

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lancaster County

William Jeffrey Young, Circuit Court Judge

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**RECEIVED**

FEB 13 2013

Opinion No. 5052 (S.C. Ct. App. filed 11/21/2012)

**S.C. Supreme Court**

09-GS-29-1204.

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THE STATE,

RESPONDENT,

V.

MICHAEL DONAHUE,

PETITIONER

Appellate Case No. 2013-000087

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APPENDIX

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**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State, Respondent,

v.

Michael Donahue, Appellant.

Appellate Case No. 2010-157867

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Appeal From Lancaster County  
W. Jeffrey Young, Circuit Court Judge

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Opinion No. 5052  
Heard October 4, 2012 – Filed November 21, 2012

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**AFFIRMED**

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Deputy Chief Appellate Defender Wanda H. Carter and  
Appellate Defender Tristan M. Shaffer, both of  
Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney  
General John W. McIntosh, Senior Assistant Deputy  
Attorney General Salley W. Elliott, and Assistant  
Attorney General William M. Blich, Jr., all of Columbia;  
and Solicitor Douglas A. Barfield, Jr., of Lancaster, for  
Respondent.

---

**FEW, C.J.:** Michael Donahue pled guilty to burglary in the third degree. He  
appeals his sentence, arguing the circuit court erred in treating him as a second  
offender based on his previous burglary conviction in Georgia. We affirm.

Burglary in the third degree is defined in section 16-11-313 of the South Carolina Code (2003). Subsection 16-11-313(B) provides: "Burglary in the third degree is a felony punishable by imprisonment for not more than five years for conviction on a first offense and for not more than ten years for conviction of a second offense according to the discretion of the Court." Before accepting Donahue's plea, the circuit court ruled that his Georgia conviction triggered the enhanced sentencing range in subsection 16-11-313(B). The court sentenced Donahue to ten years in prison, suspended upon service of six years, and two years of probation.

The State argues Donahue waived his right to challenge the circuit court's ruling by pleading guilty. We disagree. A criminal defendant does not give up his right to challenge the circuit court's interpretation of a statute regarding his sentence simply by pleading guilty. *See Easter v. State*, 355 S.C. 79, 81-82, 584 S.E.2d 117, 119 (2003) ("Sentencing, although often combined with the admission of guilt in a hearing, is a separate issue from guilt and a distinct phase of the criminal process. Therefore, when Easter entered his guilty plea but objected to his sentence he did not enter an invalid, conditional guilty plea." (citation omitted)).

The State also argues Donahue waived his challenge when he told the circuit court he was guilty of, and was pleading guilty to, "burglary in the third degree second offense" and that he understood he faced up to ten years in prison. We disagree with this point as well. After Donahue's counsel presented to the circuit court the same arguments he now makes on appeal, counsel made it clear, and the circuit court acknowledged it understood, that Donahue challenged the court's interpretation of the statute and intended to appeal the ruling that he faced ten years. Under the circumstances of this case, we find Donahue did not waive his right to challenge the circuit court's interpretation of subsection 16-11-313(B).

In *State v. Zulfer*, 345 S.C. 258, 547 S.E.2d 885 (Ct. App. 2001), this court faced a similar question under the statute defining burglary in the first degree—subsection 16-11-311(A) of the South Carolina Code (2003). Subsection 16-11-311(A)(2) provides that what would otherwise be a second-degree burglary is elevated to first-degree if "the burglary is committed by a person with a prior record of two or more convictions for burglary . . . ." *See also* S.C. Code Ann. § 16-11-312(A) (2003) (defining second-degree burglary of a dwelling). We held that "prior record . . . of convictions" included out-of-state convictions:

Nowhere does the language of the statute limit a prior record of convictions for burglary or housebreaking to only those that occurred within South Carolina. In not so limiting a prior record of convictions, the plain language of our burglary statute permits an enhancement of the offense based on a prior record of out-of-state convictions for burglary . . . .

*Zulfer*, 345 S.C. at 262, 547 S.E.2d at 887.

Similarly, nothing in the language of subsection 16-11-313(B) limits a circuit court to considering only South Carolina offenses. Therefore, a circuit court must consider an out-of-state burglary conviction in determining the sentencing range for third-degree burglary.<sup>1</sup> 345 S.C. at 262-63, 547 S.E.2d at 887.

Donahue attempts to distinguish *Zulfer* by arguing that the word "offense" in subsection 16-11-313(B) has a different meaning than the word "convictions" in subsection 16-11-311(A)(2). We find no basis for the distinction. In subsection 16-11-311(A)(2), the legislature used the word convictions to refer to prior crimes, which would make a defendant eligible for sentence enhancement only if he had been convicted of the crime. In subsection 16-11-313(B), the legislature was referring to the subsequent crime—a situation in which the legislature and our courts typically use the term offense to describe a second or subsequent crime. Thus, the legislature had a valid reason to use different terms for the same purpose—enhancing a sentence based on prior convictions. *See Zulfer*, 345 S.C. at 263, 547 S.E.2d at 887 (recognizing that a purpose of subsection 16-11-311 is to punish recidivism by imposing "a stiffened penalty for the latest crime" (quoting *State v. Washington*, 338 S.C. 392, 396, 526 S.E.2d 709, 711 (2000))). As we stated in *Zulfer*, "had the legislature intended that a prior record of out-of-state convictions for burglary . . . could not be used for purposes of enhancement, it could easily have limited the statute to only South Carolina offenses." 345 S.C. at 262-63, 547 S.E.2d at 887. We find the use of the word offense in subsection 16-11-313(B) does not indicate the intent to limit the circuit court to the use of South Carolina crimes for enhancement. *Cf. State v. Breech*, 308 S.C. 356, 358-59, 417

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<sup>1</sup> Donahue argues on appeal that "[a] burglary conviction in Georgia is not the same as burglary third in South Carolina." However, because he did not present this argument to the circuit court, it is not preserved for appellate review. *State v. Bickham*, 381 S.C. 143, 147 n.2, 672 S.E.2d 105, 107 n.2 (2009).

S.E.2d 873, 875 (1992) (finding statute that defined a prior offense as "the violation of any law or ordinance of this State or any municipality of this State" limited recidivism enhancement to offenders with previous convictions for violations of South Carolina law), *superseded by statute*, Act No. 453, § 14, 1992 S.C. Acts 2402, *as recognized in State v. Tennyson*, 315 S.C. 471, 445 S.E.2d 630 (1994).

Moreover, Donahue's interpretation of subsection 16-11-313(B) would produce absurd results. *See State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention."). His definition of the word offense allows sentence enhancement under subsection 16-11-313(B) only when the defendant has a prior South Carolina conviction for burglary in the third degree. Under his interpretation, therefore, a prior South Carolina conviction for first-degree or second-degree burglary would not trigger the higher maximum sentence. Thus, a defendant with a prior conviction for a more serious burglary would be exposed to a lower maximum sentence than someone with a prior conviction for third-degree burglary. The result Donahue proposes is even more absurd because third-degree burglary is a lesser-included offense of first-degree and second-degree burglary. *See generally State v. Goldenbaum*, 294 S.C. 455, 365 S.E.2d 731 (1988) (recognizing third-degree burglary as a lesser-included offense of first- and second-degree burglary where the facts support it). Therefore, a person previously convicted of the greater offense would be subject to a lesser penalty, even though his prior conviction actually constituted third-degree burglary.

