IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 21-0323
Circuit Court No.: 20-F-11
20-F-12
20-F-13
Fayette County, West Virginia

JUSTIN CONNER,

Petitioner.

PETITIONER'S BRIEF

Crystal L. Walden
Director of the Appellate Advocacy Division
West Virginia State Bar #8954
Graham B. Platz
WV R. ADMIS Rule 10
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
Phone: 304-558-3905
crystal.l.walden@wv.gov

Counsel for the Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions

Statutes and Rules

Other Authorities

ASSIGNMENTS OF ERROR

II. Whether the circuit court erred when it denied Petitioner's motion for acquittal on the burglary charge because it found the statute applicable to Petitioner.

STATEMENT OF THE CASE

Petitioner was convicted in the Fayette County Circuit Court, after a jury trial, on indictments 20-F-11 and 20-F-12. A.R. 1082. On appeal, Petitioner argues Count Two of 20-F-12, the burglary charge, should be reversed because Petitioner cannot burglarize his own home. Petitioner, and his girlfriend at the time, Charity Baker ("Baker"), shared a home together at 49 Trump Street Oak Hill, West Virginia 25901. A.R. 433. It is that residence Petitioner was convicted of burglarizing. A.R. 951.

Petitioner and Baker lived together for some time and were on again off again as a couple. A.R. 429–33. After an altercation, Baker sought a protective order against Petitioner, and the Fayette County Magistrate Court granted that protection order. A.R. 1165. The Fayette County Family Court then affirmed that protection order on March 26, 2019. A.R. 1177. A week later, on April 3, 2019, Baker filed a petition to terminate the protective order in the Fayette County Family Court. A.R. 1181–82. Baker supported the petition with assurances that the two were reconciling differences and wanted to work toward a positive future together. *Id.* On April 8, 2019, the family court terminated the protection order against Petitioner. A.R. 1243–44. The family court ordered service of the order be made at the Trump Street residence for both Petitioner and Baker. *Id.* Count Two of Indictment 20-F-12, the burglary charge, alleges Petitioner committed burglary on his Trump Street residence on or about April 16, 2019. A.R. 951.

SUMMARY OF ARGUMENT

This Court has not addressed whether an individual can burglarize his or her own home. The answer must be no. To hold otherwise would subject defendants to being charged once for the

crime committed in the house and again—for the same conduct—for burglary. It makes no sense to convict someone for burglarizing their own home when other provisions of the criminal code address the conduct the state seeks to curb.[1] Importantly, ruling in favor of Petitioner does not preclude prosecutions for burglary when a protection order prohibits a defendant's access to the home. But when no protective order is in place, as is the case here, you cannot be guilty of burglarizing your own home.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Whether an individual can burglarize his or her own home is a question of first impression for this Court. Other state high courts have answered that question with a resounding no. Thus, Petitioner respectfully requests a Rule 20 oral argument and a signed opinion.

ARGUMENT

After the State rested at trial, Petitioner moved the circuit court to dismiss his burglary charge because there was no evidence presented that deprived Petitioner of the lawful possession of his home. A.R. 577–78. Although phrased as a motion to dismiss, Petitioner in sum asked for a judgment of acquittal, arguing insufficient evidence. *Id.* Likewise, the circuit court ruled on the motion as if it were a motion for acquittal because it rested its denial of the motion on the sufficiency of the evidence. A.R. 580–81. Petitioner was entitled to an acquittal on the burglary charge because burglary requires the unlawful entry into a dwelling, and Petitioner had lawful possession of his home on April 16, 2019.

[1] Petitioner was convicted of domestic battery resulting from an altercation that happened after Petitioner entered the Trump Street residence on April 16, 2019.

This Court reviews the denial of a motion for judgment of acquittal, based upon sufficiency of the evidence, de novo. *State v. Juntilla*, 227 W. Va. 492, 497, 711 S.E.2d 562, 567 (2011). A de novo standard of review is also applied to questions of law or a circuit court's interpretation of a statute. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

I. The circuit court erred when it denied Petitioner's motion for acquittal on the burglary charge.

Petitioner cannot be guilty of burglarizing his own home, and this Court should reverse his conviction, because there was no invasion into the possessory right of the home as the burglary statute intended to protect against. Most states consistently hold that one cannot burglarize their own home. *See e.g.*, *State v. White*, 330 P.3d 482, 482 (Nev. 2014) (holding you cannot burglarize your own home); *State v. Machan*, 322 P.3d 655 (Utah. 2013); (finding insufficient evidence to convict a husband of burglarizing marital home because restraining order expired); *State v. Altamirano*, 803 P.2d 425, 436 (Ariz. 1990) (considering state legislature's abrogation of common law burglary and still finding one cannot burglarize their own home); *People v. Gauze*, 542 P.2d 1365, 1367 (Cal. 1975) (holding a "defendant cannot be guilty of burglarizing his own home"). This is true even in the District of Columbia where—like West Virginia—the burglary statute does not explicitly qualify dwelling with "of another." *Spriggs v. U.S.*, 52 A.3d 878, 881–2 (D. C. 2012).

