STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

G. Edward Welmaker, Circuit Court Judge

Opinion No. 5053 (S.C. Ct. App. filed 11/28/2012)

10-GS-23-4939-40.

THE STATE,

RESPONDENT,

V.

THOMAS E. GILLILAND,

PETITIONER

APPELLATE CASE No. 2013-000396

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 25, 2013. App. 18.

QUESTIONS PRESENTED

I. The Court of Appeals erred in affirming the trial court's failure to direct a verdict of acquittal on the charge of burglary in the first degree where the only evidence presented to support the element of intent to commit a crime in the dwelling was the violation of the order of protection.

II. The Court of Appeals erred in concluding that trespass is not a lesser-included offense of burglary in the first degree where a violation of an order of protection is used as the predicate crime because the order of protection essentially provided notice to Petitioner not to be on the premises, just as a trespass notice would.

STATEMENT OF THE CASE

During its September 2010 term, a Greenville County Grand Jury indicted Petitioner on one count of violating an order of protection (2010-GS-23-4939) and one count of burglary in the first degree (2010-GS-23-4940). R. 168 (Indictments). Petitioner proceeded to trial on both charges on February 1, 2011. Jennifer Tessitore prosecuted Petitioner. Dorothy Manigault represented Petitioner. The Honorable G. Edward Welmaker presided over the two-day trial. R. 1. The jury found Petitioner guilty of both charges. R. 160 lines 3-11. Judge Welmaker sentenced Petitioner to fifteen years imprisonment for the burglary conviction and thirty days imprisonment on the violation of protective order conviction. R. 162 line 24 – R. 163 line 5.

Thereafter, Petitioner filed a timely notice of appeal, which was perfected. The Court of Appeals affirmed Petitioner's conviction and sentence in a published opinion on November 28, 2012. State v. Gilliland, Op. No. 5053 (Ct. App. filed Nov. 28, 2012); App. 1-9. On December 13, 2012, Petitioner filed a petition for rehearing. App. 10-17. By order dated January 25, 2013, the Court of Appeals denied the petition. App. 18.

This petition for writ of certiorari follows.

ARGUMENT

I. The Court of Appeals erred in affirming the trial court's failure to direct a verdict of acquittal on the charge of burglary in the first degree where the only evidence presented to support the element of intent to commit a crime in the dwelling was the violation of the order of protection.

In 2008, a romance blossomed between Petitioner and Pamela Morgan, who were co-workers. R. 25 line 8 – R. 26 line 1; R. 81 lines 3-11. Eventually, the two decided to move in together. R. 23 line 24 – R. 24 line 1; R. 81 lines 12-16. In February of 2009, Petitioner and Morgan moved into a home rented by Morgan. R. 24 lines 2-3; R. 57 lines 20-24. In January of 2010, the relationship soured. R. 24 lines 4-8. On February 16, 2010, Morgan obtained an order of protection against Petitioner. R. 24 lines 9-11; R. 28 lines 1-3; R. 164 Order of Protection. Pursuant to the order of protection, Petitioner was not permitted to contact Morgan and was not allowed into the home the two had shared. R. 164 Order of Protection. Despite the order of protection, Petitioner continued to contact Morgan through numerous letters. R. 48 lines 11-22; R. 51 lines 6-12; R. 53 lines 12-15. Petitioner admitted to violating the order of protection by writing Morgan letters. R. 83 lines 15-18.

Shortly after the issuance of the order of protection, Morgan contacted Petitioner's son, with whom Petitioner was living. R. 29 lines 14-23; R. 61 lines 4-5. Morgan testified that she called Petitioner's son, who handed the phone to Petitioner. R. 30 lines 11-12; R. 61 line 8. She then told Petitioner that a member of his family could obtain Petitioner's belongings when she was home. R. 30 lines 14-16. On March, 16, 2010 Morgan arrived home from work at 12:10 a.m. R. 31 lines 7-14; R. 60 lines 2-4. When she arrived, she was startled to see Petitioner in her home. R. 33 lines 7-9. Thereafter, the Petitioner talked to Morgan for several hours. R. 63 lines 16-23. Eventually,

Morgan contacted 911. R. 35 lines 19-24. Within a few minutes, officers arrived at her door. R. 36 lines 16-18.