Finally, Donahue's interpretation would create an inconsistency between the first-degree and third-degree burglary statutes, which were enacted contemporaneously. Act No. 159, § 2, 1985 S.C. Acts 603, 604-06; *see Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992) ("In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction."). The legislature could not have intended that an out-of-state burglary conviction could be used to elevate a second-degree burglary to first-degree burglary, thereby increasing the defendant's exposure from fifteen years to a possible life sentence,<sup>2</sup> but could not be used to enhance a third-degree burglary

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<sup>2</sup> Compare S.C. Code Ann. § 16-11-312(C) (2003) (providing a fifteen-year maximum prison sentence for second-degree burglary) with § 16-11-311(B) (2003)

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defendant's sentence by five years. *See Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) ("We should consider . . . not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.").

**AFFIRMED.**

**WILLIAMS and PIEPER, JJ., concur.**

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(providing first-degree burglary is punishable by a maximum sentence of life imprisonment and a minimum sentence of fifteen years).

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MICHAEL DONAHUE,

APPELLANT

Appeal from Lancaster County  
William Jeffrey Young, Circuit Court Judge

Opinion No. 5052

Appellate Case No. 2010-157867

PETITION FOR REHEARING

Pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, the undersigned counsels would petition for rehearing in the above titled appeal because this Court may have misinterpreted legislative intent regarding enhanced sentencing under the third degree burglary statute, which was evidenced by its holding that appellant was correctly sentenced as a second offender under the statute because he committed burglary in Georgia previously, when it was clear that there were statutory sentencing enhancement limitations in place that would render an out-of-state or a non-burglary third offense inapplicable and unusable. Counsels would submit the following points in support of this position.

1.) This Court's rationale that the word "offense" as an enhancer under the third degree burglary statute was the equivalent of the enhancement language spelled out under the first degree burglary statute in support of its holding follows:

Donahue attempts to distinguish *Zulfer* by arguing that the word "offense" in subsection 16-11-313(B) has a different meaning than the word "convictions" in subsection 16-11-311(A)(2). We find no basis for the distinction. In subsection 16-11-311(A)(2), the legislature used the word convictions to refer to prior crimes, which would make a defendant eligible for sentence enhancement only if he had been convicted of the crime. In subsection 16-11-311(B), the legislature was referring to the subsequent crime—a situation in which the legislature and our courts typically use the term "offense" to describe a second or subsequent crime. ... We find the use of the word offense in subsection 16-11-313(B) does not indicate the intent to limit the circuit court to the use of South Carolina crimes for enhancement. Cf. *State v. Breech*, 308 S.C. 356, 358-59, 417.

2.) A third degree burglary conviction requires imprisonment for not more than five years for a first offense and for not more than ten years for a conviction on a second offense. See S.C. Code Ann §16-11-313 (B). Appellant was indicted for second degree burglary, but pled guilty to third degree burglary and received an enhanced sentence<sup>1</sup> due to a Georgia burglary conviction gained previously. On appeal, appellant argued that the words "second offense" under the third degree burglary statute referred to a prior South Carolina conviction for third degree burglary. However, this Court held that *State v. Zulfer*, 345 S.C. 258, 547 S.E. 2d 885 (Ct. App. 2001), was dispositive in the matter because per *Zulfer*, the requirement for enhancement under the first degree burglary statute, which is "a prior record of two or more convictions for burglary or housebreaking or a combination of both," meant that out-of-state burglary or housebreaking convictions applied sans any limitations.

3.) However, it was error for this Court to apply the *Zulfer* "intent of the legislature" rationale under the first degree burglary statute (S.C. Code Ann. 16-11-311) to the third degree burglary statute (S.C. Code Ann. 16-11-313) at issue in this case because the language and structure of the

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<sup>1</sup> Appellant was sentenced to ten years suspended upon the service of six years and two years probation as a second offender per his third degree burglary conviction

two statutes with respect to enhancement matters are different obviously. If the legislators had desired identical enhancement provisions for both statutes, then both enhancement provisions would have contained identical or similar enhancement language. For example, compare the following enhancement provisions from the two statutes in question:

**First Degree Burglary would require that:**

the burglary [be] committed by a person with a prior record two or more convictions for burglary or housebreaking or combination of both.

**Third Degree Burglary is enhanced:**

upward to ten years if a conviction on a second offense exists.

Clearly, the legislators intended different enhancements involving different past histories for defendants depending on which burglary charge one faced. For example, the enhancement language under the first degree burglary statute referred to “prior record/convictions” whereas the enhancement language under the third degree burglary statute referred to the existence of a “second offense” in order to increase sentencing. This Court’s finding that there was no “basis for the distinction” with respect to the word “offense” under the third degree burglary statute and the words “prior record/convictions” under the first degree burglary statute inadvertently overlooked the different language describing the two statutory enhancement provisions. The words “prior record/convictions” under the first degree burglary statute would recognize any prior conviction whether in-state or out-of-state as an enhancer, but the words “second offense” under the third degree burglary statute would speak to a South Carolina third degree burglary offense committed previously in order to trigger enhanced sentencing. Since these two different statutes are different in kind, different in proof, and different in nature, it follows logically that the enhancement provisions for these two different statutes would differ also. Moreover, if the legislators intended for sentencing enhancement under third degree burglary to be identical or similar to the first degree burglary enhancement provision, then they would have placed in the third degree burglary statute

language that was identical or similar to the enhancement language found in the first degree burglary statute.

4.) As a rule, legislative intent is adduced by giving words their plain and ordinary meaning. State v. Phillips, 2012 WL 5872601 (November 21, 2012). Appellant has done so. Additionally, this Court concluded that appellant's interpretation of the word "offense" would lead to absurd results; however, appellant has chosen not to question the wisdom of our legislators, but rather only to offer an interpretation of their statutes, especially since we have been admonished not to force a particular construction on a statutes. See again State v. Phillips, *supra*.

5.) Finally, this Court erred in ruling that the issue of whether the Georgia conviction qualified as a burglary third degree offense in South Carolina was not preserved for appellate review because a general objection is acceptable if said nature of the objection is contextually apparent. State v. Cherry, 353 S.C. 263, 577 S.E.2d 719 (2001). This appeal emanates from and is hinged and predicated upon the usage of appellant's previous Georgia burglary for enhancement. Counsel's objection to appellant's sentence via the role of Georgia burglary is the core of this appeal. Note that the Georgia burglary statute<sup>2</sup> is much broader than South Carolina's third burglary degree statute or any of South Carolina's burglary statutes. Therefore *even if* the enhancement portion of the statute is *not* limited to South Carolina convictions for burglary in the third degree, it would still be *inappropriate* to enhance his sentence based solely upon his conviction when there is no evidence in the record that appellant's Georgia burglary fell within the prohibited conduct of the statute. Compare State v. Lindsey, 355 S.C. 15, 583 S.E.2d 740 (2003), where the Court held that the trial judge erred in sentencing the defendant to LWOP by using a prior 1976 rape

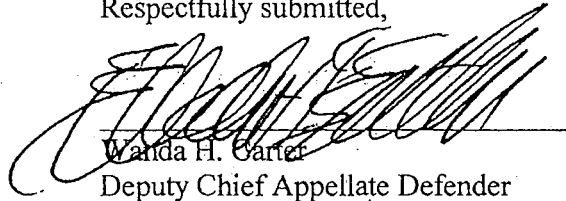
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<sup>2</sup> A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof. A person convicted of the offense of burglary, for the first such offense, shall be punished by imprisonment for not less than one nor more than 20 years. For the purposes of this Code section, the term "railroad car" shall also include trailers on flatcars, containers on flatcars, trailers on railroad property, or containers on railroad property.

conviction because the prior did not fall into the category (different elements) of a first or second degree criminal sexual conduct offense under South Carolina law.