Petitioner asserts two theories as to why the burglary statute is inapplicable to him. First, when the West Virginia Legislature amended the statute in 2018 omitting the phrase "of another," it did not intend to expand the burglary statute to cover the defendant's own dwelling house. Second, assuming the West Virginia legislature intended to abrogate the common law rule, that one cannot burglarize their own home, it did not eliminate the requirement of unlawful entry. Under either of these theories, Petitioner is incapable of burglarizing his own home, and this Court should reverse his conviction.

A. The legislature did not intend to criminalize the burglary of one's own home.

In 2018, the West Virginia Legislature amended the burglary statute to its current form. Prior to the 2018 amendment, the statute read, in relevant part:

> (a) Burglary shall be a felony and any person convicted thereof shall be confined in the penitentiary not less than one nor more than fifteen years. If any person shall, in the nighttime, break and enter, or enter without breaking, or shall, in the daytime, break and enter, the dwelling house, or an outhouse adjoining thereto or occupied therewith, *of another*, with intent to commit a crime therein, he shall be deemed guilty of burglary.
>
> (b) If any person shall, in the daytime, enter without breaking, a dwelling house, or an outhouse adjoining thereto or occupied therewith, *of another*, with intent to commit a crime therein, he shall be deemed guilty of a felony, and, upon conviction, shall be confined in the penitentiary for not less than one nor more than ten years.

W. Va. Code § 61-3-11 (1993) (emphasis added). Following the 2018 amendment, and still today, the West Virginia burglary statute reads, in relevant part:

> (a) Any person who breaks and enters, or enters without breaking, a dwelling house, or outbuilding adjoining a dwelling with the intent to commit a violation of the criminal laws of this state is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for not less than one nor more than 15 years.

W. Va. Code § 61-3-11 (2018). The amendment made two meaningful changes. First, and most prominently, the amendment equalized the penalties between nighttime and daytime burglaries. Second, it removed "of another" as qualifying language for the term "dwelling house." All available legislative history indicates that the legislature did not intend to criminalize the burglary of one's own dwelling house.

The burglary statute originated as a Senate Committee on the Judiciary ("Committee") Committee Substitute, under the short title: "Equalizing penalty for entering without breaking regardless of time of day."[2] Similarly, the summary of the bill mentions only the elimination of

[2] W. Va. Leg., Senate Comm. on the Judiciary, 2018 Bill Summaries, pg. 2 (available at: https://www.wvlegislature.gov/legisdocs/committee/senate/judiciary/jud_summaries_2018.pdf).

any distinction between nighttime and daytime burglary. *Id.* The official title of the bill states: "relating to the crime of burglary; eliminating the offense of daytime burglary; making breaking and entering or entering without breaking into a dwelling or outbuilding thereof a felony regardless of the time of day; and establishing the criminal penalty for burglary." Senate Bill 37, 83rd Leg., Reg. Sess. (W. Va. 2018). There is no mention of the deletion of the words "of another" in any title to any version of Senate Bill 37.

Consistent with this theme, the archived video of the Committee meeting discussing this amendment focused solely on the distinction between nighttime and daytime burglary.[3] The committee neither addressed nor discussed the deletion of the phrase "of another." *Id.* During the 2018 Committee meeting, counsel explaining the amendment characterized the purpose as "to eliminate the distinction between daytime and nighttime burglary, while maintaining the current penalty for nighttime burglary for the general offense of burglary." *Id.* The lead sponsor of the amendment, Senator Woelfel, said the bill was "identical" to the version passed by the senate last year and that "the bill speaks for itself." *Id.*

Accordingly, to fully understand the purpose of the bill, it is helpful to review the Committee meeting from 2017 when the bill was first introduced. In 2017, counsel explaining the amendment provided the same purpose for the bill as given in 2018.[4] But Senator Woelfel provided a more detailed explanation behind the motivation for enacting this amendment. *Id.* He said this bill was "one of eight" aimed at combating the drug crisis in West Virginia. *Id.* It was thought that

---

[3] W. Va. Senate Judiciary Comm. Meeting (Jan. 18, 2018) (Available at: http://sg001harmony.sliq.net/00289/Harmony/en/PowerBrowser/PowerBrowserV2/20180118/-1/17767#agenda_, starting at 3:13:54).