Officer Flood, the responding officer, testified that when he arrived he learned there was an order of protection in place. R. 8 lines 2-3. He then placed Petitioner, who was handcuffed, in his patrol car. R. 8 lines 4-6. After speaking with Morgan, Officer Flood then questioned Petitioner. R. 8 lines 18-20. According to Officer Flood, Petitioner claimed he walked eight miles to get there, he was aware of the order of protection, he entered through a bathroom window, and his purpose in going there was to reconcile the differences with Morgan. R. 12 lines 8-18. Officer Flood did not look in the bathroom, the alleged point of entry for Petitioner. R. 14 lines 7-8; R. 40 lines 9-11. On April 2, 2010, an officer in forensics went to Morgan's home for the first time. R. 17 lines 20-22; R. 66 lines 13-16. During this visit, the forensics officer took photographs of the outside of the house. R. 66 line 20. Sometime after this visit, Morgan noticed the latch to the bathroom window was damaged. R. 41 line 23 – R. 42 line 3; R. 66 lines 21-23. The forensics officer returned to Morgan's home on April 13, 2010. R. 17 lines 23-24. During this visit, the officer took photographs of the inside of the house. R. 67 lines 8-11.

At the conclusion of the state's case, Petitioner moved to dismiss the charge of burglary in the first degree because the state had not proven all of the elements. R. 78 lines 9-12. Holding that there was sufficient evidence from which the jury could logically and fairly deduce guilt, the trial judge denied the motion. R. 78 lines 13-22.

In his defense, Petitioner presented a slightly different version of the facts. Petitioner testified that according to his son, Morgan had called four or five times for Petitioner while he was out. R. 85 lines 16-18. When Morgan called again, Petitioner's son gave the phone to Petitioner. R. 85 lines 18-19. During the conversation, Morgan informed Petitioner that he could pick up his

belongings and his truck on her day off from work. R. 86 lines 8-13. During the late evening of March 15 and the early morning of March 16, Petitioner walked to Morgan's home. R. 88 lines 13-14. He arrived at 12:15 a.m. when he knew she would be home from work as she worked second shift. R. 90 lines 3-5. He knocked on the door, and Morgan permitted him to enter. R. 88 line 23; R. 89 lines 8-9. The two engaged in conversation and then made love. R. 89 line 23; R. 91 lines 2-4. According to Petitioner, around 3 a.m., a police officer arrived at the door. R. 95 lines 12-13. Petitioner testified that he informed the officer that he walked eight miles to get there, he was permitted entry by Morgan, he wanted to reconcile with Morgan, and he was there to get his belongings. R. 97 lines 16 -24; R. 98 lines 10-17.

After the presentation of all of the evidence, Petitioner renewed his dismissal motion. R. 137 lines 20-22. The judge denied the motion. R. 137 lines 23-25. During the conference among the attorneys and the judge concerning the jury instructions, Petitioner noted that one of the elements of burglary is the intent to commit a crime in the dwelling and the state's evidence of such was a violation of the order of protection. R. 139 lines 7-10. Shortly after beginning its deliberations, the jury made an inquiry of the judge. The jury wanted the following: (1) to review a police report and a statement from Morgan to police; (2) a copy of the transcript of Officer Flood's testimony; and (3) a re-charge on the law of burglary in the first degree. R. 157 lines 9-10. After the jury returned a verdict of guilty on both charges, the defendant renewed all previous motions and asked the court to set aside the verdict and grant a new trial because the evidence did not support the verdict, "especially as far as the burglary first is concerned." R. 161 lines 3-9. The judge denied this motion. R. 161 lines 10-20.

The issue presented – whether a violation of an order of protection may satisfy the element of burglary in the first degree requiring the offender to have the intent to commit a crime in the

dwelling - was one of first impression in South Carolina. A starting point for the analysis is the order of protection statute. An order of protection is issued to protect a person who has suffered abuse from further harm. S.C. Code Ann. § 20-4-60. The protection order includes both a no contact provision that makes any communication or contact with the abused person an act of contempt; and, most importantly, a provision that criminalizes any further abusive or malicious communication or physical act against the abused person. Id.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id. (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The Court of Appeals held an alleged violation of an order of protection is a crime sufficient to support first-degree burglary. The Court was persuaded by the "plain language" of the statutes governing burglary and protection orders. Essentially, the Court held that because violating the terms of an order of protection is a crime and the elements or burglary require a person enter the dwelling with the intent to commit a crime once inside, the plain language of the statutes permitted the use of a violation of a protection to be used as a predicate offense for

burglary. In its analysis, the Court neglected to give the order of protection statute its intended effect and meaning. See Hodges, supra; In re Vincent J., supra; Charleston County Sch. Dist., supra.

