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

ARGUMENT

1.

Where the State admits that the issue on which it seeks certiorari was not raised until a post-trial motion "which would have ordinarily meant the argument was not raised in a sufficiently timely manner to preserve the matter for appellate review" (State's Pet. Cert. at 12), this Court should not excuse the State's procedural default.

The Court of Appeals properly applied our error preservation rules and found that the State raised its argument concerning the trial judge's authority to quash the indictment too late. The State admits this procedural default in its brief. (State's Pet. Cert. at 12). But the State nevertheless begs this Court to excuse its procedural default because it comports with "the purposes of South Carolina's issue preservation requirements." (State's Pet. Cert. at 13). The State asks this Court to modify our issue preservation rules to create an exception that as long as a trial judge is given an opportunity to correct an error, even though such request is untimely, because nothing substantive happened to prevent the judge from correcting the error. Such an exception could have far-reaching and unforseen consequences.

This Court should not grant certiorari to give the State this free pass on issue preservation. In 1996, this Court did away with *in favorem vitae* review in death penalty cases. See State v. Torrence, 305 S.C. 45, 60-61, 406 S.E.2d 315, 324 (1991). This Court has consistently refused to adopt plain error, even though approximately forty-two (42) other states and the federal courts utilize it. See State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011). See also Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suff. J. Trial & App. Advocacy 179, 222 and n.223 (2012). Recently, this Court tightened its error preservation rules in PCR cases. See Mangal v. State, 421 S.C. 85, 805

S.E.2d 568 (2017). If this Court cannot excuse a procedural default in a case where a defendant might be executed, then it should not excuse the State's procedural default because a trial judge quashed a first-degree burglary indictment and the State declined the judge's offer to proceed on second-degree burglary. R. 51, l. 8 – 56, l. 17.

2.

The Court of Appeals properly affirmed the trial judge's quashing of 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.

The Court of Appeals correctly held that "a storage building unattached to a residence and located on a separate parcel of land is not 'usually considered as a necessary appendage of a dwelling-house.'" Op. at 5 *quoting* State v. Evans, 18 S.C. 137, 139 (1882). 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. Evans, 18 S.C. at 139 (1882). 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. 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.

Below, the State argued 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.

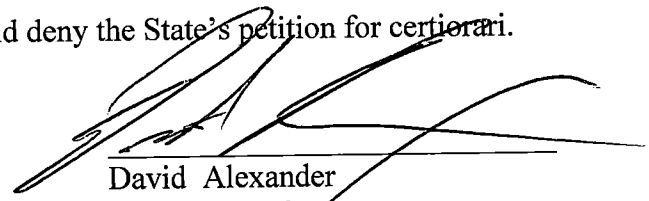
While the State is correct that one does not have to be the titled property owner to be a victim of burglary, here we are not dealing with whether Mr. Callahan was a victim of burglary, but whether the scope of the first-degree burglary statute includes parcels legally separate from the victim's dwelling. 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. 64-65. 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. 62-63. 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. 64-65. 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 grant certiorari to 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 deny the State's petition for certiorari.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of July, 2019.

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RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari and a copy of the Appendix 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 John Kenneth Massey, Jr., #305341, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 11th day of July, 2019.

David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 11th day of July, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 26, 2019