MAY 1974

POLICE OFFICER'S HANDBOOK

COMMON LAW CRIMES

PART II

BURGLARY

INFORMER TESTIMONY IN PRIVATE
(State of SC v. Gee)

WARRANTLESS EXAMINATION
OF PRISONER'S CLOTHING
(US v. Edwards)

FLEMING'S NOTEBOOK...Chapter 100:
Suits Against State Officers
(Scheuer v. Rhodes...Kent State Decision)

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LAW ENFORCEMENT - ETV TRAINING PROGRAM

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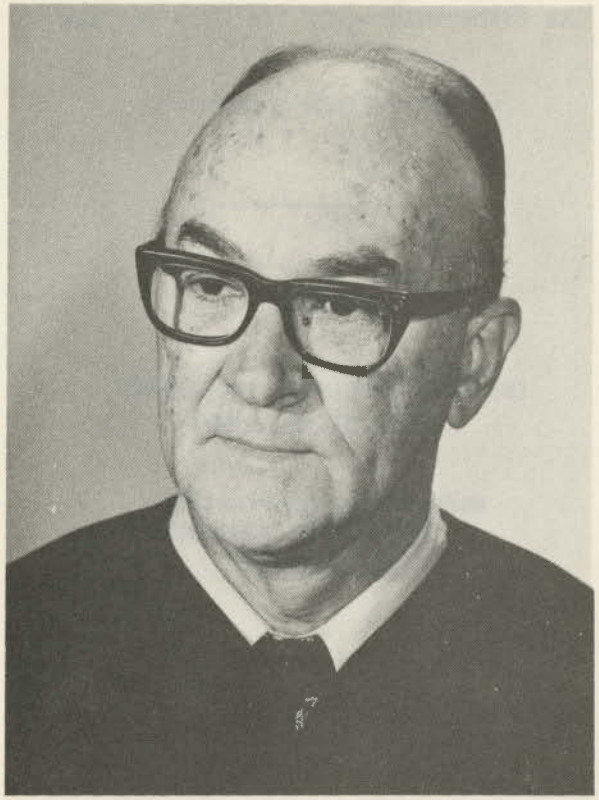
OF PRISONER'S CLOTHING
(US v. Edwards)

By

Joseph C. Coleman
Deputy Attorney General
State of South Carolina

Endorsed by

South Carolina Governor, John C. West
South Carolina Law Enforcement Division
South Carolina Sheriffs' Association
South Carolina Enforcement Officers' Association
South Carolina Police Chiefs' Executive Association
South Carolina FBI National Academy Associates
South Carolina Southern Police Institute Associates



Roy A. Powell
Municipal Judge
Columbia, South Carolina

FOREWORD

"The constitutional right to a public trial does not mean that a trial judge may not clear the courtroom while a confidential informant is testifying...when there is good reason to believe that the life or future usefulness of the witness may be endangered by public testimony!"

Roy A. Powell
Municipal Judge
Columbia, South Carolina

CONTENTS

BURGLARY

Burglary is one of the more serious crimes...and it comes from the common law of England, rather from the statutory law of the State. The crime is related to housebreaking, but, in effect, is different altogether from its relative. Any building at any time can be the subject of housebreaking, whereas burglary is restricted as follows:

BURGLARY IS THE UNLAWFUL BREAKING AND ENTERING, OR THE UNLAWFUL BREAKING WITH INTENT TO ENTER:

1. A RESIDENCE, OR OTHER BUILDING WITHIN 200 YARDS OF THE RESIDENCE APPURTENANT TO THE RESIDENCE, (USED IN CONNECTION WITH LIVING IN THE RESIDENCE);

2. AT NIGHT;

3. WITH INTENT TO COMMIT A FELONY THEREIN.

RESIDENCE

In order for a building to be a '<u>residence</u>' for purposes of a burglary charge, someone must be using the building as living and sleeping quarters at least part of the time.

BUILDING USED PARTLY FOR BUSINESS AND PARTLY FOR LIVING

When a building is used for business purposes <u>and</u> as living quarters for a manager, owner, or other person, an unlawful breaking and entry of the business area alone, without affecting the living area, is not burglary. In order to constitute burglary, there must be a breaking with intent to enter the living area.

ABANDONED RESIDENCE

A residence that has been abandoned as living quarters may be the subject of housebreaking, but not burglary.

