IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 131847

LEVIN GRIMES,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF THE COMMONWEALTH

MARK R. HERRING
Attorney General of Virginia

VICTORIA JOHNSON
Assistant Attorney General
Virginia Bar No. 68282

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071 phone
(804) 371-0151 fax
oagcriminallitigation@oag.state.va.us

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STATEMENT OF THE CASE

Following a November 20, 2012 bench trial, the Newport News Circuit Court convicted Levin Grimes of grand larceny; conspiracy to commit grand larceny; larceny with the intent to sell or distribute property with a value of $200 or more; conspiracy to commit larceny with the intent to sell or

distribute property with a value of $200 or more; and statutory burglary.[1] By order entered February 5, 2013, the trial court sentenced Grimes to an aggregate sentence of forty-seven years, with all but seven years suspended.

In a published opinion, the Court of Appeals of Virginia affirmed the burglary conviction and reversed the larceny crime convictions. Grimes v. Commonwealth, 62 Va. App. 470, 749 S.E.2d 218 (2013); (App. 133-41). By order dated April 16, 2014, this Court granted Grimes' appeal from the Court of Appeals' judgment.

ASSIGNMENT OF ERROR

The assignment of error as stated by the defendant is:

> The Court of Appeals erred in affirming the trial court's denial of Grimes' motion to strike the breaking and entering charge where the evidence was insufficient to prove that Grimes actually broke into the residence at 6207 Roanoke Avenue.

STATEMENT OF FACTS

On June 18, 2012, Geraldine Sykes and Joan Taylor were standing in Taylor's driveway, discussing Taylor's interest in buying the house across the street, 6207 Roanoke Avenue. (App. 5, 11-12). The two women

[1] The court also convicted Grimes of destruction of property and possession of burglary tools; the Court of Appeals of Virginia denied Grimes' appeal of those convictions by order dated June 17, 2013.

crossed the street and walked around the house in question. (App. 6, 12). When they reached the back of the house, they noticed the door leading to the home's crawl space was standing approximately two inches open. (App. 6, 18, 93). As the women continued to walk along the back of the house they heard a noise. (App. 6, 12). As they approached the crawl space, they "heard the noise again. It was a clanging noise." (App. 6, 12). At that point, the women determined someone was underneath the house. (App. 6, 12).

Sykes blocked the crawl space door while Taylor ran back to her house to call the police. (App. 12). As Sykes stood near the door, a man, whom she identified at trial as Grimes, emerged from the crawl space. (App. 6-7, 12-13). Sykes backed away from the door while Taylor continued across the street to her house to call the police. (App. 7-8, 13-14). Grimes held several pieces of pipe under his arm and told Sykes, "The lady said I could have this pipe." (App. 7-8). Grimes fled, discarding copper pipe along his path. (App. 8, 22-23). Another man, later identified as Emmanuel Yates, also crawled from beneath the house and started loading items into a truck parked on the street. (App. 12-13, 16).

While Taylor was talking to the 9-1-1 dispatcher, she waived down Officer Michael Miller of the Newport News Police as he drove by. (App.

13-14, 16). Officer Miller detained Yates, and saw Grimes fleeing "with a handful of copper pipe." (App. 16-17). Although Miller ordered Grimes to stop, he continued to walk away. (App. 17). Officer John Chittwood apprehended Grimes a short distance from Roanoke Avenue. (App. 32-34). When Officer Chittwood caught up with him, Grimes was covered in "wet mud and sand" and holding two armfuls of copper pipe. (App. 33-34). Chittwood also found "three hand held tools and a little red flashlight" on Grimes' person. (App. 33). The tools were "small cutting or grabbing tools." (App. 34-35, 99-105).

As Miller investigated the scene at the house, he noticed the crawl space door was open and the lock on the door "appeared to have been cut." (App. 23-24, 93). Several copper pipes were scattered around the back yard, with "about five or six" copper pipes "right near the crawl space in the back of the residence." (App. 23, 94-98). Officers also found "wire cutting instruments, pipe cutting instruments, and pliers" in the truck. (App. 64). The contractor who replaced the copper pipe found a hack saw in the crawl space "up against the wall where the hot water pipe penetrated." (App. 74).