WHEREFORE, inasmuch as this Court might have misinterpreted legislative intent in reference to enhanced sentencing under the third degree burglary statute, the undersigned counsels would thereby request a rehearing in order to revisit this issue in the case.

Respectfully submitted,



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This 6th day of December, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Lancaster County

William Jeffrey Young, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MICHAEL DONAHUE,

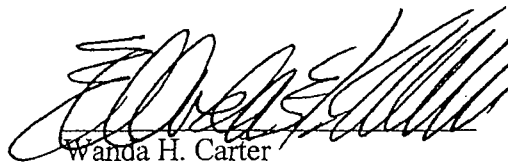
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CERTIFICATE OF SERVICE

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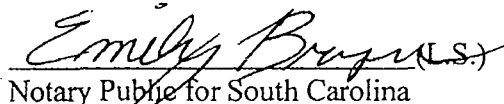
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of December, 2012.



Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 6th day  
of December, 2012.

  
Notary Public for South Carolina

My Commission Expires: November 16, 2022.

# The South Carolina Court of Appeals

The State, Respondent,

v.

Michael Donahue, Appellant.

Appellate Case No. 2010-157867

\_\_\_\_\_  
ORDER  
\_\_\_\_\_

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

\_\_\_\_\_  
*John Cannon, Jr.* C.J.  
\_\_\_\_\_  
*H. B. W.* J.  
\_\_\_\_\_  
*Daniel G. Pieper* J.  
\_\_\_\_\_

Columbia, South Carolina.

cc:  
William M. Blich, Jr.  
Wanda H. Carter  
Tristan M. Shaffer

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DEC 13 2012

SC OFFICE OF  
APPELLATE DEFENSE

**FILED**

*December 13, 2012*

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STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM LANCASTER COUNTY

William Jeffrey Young, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MICHAEL DONAHUE,

APPELLANT

---

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA  
COURT OF GENERAL SESSIONS  
COUNTY OF LANCASTER  
2009-GS-29-1204

STATE OF SOUTH CAROLINA  
VS.  
MICHAEL DONAHUE

LANCASTER, SOUTH CAROLINA  
MARCH 30, 2010

BEFORE THE HONORABLE WILLIAM JEFFREY YOUNG

APPEARANCES

FOR THE STATE: TREY COOK  
FOR THE DEFENDANT: MIKE LIFSEY  
REPORTED BY: MICHAEL C. WATKINS  
OFFICIAL COURT REPORTER

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1 MR. COOK: Your Honor, it's my understanding that the  
2 defendant is going to plead guilty.

3 THE COURT: Is that correct, Mr. Lifsey?

4 MR. LIFSEY: Yes, sir. Your Honor, he is going to  
5 plead guilty to burglary in the third degree. Let me just  
6 put one thing on the record in regards to the punishment  
7 range in this defense. As the Court knows the statute for  
8 a burglary in the third degree says -- under 16-11-313,  
9 which is the burglary in the third degree statute, Your  
10 Honor, the statute says -- and I'll read from part B,  
11 burglary in the third degree is a felony punishable by  
12 imprisonment for not more than five years for a conviction  
13 on a first offense, and for not more than ten years for a  
14 conviction on a second offense according to the discretion  
15 of the Court. He's pleading to burglary in the third  
16 degree. My client admits he has a prior conviction from  
17 the State of Georgia for burglary. I have no idea what  
18 degree or even if the Georgia statute even encompasses the  
19 degrees, but he has a prior conviction for burglary from  
20 the State of Georgia which he admits to. The solicitor  
21 contends that that can be used for enhancement purposes, I  
22 disagree and would argue that point only.

23 THE COURT: What makes you believe that it has to be a  
24 South Carolina conviction?

25 MR. LIFSEY: Well, the language in the statute. First

1 of all, I guess, there is a couple of points I would raise.  
2 First of all, the statute doesn't make any mention of out  
3 of state convictions as opposed to for example the drug  
4 statutes which specifically include out of state  
5 convictions and federal convictions. The life without  
6 parole statute is specifically includes out of state  
7 convictions, the DUI statute that specifically includes out  
8 of state convictions. I believe -- my belief is that if  
9 the legislature had intended to include out of state  
10 convictions they would have said that and they do not.  
11 Now, I am aware unfortunately -- I can't remember, it  
12 starts with a Z, the Zolfer case, State versus Zolfer, Your  
13 Honor, and it concerned the enhancement from burglary  
14 second to burglary first degree which has to do with a  
15 burglary committed by a person with a prior record of two  
16 or more of burglary or housebreaking or two or more of both  
17 and in that case the State -- the court of appeals says  
18 that an out of state conviction can be used for enhancement  
19 purposes in that statute. But you've got to look at the  
20 language, the language is different. I don't think it's as  
21 much in state or out of state as much I believe the plain  
22 wording in the statute requires that it be a South Carolina  
23 conviction for burglary in the third degree. The second  
24 statute after the burglary first statute encompasses the  
25 prior burglaries is broad, it says a person with a prior

1 record of two or more convictions for burglary or house  
2 breaking or a combination of both as opposed to the  
3 language in subsection B that says for a conviction of a  
4 second offense specifically. So I guess my contention is  
5 that you would need a -- first of all I guess my contention  
6 would be you could not use an out of state conviction, I  
7 guess that is the most basic way to put it.

8 THE COURT: I just haven't found in my term as a  
9 legislator and as a judge that we have been so possessive  
10 of our crimes that we make you do them in this state, and  
11 therefore I am of the opinion that when it says  
12 specifically that a -- for a subsequent second offense it  
13 doesn't matter whether it was in Monroe, Fort Lawn or Los  
14 Angeles, it's a conviction and it will be considered for  
15 enhancement purposes.

16 MR. LIFSEY: Thank you, Judge. And let me just put --  
17 because I want to cover myself further down the road that  
18 obviously we do not have conditional guilty pleas in South  
19 Carolina, the case law is clear, however it's my legal  
20 opinion whether somebody agrees with me or not down the  
21 road, I guess, that we are not conditionally pleading  
22 guilty. He is pleading guilty without condition of  
23 burglary in the third degree and it's my view that the  
24 issue of enhancement is a sentencing provision in the  
25 discretion of the Court, so it is my intention to preserve

1 that issue for appeal.

2 THE COURT: If another court wants to review it and  
3 says that I should not have given him up to ten years then  
4 that is within their discretion.

5 MR. LIFSEY: Thank you very much, Judge. With that  
6 understanding I would like to bring my client forward and  
7 we can stand up here and enter a plea.

8 MR. COOK: Please the Court?

9 THE COURT: Yes, sir.

10 MR. COOK: Case number 2009-GS-29-1204, State versus  
11 Michael Scott Donahue, he's been indicted for burglary  
12 second degree, he's pleading guilty today to burglary third  
13 degree. No recommendation from the State, Your Honor.

14 THE COURT: And you consider this to be a second --

15 MR. COOK: I consider this to be a second offense, I  
16 put the CDR code as a second offense of burglary third on  
17 the sentence sheet.

18 THE COURT: Mr. Lifsey, you represent Mr. Michael  
19 Scott Donahue?

20 MR. COOK: Yes, sir, I do.

21 THE COURT: And have you had an opportunity to explain  
22 to him the charges in the indictment and the possible  
23 punishment he faces and his constitutional rights?