OCCUPANTS TEMPORARILY AWAY FROM RESIDENCE

A residence may be the subject of burglary even though the residents are temporarily away from home. So long as the building has not been abandoned as a residence, it may be the subject of burglary...even though no one is at home at the time of the crime.

BEACH OR LAKE HOUSE

A house that is used on a parttime basis as a residence, such as a beach house, lake house, or other recreational living quarters, is a '<u>residence</u>' for '<u>burglary</u>' purposes, even though it is not occupied at the time of the break-in.

MOTEL ROOMS

Rooms at a hotel, motel, or rooming house, may be the subject of burglary if they are rented for living quarters at the time of the crime.

AT NIGHT

'At night' in a burglary charge does not mean from sunset until sunrise, as it does in some states. South Carolina has never seen fit to pass a law defining 'night' for arson or burglary charges. For that reason, the term 'night' is still defined as it was by the English common law, i.e.:

"WHEN IT IS TOO DARK FOR SOMEONE WITH GOOD EYESIGHT TO RECOGNIZE A FACE FROM A REASONABLE DISTANCE WITHOUT THE USE OF MOONLIGHT OR ARTIFICIAL LIGHT."

SAMPLE ARREST WARRANT

AFFIDAVITS FOR BURGLARY

I. "...that one John Doe did unlawfully break and enter the residence house of one Richard Roe in this County at night with intent to commit a felony therein, all on the 1st day of January, 1974."

II. "...that one John Doe did unlawfully break with intent to enter and commit a felony therein the residence of Richard Roe in this County, at night, on the 1st day of January, 1974."

III. "...that on the 1st day of January, 1974, in the nighttime, one John Doe did unlawfully break and enter a storage building within 200 yards of the residence of Richard Roe in this County, such storage building being appurtenant to such residence, with intent to commit a felony therein."

BURGLARY CHECKLIST

1. Unlawful breaking and entering;

   or

   Unlawful breaking with intent to enter.

2. Residence;

   or

   Building within 200 yards of residence and appurtenant to such residence.

3. In the nighttime.

4. With intent to commit a felony therein.

NOTES FROM

WHARTON'S CRIMINAL LAW

I. IN GENERAL

§406. DEFINITION. Burglary at common law is the breaking and entering, in the nighttime, of the dwelling house of another, with the intent to commit a felony therein.

The crime of burglary is an offense against the security of a dwelling place or habitation. It is an offense against possession rather than against the legal title or the person of the possessor.

§407. STATUTORY CHANGES. Burglary has been the subject of many statutory changes. Sometimes the statutory offense is not known by the name of burglary, but as breaking and entering; entering a warehouse with felonious intent; and so forth.

In a number of states burglary in its common-law form is punished most severely, and other extensions of burglary are given a lesser punishment. In a number of states, burglary is divided into degrees.

II. THE MENTAL STATE

§408. IN GENERAL. The breaking and entry of the dwelling house must be with the intent to commit a felony therein. In the absence of such intent, the entry of the defendant is not burglary, and may be merely a civil trespass. The violent breaking into the dwelling house of another, with intent to disturb the peace, may be indictable at common law as malicious mischief, but is not burglary; nor is it burglary to enter a house for adulterous purposes, when adultery is not a felony.

To a charge of burglary it is a good defense for the defendant to show that he entered the house in question merely as a detective to fasten guilt on

parties really guilty of burglary, and that he entered with no felonious intent.

The fact that a felony was committed after breaking and entering is, of course, admissible as evidence from which the jury can infer that the intent to commit the felony existed at the time of the breaking and entering. The existence of such intent is to be inferred from the circumstances of the case. Moreover, when a dwelling house is broken and entered in the nighttime and no lawful motive or purpose is shown or appears, and no satisfactory explanation can be given for such action, a presumption arises that the breaking and entering were committed with the intent to commit larceny.

§409. INTENT TO STEAL. At common law, all larceny was a felony, and therefore a breaking and entering with intent to commit any larceny constituted burglary. In many states, larceny is divided into degrees of grand and petit larceny, and the latter is merely a

misdemeanor. If the common-law principles are then literally applied, a breaking and entering to commit petit larceny is not burglary. This conclusion has been avoided in some states by a statutory expansion of the burglarious intent as the intent to commit "felony or any larceny", or " to steal anything of value", or "to steal". In some states the distinction between an intended felony and an intended misdemeanor has been abolished by providing that the intent be to commit "any crime", or "public offense". Such statutes are broad enough to include a misdemeanor, or to create a statutory offense of breaking and entering with intent to commit a misdemeanor.