Detective Brad Rodgers of the Newport News Police Department examined the crawl space itself. (App. 46). He observed that there were

still some pieces of four-and-one-half-inch copper pipe attached to the home and, using "distinct markings of like yellow tape that manufacturers use to mark the pipes," was able to "perfectly" match one of the pieces of copper pipe recovered from Grimes with a pipe remaining in the crawl space. (App. 47).

At the conclusion of the Commonwealth's evidence, defense counsel moved to strike on the ground, as relevant to this appeal, that Grimes did not "actually go into the house, [he] went underneath the house and that therefore is not burglary." (App. 77). The trial court denied the motion to strike and found Grimes guilty as charged. (App. 79, 85).

ARGUMENT

Grimes claims the Commonwealth did not prove he "actually broke into the residence at 6207 Roanoke Avenue." (Appellant's Br. 19). Grimes contends he only crawled ***underneath*** the house and did not enter the house. This argument is without merit because the evidence, including photographs of the house, shows that the crawl space is enclosed within the walls of the house and is physically part of the house. (App. 93, 97,

99). Thus, Grimes committed statutory burglary by breaking and entering into a dwelling house.[2]

Grimes was convicted of statutory burglary under Virginia Code § 18.2-91. In relevant part, that section provides, "[i]f any person commits any of the acts mentioned in § 18.2-90 with intent to commit larceny . . . he shall be guilty of statutory burglary." In turn, Code § 19.2-90 states, in pertinent part, that "[i]f any person . . . in the daytime breaks and enters . . . a dwelling house . . . or at any time breaks and enters . . . any building permanently affixed to realty . . . he shall be deemed guilty of statutory burglary." Thus, a conviction under Code § 18.2-91 required the Commonwealth to prove (1) a breaking and entering in the daytime of (2) a dwelling house or any building permanently affixed to realty (3) with the intent to commit larceny.

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[2] As the Court of Appeals noted, Grimes does not contest that the residence at 6702 Roanoke Avenue constituted a dwelling house. (App. 139). In any event, the burglary indictment charged Grimes with breaking and entering in the daytime "a dwelling house or an adjoining, occupied outhouse, ***or*** any building permanently affixed to realty in Newport News, Virginia, with the intent to commit larceny, in violation of § 18.2-91 of the Code of Virginia (1950) as amended." (App. 1) (emphasis added). Thus, the Commonwealth was not required to prove the crawl space or the house were used for habitation. Moreover, the house, including the crawl space, was plainly affixed to the realty.

I. Standard of Review

Courts review issues of statutory construction *de novo*. Baker v. Commonwealth, 284 Va. 572, 576, 733 S.E.2d 642, 644 (2012). "The primary objective of statutory construction is to ascertain and give effect to legislative intent." Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998). Courts determine the General Assembly's intent from the words contained in a statute. Williams v. Commonwealth, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003). Although "[p]enal statutes must be strictly construed against the [Commonwealth] and . . . cannot be extended by implication or construction, or be made to embrace cases which are not within their letter and spirit," an appellate court "will not apply an unreasonably restrictive interpretation of the statute that would subvert the legislative intent expressed therein." Armstrong v. Commonwealth, 263 Va. 573, 581, 562 S.E.2d 139, 144 (2002) (internal quotation marks and citations omitted; third alteration in the original).

A court is bound by the plain meaning of a statute's language when that language is unambiguous. Kozmina v. Commonwealth, 281 Va. 347, 349-50, 706 S.E.2d 860, 862 (2011); see also Commonwealth v. Diaz, 266 Va. 260, 264-265, 585 S.E.2d 552, 554 (2003) ("When the language of a statute is unambiguous, we are bound by the plain meaning of that

language and may not assign the words a construction that amounts to holding that the General Assembly did not mean what it actually stated.”). In analyzing a statute, courts give each word “‘its ordinary meaning, given the context in which it is used.’” Sansom v. Bd. of Supervisors, 257 Va. 589, 594-95, 514 S.E.2d 345, 349 (1999) (quoting Dep’t of Taxation v. Orange-Madison Coop. Farm Serv., 220 Va. 655, 658, 261 S.E. 2d 532, 533-34 (1980)).