24 MR. LIFSEY: Yes, sir, I have.

25 THE COURT: And do you believe he has understood what

1 you have told him?

2 MR. LIFSEY: Yes, sir, I do.

3 THE COURT: And does he wish to plead guilty or not  
4 guilty?

5 MR. LIFSEY: He wishes to plead guilty.

6 THE COURT: And do you agree with his decision to  
7 plead guilty?

8 MR. LIFSEY: Yes, sir, I do.

9 THE COURT: Do you believe that if this case were to  
10 go to trial that there would be a substantial likelihood  
11 that he would be found guilty beyond a reasonable doubt?

12 MR. LIFSEY: Yes, sir, on the burglary third I do,  
13 yes, sir.

14 THE COURT: Now, Mr. Donahue, I need to ask you some  
15 questions to make sure that you're entering into this plea  
16 freely and voluntarily and knowingly and intelligently of  
17 the charges contained in the indictment and the possible  
18 punishments that you face, but the first question I have is  
19 are you under the influence of alcohol or drugs?

20 THE DEFENDANT: No, sir, I'm not.

21 THE COURT: Are you taking any medication that would  
22 cloud your judgment?

23 THE DEFENDANT: No, sir.

24 THE COURT: Are you aware of any physical, emotional  
25 or nervous condition that would make it so that you can't

1 understand what's happening in this courtroom today?

2 THE DEFENDANT: No, sir.

3 THE COURT: Now, it's my understanding that you're  
4 wanting to plead guilty to burglary in the third degree  
5 second offense; is that correct?

6 THE DEFENDANT: Yes, sir Your Honor.

7 THE COURT: In fact, have you been convicted of  
8 burglary in the State of Georgia?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: And what was the date of that conviction?

11 THE DEFENDANT: It was 2007, I'm not exactly sure of  
12 the date. I'm not exactly sure but it was definitely in  
13 July, I mean, 2007.

14 THE COURT: What punishment did you receive?

15 THE DEFENDANT: I received time served, I was in jail  
16 eight months, or seven months and some change and the  
17 balance of probation for eight years.

18 THE COURT: So now you're looking at a possible  
19 probation violation in Georgia?

20 THE DEFENDANT: Yes, sir, more likely than probably.

21 THE COURT: Well, this indictment that you're pleading  
22 guilty to says that Michael Scott Donahue did in Lancaster  
23 County on or about May 8th of 2009 did enter the building  
24 of South 200 Flee Market without consent and with the  
25 intent to commit a crime in the building when entering --

1 in the indictment it says it's nighttime but under the  
2 charge of burglary in the third degree it would not require  
3 it would be at night time, do you understand that?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you agree with the facts as stated in  
6 the indictment concerning the burglary even though it is in  
7 the daytime?

8 THE DEFENDANT: Yes, sir, I agree.

9 THE COURT: Mr. Solicitor, what are the facts?

10 MR. COOK: Your Honor, this incident occurred between  
11 around 5:30 on May 27th of 2009 and around 8:00 on May 28  
12 of 2009 at the South 200 Flee Market here in Lancaster  
13 County. Mr. Jackie Jordan is the owner of that flea market  
14 and has an employee named James Simpson, they left the flea  
15 market that evening on May 27th around 5:30, everything was  
16 intact, everything was fine. To give you a little bit of  
17 background it's kind of like a breezeway setup, within the  
18 middle he's got a concession stand and his office and a  
19 storage building that is enclosed. When they got back the  
20 next morning there was a hole in the ceiling where the  
21 insulation had been cut, somebody had come down into the  
22 concession stand, made entry into Mr. Jordan's office and  
23 stole various things, freon and a pump and some checks were  
24 also missing out of the office. The Lancaster County  
25 Sheriff's Office was dispatched, took pictures of the area,

1 did not notice any doors where forced entry had been made  
2 or windows, it looks like they came in the hole and went  
3 back out the hole in the ceiling. They ended up arresting  
4 Mr. Donahue the next day on an unrelated charge and while  
5 he was incarcerated he did give a statement in this case,  
6 he admitted to -- he said there was another guy with him --  
7 but to reaching in the hole in the ceiling and grabbing the  
8 stuff that the guy was handing him and putting it on a push  
9 cart and rolling it across the field into a wood line and  
10 that's what lead him to being charged in this case, Your  
11 Honor, for burglary second degree.

12 THE COURT: He was initially charged with burglary  
13 second but y'all realized that y'all couldn't put him there  
14 at night; is that correct?

15 MR. COOK: We do not have any sure proof to put him  
16 there in the nighttime.

17 THE COURT: Which would be one of the elements of  
18 burglary second.

19 MR. COOK: Which would be one of the elements of  
20 burglary second violent.

21 THE COURT: Mr. Donahue, do you agree with the facts  
22 as stated by the solicitor?

23 THE DEFENDANT: Yes, sir, Your Honor, I do.

24 THE COURT: And are you, in fact, guilty of the charge  
25 of burglary in the third degree second offense?

1 THE DEFENDANT: Yes, Your Honor, I am.

2 THE COURT: All right. Now, you understand with that  
3 charge, and I have ruled earlier concerning the  
4 enhancement, that you could receive up to ten years up in  
5 jail?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: And you are likely going to have a problem  
8 with Georgia as a result of your probation violation so I  
9 don't know what they're going to do down there, but you  
10 understand that I can sentence you up to ten years in jail?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Now, do you understand the charges against  
13 you and the sentence that I can impose?

14 THE DEFENDANT: I do, Your Honor.

15 THE COURT: Do you also understand that when you plead  
16 guilty you waive certain constitutional rights? The first  
17 right you waive is your right against self incrimination.  
18 Not in this court or any other court in this great land  
19 would you ever be required to testify against yourself,  
20 however, when you plead guilty you're in essence doing  
21 that. Do you wish to waive your right against self  
22 incrimination at this time?

23 THE DEFENDANT: I do, Your Honor.

24 THE COURT: You also understand that when you plead  
25 guilty you're waiving your right to have a jury trial.

1 Now, we've got a jury already selected sitting in this room  
2 who are ready to come out here, they were here at five  
3 minutes until 10:00 and we could probably have this case  
4 done by noon tomorrow and you would get to cross examine  
5 the witnesses presented by the State, and Mr. Lifsey could  
6 in his artful ability to do so may be able to stop the  
7 statement from coming in or at least make it so that the  
8 jury doesn't believe it. I've already ruled it is coming  
9 in but he could make it so that they don't believe that  
10 statement. But when you plead guilty you don't get to ask  
11 any questions and the State doesn't have to present any  
12 evidence, do you understand that?

13 THE DEFENDANT: I understand that, Your Honor.

14 THE COURT: So you want to give up your right to have  
15 this jury decide your fate?

16 THE DEFENDANT: I do.

17 THE COURT: Now, has anybody threatened you in any way  
18 to get you to plead guilty?

19 THE DEFENDANT: No, Your Honor.

20 THE COURT: Has anybody promised you anything to get  
21 you to plead guilty?

22 THE DEFENDANT: No, Your Honor.

23 THE COURT: Is the only reason that you are pleading  
24 guilty is because you are, in fact, guilty of the charge of  
25 burglary in the third degree second offense?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Now, are there any plea negotiations, Mr.  
3 Solicitor?

4 MR. COOK: There are none, Your Honor.

5 THE COURT: Just a straight-up plea?

6 MR. COOK: Straight-up.

7 THE COURT: Now, are you satisfied with the services  
8 rendered to you by Mr. Lifsey?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Has he done everything that you've asked  
11 him to do?