Under some statutes the penalty is increased if the intent is to commit a major felony such as murder or arson.

When the defendant breaks and enters with the intent to take property which would not be the subject of larceny, or its statutory equivalent, as to take a

dog in a state which still follows the common-law rule, his act of breaking and entering is not burglary, unless otherwise declared by statute.

§410. INTENT NOT EXECUTED. It is the act of breaking and entering with felonious intent which is essential to the offense of burglary. Whether the intented felony or any felony is actually committed is immaterial. The offense has been completed by the breaking and entering without regard to whether completion of the intended felony was prevented because the presence of the defendant was discovered, or he was stopped by police officers, or because he was unable to commit the offense, as when the thing sought was not in the house.

As the completion of a felony within the building is not required, it is immaterial that the defendant did not in fact take any property or that there was no asportation of any property.

Evidence of commission of a felony within the building is admissible, however, as relevant to the question whether the entry was made with felonious intent.

In extending the crime of burglary to buildings other than dwelling places, statutes sometimes make completion of the intended felony essential. Thus, a statute may declare it a crime to break into a warehouse and take therefrom any goods, wares, merchandise, or other things of value, or to break and enter any building and commit a larceny therein.

If the defendant does commit a felony or other crime inside the dwelling or building which he has burglarized, he is then guilty of two offenses, that of burglary and that of the crime which he committed when inside.

§411. POSSESSION OF STOLEN GOODS. While the possession of recently stolen goods gives rise to an inference that the possessor has stolen the goods, it is not ordinarily proof or prima facie evidence of burglary. There should be some evidence of guilty conduct besides the bare possession of the stolen property, before the presumption of burglary is superadded to that of the larceny. However, such possession is evidence which may be considered with all the other circumstances of the case as bearing on the question whether the defendant committed the burglary, and there is authority that if the possession is unexplained it may support the conclusion of guilt of burglary. Moreover, when goods have been feloniously taken by means of a burglary, and they are immediately or soon after found in the actual and exclusive possession of a person who gives a false account, or refuses to give any account, of the manner in which the goods came into his possession, proof of such possession and guilty conduct may sustain the interence not only that he stole the goods, but that he made use of the means by which access to them was obtained.

STATE V. GEE (SC)

FILED APRIL 24, 1974

THE COURTROOM MAY BE CLEARED DURING THE TESTIMONY OF A CONFIDENTIAL INFORMER IF THE STATE CAN SHOW THAT THE LIFE OF THE WITNESS MIGHT BE ENDANGERED OR HIS FUTURE USEFULNESS DESTROYED BY PUBLIC TESTIMONY.

Further legal authority for excluding the public during the testimony of a confidential informer or undercover agent:

21 Am.Jur. 2d, Cr. Law, S.266.

48 ALR 2d 1436.

People v. Pacuicca, 134 NYS 2d 381.

The South Carolina Supreme Court said in the Gee case:

I. "It was held (in Pacuicca) that the court was justified in so doing (clearing the courtroom) in order to shield the identity of the witness from the public, so as to preserve her future usefulness and to safeguard her life. We find no abuse of discretion on the part of the trial judge in excluding the public from the courtroom while the confidential informer was testifying."

II. DELAY IN ARRESTING A DEFENDANT IN ORDER TO GET FURTHER EVIDENCE AND BUILD A BETTER CASE DOES NOT JUSTIFY DISMISSING THE CHARGE...NO PREJUDICE TO THE DEFENDANT BEING SHOWN.

III. FAILURE TO BRING A DEFENDANT BEFORE A MAGISTRATE UPON HIS ARREST IS NOT ERROR...UNLESS THE DEFENDANT CAN SHOW THAT SUCH FAILURE DEPRIVED HIM OF A FAIR TRIAL.

The South Carolina Supreme Court said in Gee:

"In Thomas v. Colonial Stores (236 SC 95), we held that if there has been a lawful arrest made in good faith, subsequent unreasonable delay in taking the person before a magistrate will not affect the legality of the arrest."

SEE ALSO: State v. Swilling, 249 SC 541.

UNITED STATES V. EDWARDS

(US SUPREME COURT, 42 LW 4463)

WARRANTLESS SEARCH OF PRISONER'S CLOTHING FOR EVIDENCE WAS LAWFUL WHEN THERE WAS CAUSE TO BELIEVE HIM GUILTY OF A FELONY.