The statute outlining violations of a protection order illustrates the legislative intent to protect persons who have been the victim of domestic violence and to categorize any violations as either contempt or trespass. See S.C. Code Ann. § 20-4-60. The first provision of the statute states that the order of protection is "to protect the petitioner or the abused person" by enjoining a particular person from "abusing, threatening to abuse, or molesting" by way of communication or actual contact with the protected person. Id. Likewise, the statute is clear as to the type of crime and punishment that is applicable to the violation of a protection order: "Violation of [an order of protection] is a criminal offense punishable by thirty days in jail or a fine of two hundred dollars or may constitute contempt of court punishable by up to one year in jail and/or a fine not to exceed fifteen hundred dollars." S.C. Code Ann. § 20-4-60(B)(1). Additionally, the statute provides that a person, convicted of criminal domestic violence and subject to an order of protection, who enters or remains on the grounds of a domestic violence shelter in which the person's household member resides, is guilty of trespass. S.C. Code Ann. § 20-4-60(B)(2). This language shows that the legislature intended the violation of such an order to be either trespass or contempt. While this subsection states that the violation will be treated as trespass when the actual contact occurs at a domestic violence shelter, it is easily transferred to any dwelling "in which the person's household member resides" because the statute treats the shelter as the person's home. Id.

Although the issue presented was one of first impression in South Carolina, other jurisdictions have examined whether a violation of an order of protection may serve as the predicate

crime for burglary. The Supreme Court of Delaware concluded that a defendant's unlawful entry into his own home, in violation of a Family Court order, could not serve as the predicate offense for burglary. Buchanan v. State, 981 A.2d 1098, 1099 (Del. 2009). The defendant had been ordered to vacate the premises pursuant to a Family Court order following his divorce. Id. However, the defendant returned to the home where he was discovered by police. Id. The court held that the predicate crime element of burglary "may be satisfied by a defendant's intent to engage in conduct prohibited by an order of protection while on the banned premises" but "is not satisfied solely by a [Petitioner's] intent to violate an order of protection by entering the [banned] dwelling." Id. at 1101. The court also stated that the Petitioner's violation of the order was not a "continuing crime" that encompassed both unlawful entry and intent to commit criminal contempt because "absent the order, [the defendant] had every legal right to enter and remain on his own property." Id. at 1102. The court also noted that there is "no clear definition for what constitutes a continual disregard of a court order." Id. (emphasis in original).

Connecticut law provided that violation of a protective order by entering a dwelling failed to provide a predicate offense for burglary. The defendant was charged with burglary in the second degree, which required the prosecution to prove that he entered the victim's house unlawfully and that he did so at night with the intent to commit a crime therein. The charging document, the prosecutor's argument at trial, and the court's instruction to the jury were that the crime to be committed was violation of a protective order and the violation of the order was the defendant's entry into the victim's home. State v. Russell, 922 A.2d 191, 207-208 (Conn. App. Ct. 2007). Previously, the Connecticut Appellate Court held "'the crime of trespass or any other crime related to the breaking and entering actions of burglary itself may not be considered by this court to be a crime therein.'" Id. at 208 n. 26 (quoting State v. Wallace, 745 A.2d 216, 219 n. 7

(Conn. App. Ct. 2000). The Russell Court also explained that its protective order statute, like South Carolina's protective order statute, declared violation of a protective order by entering or remaining in a building in violation of the order amounted to criminal trespass. Id. On appeal, the prosecution conceded that the defendant could not be convicted of burglary based upon the predicate offense of violation of a protective order where the violation is entry into the building. Id. at 208.