12 THE DEFENDANT: Yes, sir, Your Honor.

13 THE COURT: Has he had enough time to -- the issue  
14 came up yesterday, do you think he's had enough time to  
15 investigate the facts of this situation so he could  
16 properly represent you?

17 THE DEFENDANT: Yes, Your Honor, I do.

18 THE COURT: Now, do you need anymore time to speak  
19 with him?

20 THE DEFENDANT: No, Your Honor.

21 THE COURT: Now, are there any other questions that  
22 you have for the Court this morning?

23 THE DEFENDANT: No, questions, Your Honor.

24 THE COURT: And have you understood everything I have  
25 told you this morning?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And do you understand that if you -- once  
3 I impose sentence and you're in jail that you are only  
4 going to have ten days to file an appeal for your plea or  
5 the sentence that I impose, do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And for the record one more time on the  
8 charge of burglary third degree second offense, how do you  
9 plead, guilty or not guilty?

10 THE DEFENDANT: Guilty, Your Honor.

11 THE COURT: All right. I find there is a substantial  
12 factual basis for the plea and I find that the defendant  
13 has entered into it freely and voluntarily. He has had the  
14 advice of counsel who he says he is well pleased. What is  
15 his prior record?

16 MR. COOK: Your Honor, in South Carolina, violation of  
17 ABC law and assault and battery in 1990. Filing false  
18 information with police in 1991. Criminal domestic  
19 violence first offense, fraudulent check of under 500 in  
20 2000. Fraudulent check in 2002. Simple assault in 2003.  
21 Simple assault in 2004. In 2008 he had 21 fraudulent  
22 checks under \$500. The defendant also has a record in  
23 Florida for this, as best I can tell it's dealing with  
24 stolen property in Florida in 2008. And as we spoke before  
25 about the Georgia, in 2002 disorderly conduct and 2006 he

1 had the burglary.

2 THE COURT: Mr. Donahue, is the solicitor's statement  
3 of your record of criminal activity on all of those charges  
4 correct?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Thank you. Mr. Lifsey?

7 MR. LIFSEY: Thank you. Your Honor, my client is 38  
8 years old, he is originally from Lancaster and  
9 unfortunately as you can tell from his record he has lived  
10 in the State of Florida and State of Georgia as well. His  
11 father, who is not here right at this moment, his father  
12 was here all day yesterday. I know his dad loves and cares  
13 about him, he's a good fellow, his father is, and he's been  
14 in my office and talked to me about it and I know he's  
15 worried about him and I'm sorry he's not here to speak to  
16 you today, but I will tell you that his father has been  
17 involved and has been present. Your Honor, my client is  
18 married but he's been separated for several years. He has  
19 two boys, 14 and 10 years old. Most recently -- while he  
20 has worked in the past some at Duracell, for example, but  
21 most recently he has run his own painting and remodeling  
22 company, he was in with his father, he and his father  
23 worked together. His father was older and to be honest  
24 with you I think his father was -- it's very difficult for  
25 somebody with a criminal record as the Court knows to get

1 jobs and credit and things he needed to do a business so  
2 his father was help in some ways. But he basically ran the  
3 business and did sort of his own painting and remodeling.  
4 Your Honor, this is really a tragic case, and I don't mean  
5 to minimize all of what my client did in this case because  
6 it's unfortunate and it's wrong and I think he realized  
7 that it's wrong and he's realized he has got to pay the  
8 price. Obviously for a man with a criminal record I can't  
9 stand in front of Your Honor and ask you to give him some  
10 small sentence.

11 THE COURT: Before I forget, I don't want to interrupt  
12 you, but I want to ask him one more question. With this  
13 plea you understand that this makes it your how many  
14 burglaries third or second?

15 MR. COOK: Two prior convictions it will enhance  
16 him --

17 THE COURT: You get one more and you can do life, do  
18 you understand that?

19 THE DEFENDANT: I will never, never.

20 THE COURT: I just want to make sure that's on the  
21 record for PCR purposes or something like that.

22 MR. LIFSEY: Yes, sir, I'm glad you mentioned that.

23 THE COURT: If you get caught again going into some  
24 place you're not and it's called a burglary then you can do  
25 life, do you understand that?

1 THE DEFENDANT: I understand, Your Honor.

2 THE COURT: Thank you.

3 MR. LIFSEY: Yes, sir. And I'm glad you mentioned  
4 that because I will tell you that he and I have discussed  
5 that, and that's one of the things while I cannot minimize  
6 what he's done and I cannot ask you to impose some  
7 insignificant sentence because of his prior record, I will  
8 tell you that in addition to whatever sentence you impose  
9 he obviously faces the possibility first of all for any  
10 time really, his record is bad enough now but now you have  
11 even more that a judge will be harsh on him. But as you  
12 quite correctly pointed out and I pointed out to him  
13 earlier that if he went into a canteen or a storage  
14 building or anything else again in South Carolina at least  
15 probably the same similar provisions in other states, he's  
16 facing a potential life without parole because it could be  
17 a burglary first degree and people have gotten life without  
18 parole in this courtroom for burglaries because of prior  
19 records and prior enhancements. So I think he is aware of  
20 that. Your Honor, in addition to make this -- his  
21 situation worse in itself, and of course it's hard to  
22 imagine it's much worse from where we are now, but to make  
23 it much worse as you've got out from him that he's got a  
24 probation violation in the State of Georgia, he is also  
25 facing probation issues in the State of Florida. Whatever

1 sentence the Court imposes today he's going to have to  
2 answer to other states so I would just ask you to keep that  
3 in mind when you impose a sentence. I do want to put one  
4 thing on the record while it is on my mind, obviously as  
5 the Court knows he's entitled to credit for time served, I  
6 would ask the Court to consider writing on -- he has not  
7 been out on bond since May 28th of '09. He at some point  
8 went to the department of corrections on these numerous  
9 fraudulent checks, basically a magistrate said -- I'm not  
10 criticizing anybody, the magistrate did his job and  
11 sentenced him pretty harshly on the fraudulent checks, so  
12 while he went -- and I think Lancaster said you can have  
13 him, let the state feed him for a little while. But he has  
14 not been out on bond, he has never made bond on this charge  
15 to the best of my knowledge and so I would ask the Court to  
16 consider giving him time served since May 28th of '09.

17 THE COURT: That would mean that he got no penalty for  
18 the other charges.

19 MR. LIFSEY: You can rule however you wish, I just --  
20 to the best of my knowledge he has not been released on  
21 bond since May 28th of '09, he has never posted bond.

22 MR. COOK: Your Honor, the State's position on that,  
23 we had this come up in January, the same situation where we  
24 had a guy that never bonded out and tried him and got  
25 convicted and he had time at SCDC for an unrelated charge

1 actually off of a probation violation, and the State's  
2 opinion is if you're serving time at SCDC for something  
3 else and even if you made bond on these charges you  
4 couldn't go home, you're not a free man and you shouldn't  
5 get that nine months -- I think he served nine months --  
6 credit for when he was at SCDC on these unrelated charges.  
7 I think he gets time before he went to SCDC and the time he  
8 has been back in the Lancaster County Detention Center but  
9 not time in the SCDC.

10 THE COURT: Okay.

11 MR. LIFSEY: We would have to agree to disagree on  
12 that point, Judge.

13 THE COURT: I'll make a ruling concerning that.

14 MR. LIFSEY: And ultimately I guess the department of  
15 corrections can calculate what they want and he can  
16 challenge it within the department of corrections through  
17 administrative law that way. But I guess I point all this  
18 out to you -- of course, the Court is faced with what do  
19 you do with this man.