FACTS:

Suspect was arrested for felony, and placed in jail. Ten hours later, without a search warrant, police seized the clothing worn by the suspect and did a lab analysis for paint scrapings... evidence of a break-in.

THE SUPREME COURT SAID:

"When it became apparent that the articles of clothing (worn by the arrested suspect) were evidence of the crime for which Edwards (suspect) was being held, the police were entitled to take, examine, and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered."

"Indeed, it is difficult to perceive what is unreasonable about the police examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest."

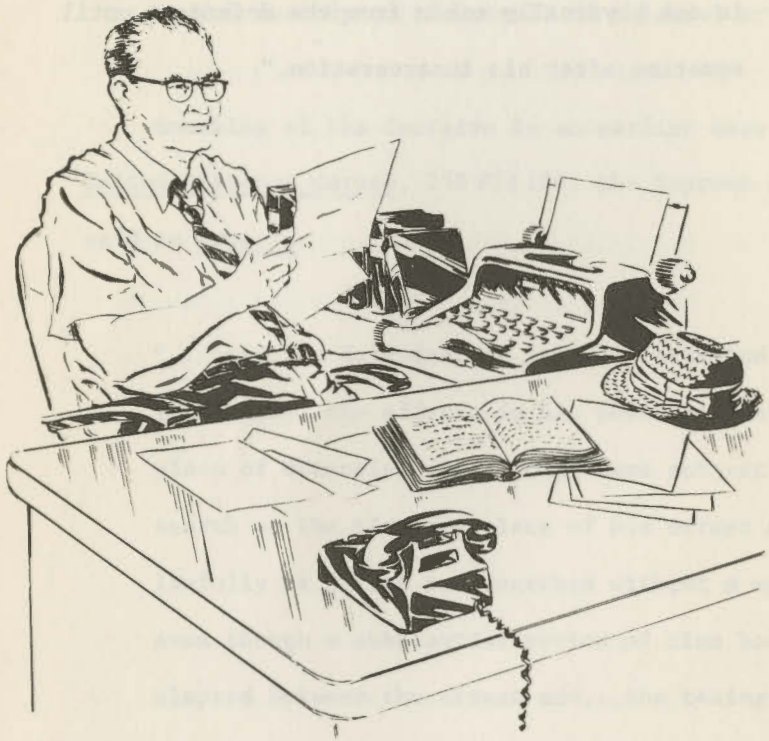
Speaking of the decision in an earlier case, United States v. Caruso, 358 F2d 184, the Supreme Court said in Edwards:

"...once the defendant is lawfully arrested and in custody, the effects in his possession at the place of detention (jail) that were subject to search at the time and place of his arrest may lawfully be seized and searched without a warrant even though a substantial period of time has elapsed between the arrest and...the taking of the property for use as evidence...

"This is true where the clothing or effects are immediately seized upon arrival at the jail, held

under the defendant's name in the 'property room' of the jail and at a later time searched and taken for use at the subsequent criminal trial. The result is the same where the property is not physically taken from the defendant until sometime after his incarceration."

FLEMING'S NOTEBOOK



FLEMING'S NOTEBOOK...Chapter 100:

When a suspect signs a statement or makes a verbal statement incriminating another person, what can be done if the suspect at trial denies that the other person was with him in the crime? Such a case was recently decided by the South Carolina Supreme Court...State v. Miller (SC), decided April 23, 1974.

RULING: The statement originally signed or made by the witness may be used on cross-examination to show that the witness is lying (impeach him).

KENT STATE RULING

The recent ruling of the United States Supreme Court in the suit against the Governor and Adjutant General of Ohio, arising out of the Kent State deaths in 1970, Scheuer v. Rhodes, 42 LW 4543, does not add anything to the law permitting suit in Federal Court under the Civil Rights Act.

It had been argued by attorneys for the Governor and Adjutant General that all offices of the State were immune from suit if they were performing duties within their authority...whether such duties were performed in good faith or not.

The Court held that anyone...including executive officers of a state...may be held liable for death, injury, or property damage, to any person resulting from a malicious, intentional, unlawful act done by any state officer. This is no change in the law. Officers have been sued hundreds of times in this State under the Civil Rights Act. The Kent State case did not enlarge the liability of officers of a state under the Civil Rights Act.

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