[4] W. Va. Senate Judiciary Comm. Meeting (Feb. 22, 2017) (available at: http://sg001-harmony.sliq.net/00289/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/6226, starting at 4:36:17).

the elimination of the daytime distinction would discourage drug dealers/abusers from going into empty homes while the homeowners were at work. *Id.*

Because the title of the bill did not reflect that the qualifier "of another," as previously applied to dwelling house, was being removed, this Court should read the West Virginia burglary statute to require the offense be committed against the dwelling house "of another." *See* W. Va. Const. Art 6, § 30 ("if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof as shall not be so expressed"). Such a result follows the reasoning of other courts, respects legislative history, and adheres to constitutional commands.

Never is it more important than when criminal sanctions are imposed for the title of a bill to signal newly criminalized conduct. *State ex rel. Myers v. Wood*, 154 W. Va. 431, 439, 175 S.E.2d 637, 643 (W. Va. 1970) ("[t]he courts in this and other states are strict in their decisions involving criminal matters or penalties with regard to requiring the object of the Act to be contained in the title in order to advise the public of the intention of an act passed by the legislature"). Notice to the citizenry of what conduct is prohibited is an essential part of legislation and fundamental fairness. *See McCoy v. VanKirk*, 201 W. Va. 718, 730, 500 S.E.2d 534, 546 (W. Va. 1997) (explaining that the purpose of having sufficient specificity in the title is to give sufficient notice to the reader of the purpose of the act).

West Virginia's burglary statute is like the D. C. statute at issue in *Spriggs*. "Although the burglary statute does not state that the dwelling must be 'of another,' the case law requires it in order to negative the defendant's right to break and enter and to protect him from a second prosecution for the same offense." *Spriggs*, 52 A.3d at 881 (citing *Douglas v. United States*, 570 A.2d 772, 774 (D.C. 1990) (cleaned up). This is supported by the trial judge's instructions to the jury where it was instructed "that to convict [defendant] [the jury] must find that he 'entered the

dwelling of another.'" *Id.* (explaining further that "a dwelling is of another, if the person entering did not have a right to use or occupancy"). The District of Columbia Court of Appeals found those instructions sufficient in concluding that as a general principle one cannot be guilty of burglarizing his or her own home. *Id.* at 882 (affirming the appellant's conviction on aiding and abetting grounds for assisting an intruder and distinguishing between that cause of action and the principal crime of burglary).

Because the West Virginia burglary statute does not cover Petitioner's conduct, this Court should reverse and vacate his burglary conviction.

B. Assuming the legislature intended to criminalize the burglary of one's own home, there still must be an unlawful entry.

Petitioner cannot be convicted of burglarizing his own home because he did not enter his home unlawfully. The requirement of unlawful entry traces back to the common law crime of burglary as "an offense 'against habitation and occupancy.'" *Gauze*, 542 P.2d at 1366 (distinguishing between possessory rights and ownership rights). Under common law, one could not burglarize his or her own home, even with felonious intent because of the possessory right to inhabit the space. *Id.* This applies equally to joint tenants as it does to sole occupants. *Id.* (citing *Clarke v. Commonwealth* 66 Va. 908, 916–917 (1874)).

In *Gauze*, the Supreme Court of California interpreted legislative changes to the state's burglary statute to implicitly retain essential elements of the common law crime. *Gauze*, 542 P.2d at 1367. The California Legislature carefully broadened the definition of what was considered a dwelling house and eliminated the requirement that the crime happen at night. *Gauze*, 542 P.2d at 1366 (including "shop, tent, airplane, and outhouse" to be protected by the burglary statute). In doing so, "the Legislature preserved the concept that burglary law is designed to protect a possessory right in property, rather than broadly to preserve any place from all crime." *Id.* The

legislature also eliminated the breaking requirement, and subsequent case law made clear the entry must still be without consent. *Id* at 1367 (referring to *People v. Barry*, 29 P. 1026 (1892) (holding defendant was guilty of burglarizing a store during business hours because one who "enters [a public place] with the intention to commit a felony enters without an invitation").