20 THE COURT: My problem is he looked like he could be a  
21 very successful man in our society, he just seems to carry  
22 himself well, he's smart but he's just decided that he's  
23 going to live outside of the law.

24 MR. LIFSEY: I can't disagree with you to some extent.  
25 And let me just tell you I do agree with you that he's

1 intelligent and he's asked me questions that makes sense,  
2 he's asked me pertinent questions about his case and I do  
3 think he is someone that had he taken another turn in life  
4 and made better decisions in his life could have  
5 contributed to society. I will say on the issue of  
6 intelligence though, as smart as this man is he's made some  
7 foolish decisions about how to handle this case. Once  
8 again, it's not your concern, I don't intend to drag the  
9 Court into what our plea negotiations were in this case, I  
10 will only tell you that he should have taken plea  
11 recommendations when Mr. Grier represented him. I think he  
12 now realizes that and I think he will tell you that in a  
13 few minutes and I think -- some people get a belief  
14 sometimes, I think, that if I just wait and I just wait and  
15 I just wait the problem is going to get better, and as you  
16 and I know that almost never happens and so here we are. I  
17 think this man stands in front of you as intelligent as he  
18 is realizing finally and probably at some point yesterday  
19 as we were picking a jury as often happens in these  
20 cases --

21 THE COURT: It tends to work that way a lot of times.

22 MR. LIFSEY: Yes, sir. But he has made foolish  
23 decisions not only by his choice in life to do this crime  
24 but now how to handle the legal representation in regards  
25 to this case, he certainly has made poor decisions. Having

1 said all of that, what do you do with this man? I think  
2 obviously, you know, my first thought is some kind of split  
3 sentence and probation. I will tell you, however, we have  
4 not presented anything in regards to restitution, he's got  
5 to do time and he is probably going to have to deal with  
6 both Georgia and Florida. It just seems to me that -- of  
7 course, the Court can do whatever the Court wants and feels  
8 is appropriate, but a straight sentence of some length  
9 wouldn't be a bad idea in this case. Obviously I'm glad  
10 that I do not have the sentencing job that you do to have  
11 to decide these sentences. I will tell you something in  
12 the neighborhood of three to five years would strike me as  
13 not inappropriate in this case. While he's been in jail  
14 and been in all of these troubles I don't think he's ever  
15 done a whole lot of jail time beyond fraudulent checks.  
16 It's ironic I guess he would get to this point where the  
17 magistrate court probably sent him to jail longer than he  
18 probably ever really served although awaiting trial in  
19 Georgia. But, Your Honor, whatever you do I would like you  
20 to -- I know you have to sentence him harshly because he's  
21 got a record, he's not a first time offender. At the same  
22 time I would ask you to take into consideration that he has  
23 made some very foolish decisions both with his life and  
24 with how he handled his legal problems that he finds  
25 himself in. I think he regrets them now. I think whatever

1 sentence the Court imposes he will have to deal with two  
2 other states and it may result in more incarceration with  
3 them. I think in addition to that as you rightly pointed  
4 out were he to commit any kind of burglary again you're  
5 talking -- he would be getting mercy not to get a life  
6 sentence, so he would be in a position where -- and I've  
7 had to do it for more clients than I wish where I would go  
8 to a client and say, "Yeah, that 20 year offer or 25 year  
9 offer is something you ought to take," because of the  
10 alternative of maybe 30 or 40 or 50 or life in prison and  
11 so he's boxed himself in. So I just ask you to take all of  
12 that into consideration. You know, I can't ask for a lot  
13 of credit for pleading guilty since we've already got the  
14 jury sitting out there, but at the same time he has pled  
15 guilty at this point and he's sorry and I would ask the  
16 Court to take all of that into consideration and I would  
17 ask you to hear from him.

18 THE COURT: Yes, sir, Mr. Donahue?

19 THE DEFENDANT: I would like to apologize. I made a  
20 mistake and I made several mistakes starting about the time  
21 me and my wife separated, a midlife crises, went crazy, I  
22 don't know what you want to call it.

23 THE COURT: Why didn't you go out and buy a red car?

24 THE DEFENDANT: I should have. I bought a motorcycle  
25 and that's why we split up. I made a mistake. From the

1 time I was arrested until now I have cooperated. I have  
2 told investigators anything they want to know freely and  
3 willingly. I am really sorry.

4 THE COURT: Would the victim like to say anything?

5 MR. COOK: I have asked him, Your Honor, he told me he  
6 did not wish to address the Court.

7 THE COURT: Is there a victim impact statement?

8 MR. COOK: There is not in this case, Your Honor.

9 MR. LIFSEY: Your Honor, I would just add to let me  
10 second that -- I'm glad he mentioned that. This is sort  
11 of -- to give you an example, it was sort of the dumbest  
12 legal strategy in the world, he basically confesses and  
13 tells the police anything in the world they want to know  
14 and then won't plead guilty until we've got a jury picked.  
15 I'm not making light of the situation but it's just  
16 foolishness in the manner of this. He did give plenty of  
17 statements on this case:

18 MR. COOK: I do have a victim's questionnaire that was  
19 sent back and the victim in this case was actually the  
20 victim of something else with the defendant and it's kind  
21 of two in one if you would like to look at it.

22 THE COURT: Anything further?

23 MR. COOK: Nothing else from the State, Your Honor.

24 MR. LIFSEY: Nothing further.

25 THE COURT: Michael Scott Donahue, on indictment

1 2009-GS-29-1204, the charge of burglary in the third  
2 degree, the sentence of the Court is that you be committed  
3 to the state department of corrections for a period of ten  
4 years, that is suspended upon the service of six years, the  
5 balance with two years of probation. I will give you time  
6 served in the Lexington (sic) County jail, however the time  
7 that you served in the department of corrections I'm not  
8 giving you credit for.

9 MR. LIFSEY: Lancaster County you mean?

10 THE COURT: What did I say?

11 MR. COOK: You said Lexington.

12 THE COURT: I meant Lancaster.

13 MR. LIFSEY: Thank you, Judge. And just for the  
14 record I would ask you to reconsider that issue and we'll  
15 reserve that for appeal.

16 THE COURT: You are preserved.

17 (END OF THE HEARING.)

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1 I, the undersigned, Michael C. Watkins, Official  
2 Court Reporter for the Sixth Judicial Circuit of the State  
3 of South Carolina, do hereby certify that the foregoing is  
4 a true, accurate and complete transcript of record of the  
5 proceedings had and evidence introduced in the trial of  
6 the captioned case, relative to appeal, in the Court of  
7 General Sessions for Lancaster County, South Carolina, on  
8 the 30th day of March, 2010.

9 I do further certify that I am neither of kin,  
10 counsel, nor interest to any party hereto.

11

12

February 13, 2011.

13

14



15

Michael C. Watkins  
Court Reporter

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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF LANCASTER )

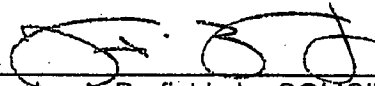
INDICTMENT

At a Court of General Sessions, convened on August 20, 2009, the Grand Jurors of Lancaster County present upon their oath:

**BURGLARY, SECOND DEGREE**

That Michael Scott Donahue did in Lancaster County on or about May 28, 2009, enter the building of South 200 Flea Market without consent and with intent to commit a crime in the building and the entering or remaining occurred in the nighttime in violation of §16-11-312(B)(3), *Code of Laws of South Carolina, (1976), as amended*.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
 \_\_\_\_\_  
 Douglas A. Barfield, Jr., SOLICITOR

WITNESSES

Crump - LCSO #09-14570

WFLB

ARREST WARRANT NUMBER/DOA

M162212 (DOA 5-29-09)

ACTION OF GRAND JURY

TRUE BILL

*Russell E. Hammon*  
Foreperson of Grand Jury

Date: AUG 20 2009

VERDICT

Foreperson of Petit Jury

Date:

The State of South Carolina

County of Lancaster

COURT OF GENERAL SESSIONS

AUGUST TERM 2009

THE STATE

VS.