Taking a more nuanced approach, the Supreme Court of Minnesota ultimately held that a violation of an order for protection was insufficient to establish first-degree burglary based on the facts presented. State v. Colvin, 645 N.W.2d 449, 456 (Minn. 2002). The order for protection provided that the defendant must not enter his ex-wife's residence or stay at the residence for any reason, even if invited. Id. at 451. One evening, ex-wife's roommate found the defendant in the home watching television and drinking a beer. When the roommate requested he leave, the defendant complied. Subsequently, the defendant was charged with burglary in the first degree and violation of the order for protection. Id. Ultimately, the defendant was convicted. Id. The Minnesota Court recognized that a violation of an order of protection can be committed in many ways, and the nature of the violation will determine whether the violation constitutes an independent crime under the burglary statute. Id. at 452. The prosecution argued on appeal that the defendant violated the protective order in two ways: (1) attempting to contact the victim; and (2) entering the victim's residence. Id. However, the appellate court determined the stipulated facts did not support the prosecution's contention that the defendant attempted to contact the victim. Id. at 453. As a result, the court concluded the defendant violated the protective order solely by entering the victim's residence. Id. The court concluded that a violation of a no-entry provision of a protective order, like trespass, could not be used as the basis for the independent crime of burglary. Id. at 454.

Although Washington State concluded that a violation of an order of protection may satisfy its burglary statute's requirement that the offender intend to commit a crime therein, State v. Stinton, 89 P.3d 717, 721 (Wash. Ct. App. 2004), this case actually supports Petitioner's position. In Stinton, 89 P.3d at 718, the order of protection not only prohibited the defendant from entering the victim's residence, it also prohibited him from harassing and threatening the victim. The state's theory was that the defendant's violation of the protective order provision against harassing the victim, not the unlawful entry, served as the predicate crime for burglary. Id. Petitioner's case is distinguished easily because the prosecutor did not offer any evidence that Petitioner engaged in unlawful conduct toward the victim while in the residence or that he had the intent to do so while in the residence. The conduct in Stinton involved harassment, which is a crime independent of the violation of the protective order. The victim testified that Petitioner did nothing more than talk. Although, the protective order forbade Petitioner from communicating with the victim, such conduct was not criminal except as a violation of the order of protection.

On the other hand, the Maine Supreme Court determined a defendant was properly charged with burglary for entering the victim's home with intent to commit assault and to violate a protective order. State v. Robinson, 656 A.2d 744, 747 (Me. 1995). However, the Maine Court did not express if the opinion would be the same had the defendant not also intended to commit an assault against the victim.

Simply put, Petitioner's unlawful entry cannot establish both elements of burglary in the first degree – entry without consent and intent to commit a crime in the dwelling. In his closing arguments, the solicitor even stated that they were "not contending that [the Petitioner] was there to hurt [his girlfriend], to assault her, to do anything in the sense of physically hurting her." R. 148 lines 11-13. It is evident from the record that Petitioner only wanted to get back together

with his girlfriend and entry into her apartment was in pursuit of this. Therefore, without any contrary intent to harass or molest her, Petitioner's entry into her home should not be legally sufficient to constitute the predicate crime element of first degree burglary.

II. The Court of Appeals erred in concluding that trespass is not a lesser-included offense of burglary in the first degree where a violation of an order of protection is used as the predicate crime because the order of protection essentially provided notice to Petitioner not to be on the premises, just as a trespass notice would.

At the conclusion of the presentation of evidence, Petitioner requested a jury instruction on trespass as a lesser included offense of burglary in the first degree. R. 138 lines 16-20. When the judge asked for the state's position, the prosecutor noted that trespass requires a lack of consent and that the defense did not dispute that the events took place in the nighttime. R. 138 line 22 – R. 139 line 5. At the judge's request, Petitioner responded that one of the elements of burglary is the intent to commit a crime in the dwelling and the state's evidence of such was a violation of the order of protection. R. 139 lines 7-10. After hearing argument from both sides and conducting independent research, the trial judge denied Petitioner's request. R. 140 lines 23-24. Citing State v. Cross, 323 S.C. 41, 448 S.E.2d 569 (1994) the trial judge determined that trespass is not a lesser-included offense of burglary in the first degree. R. 141 lines 2-5. Importantly, the trial judge noted that there were "some fact-specific issues, such as the reason for the burglary according to the state's position" causing him trouble. R. 141 lines 5-7. Because the facts of this case are so different from those in Cross, the court should look at this issue and determine whether trespass can be a lesser included of first degree burglary where the basis of the charge is a violation of the "no contact" provision of a protective order.

