

Date 5-1-2013

Dear Mr. Shearouse,

Please forward this Appeal from order of dismissal,  
Judge Newman circuit court Judge to the proper  
person or persons handling my Appeal From post conviction  
relief. I hope this will be O.K as for I am not  
feeling very well or thinking very strait.

Thank you,

Ricky Duncan

**RECEIVED**

MAY 03 2013

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal From order of Dismissal, Judge Newman,  
Circuit Court Judge

Ricky Dean Duncan,  
Appellant,

**RECEIVED**

MAY 03 2013

v.

S.C. SUPREME COURT

State of South Carolina,  
Respondent.

Appellate case no. 2012-213472

Appeal From Post Conviction Relief

comes now the pro se Appellant Pursuant to  
(SCACR 243) to show cause for an Appeal. IN  
Support of this Appeal Appellant will show the  
court the following!

on July 25, 2011 Appellant Plead Guilty to an indictment charging "Attempted Burglary First degree in violation of S.C. code § 16-11-311, and was sentenced to Fifteen (15) years suspended to Fifty Four (54) months with 377 days time served and Five (5) years Probation.

Appellant submits that defense counsel was wholly ineffective for advising him to Plead guilty to an indictment that fails to confer subject matter jurisdiction to the court. *State v. Gentry*, 363 S.C. 93, 610 S.E. 2nd 494 (2005). Subject matter jurisdiction cannot be waived and can be raised at any time. *Gentry*, 363 S.C. at 100, 610 S.E. 2nd at 498.

S.C. code § 16-11-311, "Burglary First" provides the following!

A person is guilty of First degree Burglary if the person #1) Enters a dwelling, #2) without consent, and #3) with intent to commit a crime therein. It is the Appellant's position that the element of "Entering a dwelling is an essential element of the crime and therefore, there must be evidence proving the Appellant "entered the dwelling".

However, A reading of Petitioner's indictment negates this element.

Appellant was indicted by the Grand Jurors of Oconee County on November 1, 2010 for "Attempted" Burglary First Degree. Appellant's indictment reads as follows:

The defendant, Ricky Dean Duncan did in Oconee County, South Carolina, on or about July 12, 2010, willfully and unlawfully attempt to enter a dwelling belonging to Teresa Fortson, located at 320 Millhouse Road Salem South Carolina, without consent and with the intent to commit a crime therein and aggravating circumstances were present to wit: defendant has two or more prior convictions for Burglary and/or house breaking or a combination thereof. All in violation of section § 16-11-311 and common law 16-1-80. Appellant submits that the circuit court for Oconee County was without subject matter jurisdiction or authority of law to accept a plea under the First Degree Burglary statute 16-11-311, but then convict him of an "Attempted" First Degree Burglary charge. The court was divested of subject matter jurisdiction cannot be state v. Gentry subject matter jurisdiction cannot be waived and can be raised at anytime. Gentry, 363 S.C. at 100, 610 S.E. 2d at 498. As a result Appellant's conviction, cannot stand, "Attempted" First Degree burglary #1) is not an indictable offense as there is not a statute code that criminalizes that offense and #2) even if there were a statute making "Attempted" First Degree Burglary a crime it would not be a legal lesser-included offense of Burglary First Degree.

It is the Appellant's position that the words "Attempt" to enter is not synonymous with "Entering." Therefore, the language contained in the indictment is a farse.

Furthermore, one cannot be convicted of Burglary First Degree if they do not "enter the dwelling." Entering must be proven beyond a reasonable doubt. IF Appellant attempted to enter the dwelling, but never enters as Appellant's indictment so claims, then Appellant cannot be guilty of Burglary First Degree. The language contained within the indictment which reads "Attempt to enter" renders the indictment unconstitutional and powerless to confer subject matter jurisdiction to the court to accept a plea of guilty to Burglary First or Attempted First Degree Burglary.

Therefore counsel was ineffective assistance of counsel Strickland v. Washington 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2nd 674 (1984). and the circuit court was without subject matter jurisdiction state v. Gentry, 363 S.C. 93, 610 S.E. 2nd 494 (2005). subject matter jurisdiction cannot be waived and can be raised at any time. Gentry, 363 S.C. at 100, 610 S.E. 2nd at 498. Appellant's conviction therefore must be vacated.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
PRO SE CERTIORARI

Clifton Newman, circuit court judge

Ricky Dean Duncan,

PETITIONER,

v.

State of South Carolina,

RESPONDENT,

CERTIFICATE OF SERVICE

I certify that a true copy of the Petition For writ of certiorari in this case have been served on John walt whitmire, Esquire, at Rembert Dennis Building 1000 assembly street, Room 519, Columbia S.C. 29201.

Ricky D Duncan  
PRO SE PETITIONER  
and APPENDIX. CERTIORARI

SWORN TO BEFORE ME this 1st day  
of May, 2013

Emely Horne  
Notary Public For South Carolina

my commission Expires: 4-27-2016  
~~November 16, 2022~~ EH

Ricly Dean Duncan, #110304 SA-103  
T.C.I.  
PO Box 252  
Turbeville S.C. 29162

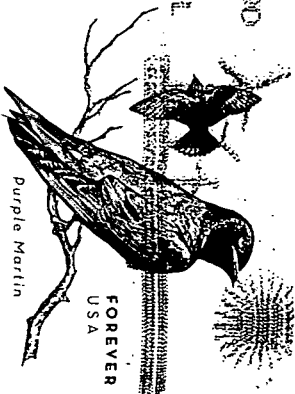
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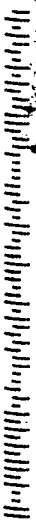
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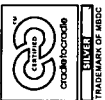
The Supreme Court of South Carolina  
Daniel E. Shearhouse, clerk of court  
Post Office Box 11330  
Columbia, South Carolina 29211

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