Michael Scott Donahue 1199-1205

James Creech 1183-89

David Stevens 1297-98

COPY

Indictment for

Burglary, Second Degree  
(Violent)

SC Code: §16-11-312(B)(3)

CDR Code: 0086

Class: Felony, D

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## CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

January 26th, 2012



Wanda H. Carter

Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR APPELLANT

RECEIVED

FEB 13 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

S.C. Supreme Court

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Appeal from Lancaster County

William Jeffrey Young, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

MICHAEL DONAHUE,

APPELLANT

---

FINAL BRIEF OF APPELLANT

---

TRISTAN M. SHAFFER

P.O. Box 176  
Chapin, SC 29036  
(803) 771-0042

ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Does a prior burglary conviction from Georgia enhance the possible penalty for burglary in the third degree when the language of S.C. Code § 16-11-313(B) does not specifically make reference to out of state convictions.

## STATEMENT OF THE CASE

On August 9, 2009, Appellant was indicted for burglary in the second degree by the Lancaster County Grand Jury. R. 26 (indictment). On March 30, 2010, Appellant pled guilty to burglary in the third degree before the Honorable W. Jeffery Young. R. 1. Appellant was represented by Mike Lifsey, and the State was represented by Trey Cool. R. 1. Appellant was sentenced to ten years suspended upon six<sup>1</sup> years and two years probation. R. 24, ll. 1-8. This appeal follows.

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<sup>1</sup> The South Carolina Department of Corrections (SCDC) projects that Appellant, Michael Scott Donahue, will be released on November 8, 2012. Although this fact is *not* present in the record, Appellant requests this Court take judicial notice of the SCDC website. *See Rule 201, SCRE; C.f. Sloan v. Greenville County*, 380 S.C. 528, 537, 670 S.E.2d 663, 668 (Ct. App. 2009) (finding that the Court of Appeals could take judicial notice of its own docket); *See* <https://sword.doc.state.sc.us/scdc-public> (Last visited Aug. 16, 2011).

## ARGUMENT

A prior burglary conviction from Georgia does not enhance the possible penalty for burglary in the third degree because the language of S.C. Code § 16-11-313(B) does not specifically make reference to out of state convictions.

### **Relevant Facts**

On March 30, 2010, Appellant pled guilty to burglary in the third degree before the Honorable William Jeffery Young. Prior to entering his plea, Appellant argued that pursuant to S.C. Code § 16-11-313(B)<sup>2</sup> (hereinafter the statute) he should not be sentenced to more than five years because he had not previously been convicted of burglary in the third degree in South Carolina. R. 3, l. 4 – R. 5, l. 7. However, in 2007, Appellant was convicted of burglary<sup>3</sup> in Georgia. R. 8, ll. 7-13. The State asserted that his Georgia conviction was sufficient for enhanced sentencing under the statute. Judge Young agreed with the State in the following ruling:

The Court: I haven't found in my term as a legislator and as a judge that we have been so possessive of our crimes that we make you do them in this state, and therefore I am of the opinion that when it says specifically that a – for a subsequent second offense it doesn't matter whether it was in Monroe, Fort Lawn or Los Angeles, it's a conviction and it will be considered for enhancement purposes.

R. 6, ll. 8-15. Appellant renewed the objection and the plea court told him that his argument was protected<sup>4</sup> for appeal. R. 5, l. 16 – R. 6, l. 7. Appellant was then sentenced to ten years suspended upon six years and two years probation. R. 24, ll. 1-8.

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<sup>2</sup> S.C. Code §16-11-313 has been in effect since 1985.

<sup>3</sup> See Ga. Code § 16-7-1.

<sup>4</sup> Any subsequent objection would have been futile. See *State v. Higgenbottom*, 344 S.C. 11, 542 S.E.2d 718 (2001) (footnote 4) (employing the doctrine of futility).

## Discussion

“Burglary in the third degree is a felony punishable by imprisonment for *not more than five years on a first offense* and for not more than ten years for a conviction of a second offense according to the discretion of the Court.” S.C. Code §16-11-313 (B).

According to the plain and unambiguous language of the statute, a defendant cannot be sentenced to more than five years for the first time they are convicted of *burglary in the third degree*. Therefore this Court should interpret the “second offense” language of the statute as limited to second convictions for burglary in the third degree under S.C. Code §16-11-313 (B). *See Binney v. State*, 384 S.C. 539, 543, 683 S.E.2d 478, 480 (2009) (“If a statute’s language is plain and unambiguous and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning.”).

Even if the language of the statute is ambiguous, this Court must still find that in order for a defendant to receive more than a five year sentence under the statute he must have previously been convicted of burglary in the third degree in South Carolina. Judge Young might have found that the statute was ambiguous because by commenting on his tenure<sup>5</sup> in the state legislature he seemed to have interjected a legislative intent<sup>6</sup> analysis into his ruling. *Cf. State v. Smith*, 330 S.C. 237, 240, 498 S.E.2d 648, 650 (Ct. App. 1998) (“Where a statute is complete, plain, and unambiguous, *legislative intent must be determined*

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<sup>5</sup> According to the South Carolina Judicial Department’s website Judge Young was a member of the South Carolina House of Representatives from 1994 until 1998.

<sup>6</sup> This Court should apply a de novo standard of review in examining the circuit court’s determination of legislative intent. *See Charleston County Parks and Recreation*

*from the language of the statute itself*") (emphasis added). However, even if the statute is ambiguous, this State follows the maxim requiring courts to strictly construe criminal statutes in favor of the defendant. *State v. Blackmon*, 304 S.C. 270, 274, 403 S.E.2d 660, 662 (1991) ("when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant."); *see also, United States v. Santos*, 553 U.S. 507, 514, 128 S.Ct. 2020, 2025 (2008) (this rule "keeps the courts from making criminal law" in the legislature's stead.). Additionally, the statute is missing the specific language allowing enhancement based upon out of state convictions which is present in other statutes. *See Whitner v. State*, 328 S.C. 1, 6, 429 S.E.2d 777, 779 (1997) (noting there is a presumption that the legislature is aware of their own legislation).

**A burglary in Georgia is not the same as burglary third in South Carolina.**

Furthermore, the State failed to prove that Appellant ever engaged in conduct that would constitute burglary in the third degree. Appellant had a burglary conviction from Georgia. The State did not present Judge Young with a copy of Georgia's burglary statute. However, the relevant portion of Georgia's burglary statute reads:

A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof. A person convicted of the offense of burglary, for the first such offense, shall be punished by imprisonment for not less than one nor more than 20 years. For the purposes of this Code section, the term "railroad car" shall also include trailers on flatcars, containers on flatcars, trailers on railroad property, or containers on railroad property.

---

*Commission v. Somner*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) ("The determination of legislative intent is a matter of law.").