II. The Commonwealth proved Grimes broke into 6207 Roanoke Avenue because the crawl space was an integral part of the house.

The plain language of Code § 18.2-90 prohibits breaking and entering, as relevant here, a “dwelling house.” A “dwelling house is a house that one uses for habitation, as opposed to another purpose.” Giles v. Commonwealth, 277 Va. 369, 375, 672 S.E.2d 879, 883 (2009). Here, the record establishes that the crawl space is enclosed within the walls of the house and is physically part of the dwelling house. (App. 93, 97). Because no language in Code § 18.2-90 excludes any portion of a dwelling house from the application of the statute, Grimes’ actions fall within the statute’s proscription: when he broke and entered the crawl space, he broke and entered the dwelling house.

While this Court has not yet addressed the issue, this analysis is consistent with that of the Court of Appeals of Virginia and courts of other jurisdictions. As the Court of Appeals of Indiana recognized several years ago, dwelling houses are viewed as single units:

> The "unit" concept of a dwelling house, despite an outside only entrance to a basement, is emphasized in 12 C.J.S., Burglary § 18 at 680-681: "[T]he cellar and all rooms of a dwelling house are regarded as parts of the dwelling house, so that it is burglary to break and enter the same with felonious intent, although there may be no entry into the dwelling house itself, or into those rooms of the dwelling house in which the occupants sleep * * *."

Burgett v. State, 314 N.E.2d 799, 803 (Ind. Ct. App. 1974).

Similarly, in Lacey v. Commonwealth, 54 Va. App. 32, 38, 675 S.E.2d 846, 850 (2009), the Court of Appeals of Virginia held that an attached garage was a part of a dwelling house for the purposes of determining whether a breaking took place. Id. at 43, 675 S.E.2d at 852. In Lacey, the defendant entered an attached garage through its open door, and, from there, entered a utility room that lead into the rest of the house. Id. at 35, 675 S.E.2d at 848. The Court of Appeals reversed the defendant's statutory burglary conviction upon concluding that he had not broken into a dwelling, but had instead entered the dwelling through the open garage door and, from there, gone into another room in the dwelling. Id. at 43, 675

S.E.2d at 852. In making its determination, the Court of Appeals explained that an attached garage "represented another room in the dwelling" because it "share[d] a roof and wall with the other portions of the house," "connect[ed] interiorly with other portions of the house," and "was used for ordinary household functions." Id. at 43, 675 S.E.2d at 852.

The crawl space at issue here is analogous to the garage in Lacey. Like the garage, the crawl space shares walls and a ceiling with the rest of the structure: it is all part of the same solid brick house. (App. 93, 97). It is also used for ordinary household functions. In this case, the plumbing pipes for the house reside in the crawl space — an important, necessary, and ordinary part of the house's function.

While there is no evidence that the crawl space at issue here provided an interior entrance into the rest of the house, that factor is not dispositive. See State v. Bryant, 775 So. 2d 596, 602 (La. Ct. App. 2000) ("Although the carport storage room had no direct entrance into the residence, it nevertheless formed part of the structure of the house; the room was under the same roof as the house."); People v. Moreno, 158 Cal. App. 3d 109 (Cal. Ct. App. 1984) ("[G]iven the fact that the garage was under the same roof, functionally interconnected with, and immediately contiguous to other portions of the house, simple logic would suffer if we

were to . . . [hold] a garage is not part of a dwelling house because no inside entrance connects the two."); Burgett, 314 N.E.2d at 803 (holding basement part of a dwelling house when accessible only by exterior entrance, located under the living area, and housing heating and mechanical equipment: "it [would require] considerable agility to leap over this fulsome interrelationship to a conclusion that a basement is not part of a dwelling house because no inside entrance connects the two"); Mitchell v. Commonwealth, 11 S.W. 209, 210 (Ky. 1889) (concluding cellar accessible only from the outside part of dwelling house when under the same roof: "It is essentially part and parcel of the habitation.").