Ultimately, the Supreme Court of California held that "while substantially changing common law burglary . . . [a] burglary remains entry which invades a possessory right in a building. And it still must be committed by a person who has no right to be in the building." *Gauze*, 542 P.2d 1367. This reasoning acknowledged that crimes may be committed once entry into the home is complete but reasoned "impos[ing] sanctions for burglary would in effect punish [the defendant] twice for the crime he committed while in the house." *Id.* at 1368. Additionally, the absurdity of an alternative holding cemented the court's rationale. *Id.* at 1369 (finding "[i]f a person can be convicted for burglarizing his own home, he could violate [the statute] by calmly entering his house with intent to forge a check. A narcotics addict could be convicted of burglary for walking into his home with intent to administer a dose of heroin"). Taken to its logical conclusion, a West Virginian who enters his or her home planning to watch cable television spliced from the neighbors would be guilty of burglary.

This Court should adopt similar reasoning referenced above and follow the other states that have addressed this issue. Like in *Gauze*, where the California Legislature's amendments to the statute did not eliminate the unlawful entry requirement, the similar amendments made by West Virginia Legislature also should not be read to eliminate the unlawful entry requirement. Here, no court order prohibited Petitioner from entering the home. In fact—just a week before the "burglary" took place, the Fayette County Family Court terminated the protection order that prohibited Petitioner from accessing the residence. A.R. 1243–44. The family court issued the

order after Baker filed a petition to revoke the protection order. A.R. 1181–82. The family court reasoned that the order was no longer necessary because the parties had reconciled, wanted to go to counseling, and were trying to resolve their differences. A.R. 1243–44. The family court even ordered service to both Baker and Petitioner at the same residence, the one they shared together, and the one Petitioner was accused of burglarizing. *Id.*

When Petitioner moved for an acquittal on the burglary charge, the State conceded that there was no domestic violence protection order in place at the time of the burglary. A.R. 580. The State instead relied on the presence of a bond condition that prohibited contact with Baker. *Id.* On March 23, 2019, the Fayette County Magistrate entered bond conditions prohibiting Petitioner to contact Baker. A.R. 927. That order did not mention any limitation on Petitioner's access to his home. *Id.* The no-contact order, unlike the terminated protection order, did not grant sole possession of the Trump Street residence to Baker. Petitioner, while he was not to contact Baker, was not prohibited from accessing his home. If the court wanted to prohibit Petitioner from his home, it needed to do so explicitly. It did not.

Thus, on April 16, 2019, Petitioner was under no legal obligation to not enter his own dwelling house. This Court should reverse and vacate his burglary conviction. If this Court does not reverse, the applicability of this law would become far too expansive, resulting in misapplication of the statute and increasing the risk of disparate treatment toward disfavored defendants.

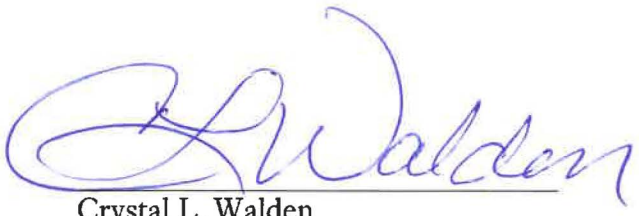
CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner respectfully requests this Court to reverse and vacate his burglary conviction under Count Two of Indictment 20-F-12.

Respectfully submitted,

JUSTIN CONNER,

By Counsel



Crystal L. Walden
Director of the Appellate Advocacy Division
West Virginia State Bar #8954
Graham B. Platz
WV R. ADMIS Rule 10
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
Phone: 304-558-3905
crystal.l.walden@wv.gov

Counsel for the Petitioner

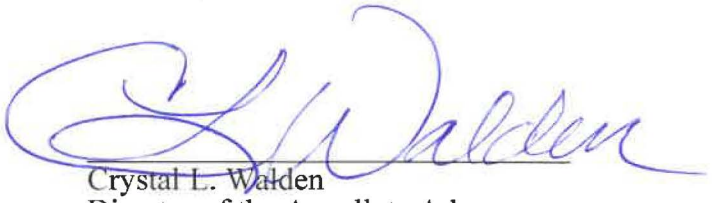
CERTIFICATE OF SERVICE

I, Graham Platz, practicing under WV R. ADMIS Rule 10, counsel for Petitioner, Justin Conner, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying *"Petitioner's Brief"* and *" Appendix Record"* to the following:

Scott E. Johnson
Assistant Attorney General
West Virginia Attorney General's Office
Appellate Division
812 Quarrier Street, Sixth Floor
Charleston, WV 25301

Counsel for Respondent

via hand-delivery on the 17th day of September, 2021.



Crystal L. Walden
Director of the Appellate Advocacy Division
West Virginia State Bar #8954
Graham B. Platz
WV R. ADMIS Rule 10
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
Phone: 304-558-3905
crystal.l.walden@wv.gov

Counsel for the Petitioner