Ga. Code § 16-7-1. The Georgia burglary statute is much broader than South Carolina's burglary in the third degree statute or any of South Carolina's burglary statutes. Therefore *even if* the enhancement portion of the statute is *not* limited to South Carolina convictions for burglary in the third degree, it would still be *inappropriate*<sup>7</sup> to enhance his sentence based solely upon his conviction when there is no evidence in the record that Appellant's conviction in Georgia fell within the prohibited conduct of the statute. *See State v. Lindsey*, 355 S.C. 15, 19-20, 583 S.E.2d 740, 742 (2003); *see also, State v. Phillips*, 393 S.C. 407, 712 S.E.2d 457 (2011).

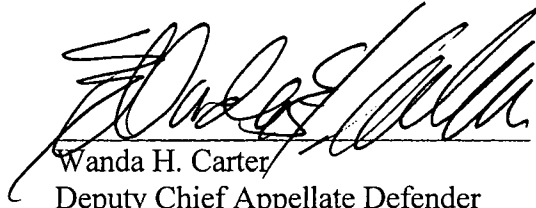
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<sup>7</sup> Appellant asserts that this argument is part of what was argued to the plea court. However, assuming *arguendo* that this part of the argument is not preserved, this Court should still remand the case for resentencing pursuant the above arguments and *State v. Johnson*, 333 S.C. 459, 465-466, 510 S.E.2d 423, 425 (1999).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court reverse and remand his case to the circuit court for resentencing for *first offense* burglary in the third degree.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

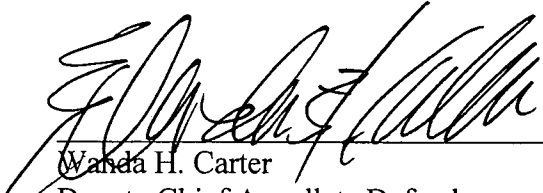
ATTORNEY FOR APPELLANT

This 2nd day of February, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

February 2<sup>nd</sup>, 2012



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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Lancaster County  
William Jeffrey Young, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MICHAEL DONAHUE,

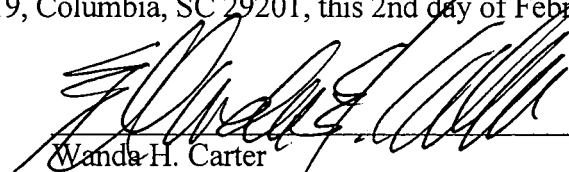
APPELLANT

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of February, 2012.

  
Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 2nd day of February, 2012.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: October 2, 2013 .

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lancaster County  
Jeffrey Young, Circuit Court Judge

RECEIVED

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S.C. Supreme Court

The State,

Respondent,

v.

Michael Donahue,

Appellant.

**FINAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUES ON APPEAL

The plea court properly sentenced Appellant based on a conviction for a second offense under section 16-11-313(B) of the South Carolina Code.

## STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

## ARGUMENT

### **I. The plea court properly sentenced Appellant based on a conviction for a second offense under section 16-11-313(B) of the South Carolina Code.**

Appellant contends the plea court erred in sentencing him after his guilty plea to third degree burglary based on a second conviction when the first conviction occurred in Georgia. Appellant waived the issue by his guilty plea to third degree burglary, second offense, and acknowledgment of the possibility of receiving up to ten years in prison at the discretion of the plea court. Further, even if the issue is not waived the unambiguous language of the statute allows the plea court to sentence Appellant to up to ten years “for conviction of a second offense according to the discretion of the Court.” S.C. Code Ann. § 16-11-313(B) (Supp. 2010).

Appellant waived his right to challenge whether the Georgia offense constituted a second offense when he specifically acknowledged it did as part of his guilty plea. “The general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of non-jurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea.” Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975).

In the instant case, prior to his plea Appellant asserted his Georgia conviction for burglary should not be considered in determining whether his current conviction will be a conviction for a second offense resulting in a possible sentence of ten years in prison under

section 16-11-313. (T.3-5; R.3,5). During his guilty plea, however, the following colloquy occurred:

Court: Now it's my understanding that you're wanting to plead guilty to burglary in the third degree second offense; is that correct?  
Appellant: Yes, sir Your Honor.  
Court: In fact, have you been convicted of burglary in the State of Georgia?  
Appellant: Yes, Your Honor.

(T.8; R.8). The colloquy continued:

Court: And are you, in fact, guilty of the charge of burglary in the third degree second offense?  
Appellant: Yes, Your Honor, I am.  
Court: All right. Now, you understand with that charge, and I have ruled earlier concerning the enhancement, that you could receive up to ten years up in jail?  
Appellant: Yes, Your Honor.

(T.10-11; R.10-11). Appellant, by his admissions during his guilty plea, acknowledged he was guilty of a second offense and voluntarily pled guilty to third degree burglary with the understanding he would be sentenced based on a second offense. Accordingly, he waived his right to contest his sentence based on a second offense on appeal.

On the merits, the plain and unambiguous language of the statute allows for the enhancement of the sentence based on his conviction in Georgia. The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of

the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id. “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Pittman, 373 S.C. at 561, 647 S.E.2d at 161.

The relevant portion of the third degree burglary statute provides: “Burglary in the third degree is a felony punishable by imprisonment for not more than five years for conviction on a first offense and for not more than ten years for conviction of a second offense according to the discretion of the Court.” S.C. Code Ann. §16-11-313(B) (Supp. 2010).

The language does not restrict the offense to one which occurred in South Carolina or under any particular statute. The statutory language merely reads second offense. In not providing a limitation, the statute unambiguously allows an enhancement of the offense based on a prior offense occurring in South Carolina or outside this jurisdiction.

This case is similar to that of State v. Zulfer, 345 S.C. 258, 547 S.E.2d 885 (Ct. App. 2001). In Zulfer, the appellant maintained an out of state conviction could not be used to meet the element of first degree burglary which indicated One may be convicted “if the person enters a dwelling, without consent and with intent to commit a crime in the dwelling and . . . 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.” S.C. Code Ann. § 16-11-311(A)(2) (Supp. 2010). This Court found the language “a prior record of two or more convictions for

burglary or housebreaking or a combination of both” contained no limiting provision restricting its application to only South Carolina offenses. As a result, the Court found:

Nowhere does the language of the statute limit a prior record of convictions for burglary or housebreaking to only those that occurred within South Carolina. In not so limiting a prior record of convictions, the plain language of our burglary statute permits an enhancement of the offense based on a prior record of out-of-state convictions for burglary or housebreaking or a combination of both. To restrict the predicate offenses for a first-degree burglary charge to acts occurring within South Carolina would give the statute a meaning that the legislature clearly did not intend. Indeed, had the legislature intended that a prior record of out-of-state convictions for burglary or housebreaking could not be used for purposes of enhancement, it could easily have limited the statute to only South Carolina offenses.

Zulfer, 345 S.C. at 262-263, 547 S.E.2d at 887.

Additionally, Appellant never objected to or contended the Georgia conviction would not apply to enhance his sentence if out of state convictions were allowed. He never argued the elements of the conviction did not qualify as a prior offense or object to its use. As a result, he cannot now raise the issue on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court); see also, State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (finding appellant cannot argue an issue on appeal when he argued a different issue at trial). Accordingly, this Court should find the plea court correctly allowed enhancement of Appellant’s sentence through consideration of his Georgia conviction for burglary.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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February 2, 2012

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Respondent,

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Appellant.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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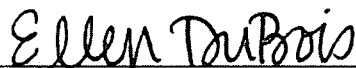
Appellant.

**PROOF OF SERVICE**

I, ELLEN DuBOIS, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.  
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