Moreover, other jurisdictions treat crawl spaces as a part of the structure or dwelling house. For instance, the Florida Court of Appeals rejected a defendant's claim that his entry into the open crawl space under a vacant wood frame house to cut and remove copper pipe did not constitute an entry into a structure under Florida's burglary statute. Tindall v. State, 997 So. 2d 1260, 1261 (Ct. App. Fla. 2009). The Florida court held the defendant's entry into the crawl space constituted entry into the structure. Id.; cf. People v. Waddell, 24 P.3d 3, 6 (Colo. Ct. App. 2000) (reversing burglary conviction because defendant had homeowners' permission to be inside crawl spaces and thus did not unlawfully enter

homes); People v. Glazier, 186 Cal. App. 4th 1151, 1155 (2010) (affirming attempted burglary conviction when defendant, while on his own property, used a pressurized paint sprayer to douse his neighbor's crawl space with gasoline and then "extended a long pole, with a flame burning on the end of it, into the crawl space").

Finally, Grimes' reliance on Lacey, 54 Va. App. at 32, 675 S.E.2d at 846 and Hitt v. Commonwealth, 43 Va. App. 473, 598 S.E.2d 783 (2004) is misplaced. (Appellant's Br. 17-18). In Lacey (as discussed above), the defendant did not commit a breaking when he walked into an ***open*** garage during the daytime and, from there, gained access to the rest of the house. Lacey, 54 Va. App. at 35, 675 S.E.2d at 848. In Hitt, the defendant was in the dwelling house with the resident's consent at the time of the burglary and broke into a locked room within the house to steal money. Hitt, 43 Va. App. at 476-77, 598 S.E.2d at 784-85. The Court of Appeals reversed Hitt's conviction because the "dwelling house" constituted the residence as a whole, not the individual rooms in the residence. Id. at 481, 598 S.E.2d at 787. Because he was in the dwelling house itself with permission, Hitt did not commit a breaking within the meaning of the statute. Id.

Grimes, on the other hand, broke and entered the crawl space through the access door built into the exterior brick wall of the house,

where he dismantled and carried away copper pipe. There is no evidence (except for Grimes' self-serving statement that was plainly discounted by the trier of fact) that Grimes had permission to enter the crawl space, as in Hitt, and the record does not support the conclusion that he entered through an open door, as in Lacey.

The floor of the house is the ceiling of the crawl space, and the entirety of the crawl space is enclosed within the walls of the house. Thus, the crawl space is part and parcel of the house.[3] Accordingly, a breaking into the crawl space is a breaking into the dwelling house itself. This Court should affirm Grimes' burglary conviction.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

MARK R. HERRING

[3] As discussed in footnote 2, Grimes has not contested that the residence at 6702 Roanoke Avenue is a "dwelling house." However, even if the residence were viewed as a "building affixed to realty" rather than a dwelling house, the same logic would apply: the crawl space is an integral part of the building and no language in Code § 18.2-90 excludes any portion of a building affixed to realty from the application of the statute.

Attorney General of Virginia

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VICTORIA JOHNSON
Assistant Attorney General
Virginia State Bar No. 68282
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-5093 phone
(804) 371-0151 fax
vjohnson@oag.state.va.us

CERTIFICATE

On June 16, 2014, the required number of copies of this brief were hand-delivered to the Clerk of this Court and three copies were mailed to **Charles E. Haden, Esq., 1 East Queens Way, First Floor, Hampton, Virginia 23669**, counsel for the appellant.

Pursuant to Rule 5:26(b), I certify the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 2,575 words.

In compliance with Rule 5:26(e), a digital copy of this brief was submitted to the Clerk of this Court and transmitted to opposing counsel via e-mail delivery.

The Commonwealth requests oral argument.

_____
Victoria Johnson
Assistant Attorney General