The question presented is whether trespass is a lesser included offense of burglary in the first degree. One of the tests used to determine if an offense is a lesser included of a charged offense is the elements test. Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998). Using the elements test, an offense is a lesser included of a greater offense if the greater offense includes all

the elements of the lesser offense. State v. McFadden, 342 S.C. 629, 632, 539 S.E.2d 387, 389 (2000), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Therefore, it is necessary to review the elements of the offense of burglary in the first degree and trespass. The elements of first degree burglary are as follows:

> [A] person enters a dwelling without consent and with intent to commit a crime in the dwelling and either: (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime: (a) is armed with a deadly weapon or explosive; or (b) causes physical injury to a person who is not a participant in the crime; or (c) uses or threatens the use of a dangerous instrument; or (d) displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or (2) the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or (3) the entering or remaining occurs in the nighttime.

S.C. Code Ann. § 16-11-311(A). The elements of trespass are as follows:

> Any person who, without legal cause or good excuse, enters into the dwelling house, place of business, or on the premises of another person after having been warned not to do so or any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative.

S.C. Code Ann. § 16-11-620.

At first blush, trespass does not appear to be a lesser-included offense of burglary in the first degree. In fact, the Court of Appeals held as such in Cross, supra based upon the facts presented. The Court of Appeals noted that burglary in the first degree applied only to dwellings and that statutory trespass required a prior warning against entry or a request to leave, which were not elements of burglary. Cross, 323 S.C. at 44, 448 S.E.2d at 570. Concerning common law trespass, the Court of Appeals held that burglary did include the elements of a willful malicious injury or entry after notice. Id. In Cross, the jury could have determined that the defendant entered the victim's home and had sexual intercourse with her while holding a knife on her on two occasions,

removed personal belongings from the home, cut a hole in the sheetrock of the garage to enter the home and forced the victim to accompany him to Myrtle Beach. Id. at 43, 448 S.E.2d at 569-570. Petitioner's case is easily distinguishable and the facts of his case present a situation in which trespass is a lesser included offense of burglary in the first degree.

In Cross, the Court of Appeals correctly noted that statutory trespass requires a prior warning against entry or a request to leave, which is not a stated element of burglary. However, in Petitioner's case, it was such an element. The evidence presented by the state to satisfy the element of burglary that the person intended to commit a crime in the dwelling was that Petitioner intended to violate the order of protection, which amounted to a prior warning to Petitioner not to enter the dwelling. Petitioner had notice of the order or protection and had an opportunity to be heard prior to its issuance. The protective order specifically forbade Petitioner from entering or attempting to enter the victim's place of residence. Here, Petitioner had been warned not to enter, but did so anyway.

Concerning Appellant's second issue, the Court of Appeals held Appellant was not entitled to a jury instruction on trespass because trespass is not a lesser-included offense of burglary relying upon Cross, supra. Because the facts of this case are so different from those in Cross, this Court should look at this issue and determine whether trespass can be a lesser included of first degree burglary where the basis of the charge is a violation of the "no contact" provision of a protective order.

In closing argument, the state conceded that Petitioner was not there "to hurt her, assault her, to do anything in the sense of physically hurting her." R. 148 lines 11-13. The only evidence of any crime to be committed in the dwelling was a violation of the order of protection. The prosecutor concluded her argument with the following: "[Petitioner] thinks that it's okay to break

the law, a judge's order. And he thought that he could do that by entering her home. ... He violated two laws when he went over there." R. 155 lines 5-8.

Therefore, because a violation of a "no contact" provision of a protection order amounts to a trespass, the elements of trespass can be reasonably inferred in the elements of burglary, and there is enough evidence in the record to support a trespass charge, the court should allow for trespass as a lesser included offense in limited circumstances.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 26th day of April, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

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THE STATE,

RESPONDENT,

V.

THOMAS E. GILLILAND,

PETITIONER

APPELLATE CASE NO. 2013-000369

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Julie Kate Keeney, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Thomas E. Gilliland #344711 at Kirkland Correctional Institution and the S.C. Court of Appeals this 26th day of April, 2013.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 26th day
of April, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.