THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

Knox R. McMahon, Circuit Court Judge

Op. No. 2013-UP-152 (S.C. Ct. App. filed Apr. 10, 2013)

The State of South Carolina, ... Respondent,

v.

Andrew E. Torrence, Jr., ... Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on April 10, 2013. See (App.p.1). Counsel for the petitioner certifies that he filed the petition for rehearing on April 23, 2013. See (App.p.4). The court denied the petition for rehearing on May 8, 2013. See (App.p.8).

QUESTION PRESENTED

Is a criminal defendant entitled to a jury charge on involuntary manslaughter when he admits intentionally discharging a firearm, but the circumstances might nevertheless allow a reasonable jury to find that he did not intend to inflict serious injury or death?

STATEMENT OF THE CASE

On September 28, 2008, very early in the morning, Andrew Torrence was involved in a fistfight inside a bar in West Columbia. The evidence surrounding the fight was contested, but there was some evidence that Mr. Torrence was the victim of an un-provoked assault by a man named Zach Chaplin.

After the fight, Mr. Torrence went outside the bar and claimed that he used his phone to call the police. Then, Torrence retrieved a pistol from his car and re-entered the bar.

Torrence was a licensed armed security guard, but he admitted he was off-duty and intoxicated during this incident. Torrence said he went back inside the bar to perform a citizen's arrest. He believed he had been assaulted by two people—Chaplin and a friend of Chaplin's—and he said he retrieved his pistol so he could use it as a "show of force" to deter any additional violence. (R.p.379, line 7 - p.380, line 18). Torrence admitted during trial that the decision to retrieve his gun was "stupid." (R.p.442, lines 7-11).

As Mr. Torrence attempted to arrest the person he believed to be Mr. Chaplin's accomplice, Chaplin threw a barstool at Torrence and charged him. To this point, Torrence had been holding the firearm at the side of his body, pointed straight down to the ground. (R.p.380, lines 8-18).

As Chaplin charged Torrence and dove at him, Torrence fired his weapon twice. Torrence said that he shot as Chaplin was trying to get control of the gun, when Chaplin was "within a foot [of him] maybe." (R.p.383, lines 12-17). Torrence could not say whether Chaplin had ever actually touched the weapon, (R.p.393, line 10 - p.394, line 12), but he explained the shooting as a "fast decision" that was "based on instinct," (R.p.382, lines 9-24), and that he believed he "had to shoot to stop [Chaplin]." (R.p.393, lines 17-19).

Both of Torrence's shots struck Chaplin, and Chaplin died several months later. The shooting and the fistfight that preceded it were captured on the bar's video surveillance equipment. The video was an exhibit at trial. See (State's Exhibit 17) (the video).

Mr. Torrence was indicted for murder, possession of a weapon during a violent crime, and carrying a firearm onto the premises of a building selling alcoholic liquors. He admitted his guilt for the charge of carrying a firearm inside a bar, and that offense is not material to these proceedings. The case was tried in front of Judge Knox McMahon over four days at the end of May and the beginning of June in 2011.

The first time the court addressed involuntary manslaughter was during the pre-charge conference and immediately following the charges themselves. The court denied Mr. Torrence's initial requests for the charge, and it also denied Mr. Torrence's request after the court charged the jury. See (R.p.513, lines 1-5; p.526, lines 4-13; p.610, lines 19-21).

The second time the court addressed this issue was during the jury's deliberations. On its own motion, the jury sent the judge a note asking whether there was a possible charge of involuntary manslaughter. See (R.p.650). Mr. Torrence again requested the charge. The judge denied the request and wrote the jury that involuntary manslaughter was not an issue for them to consider. See *id.* (note); see also (R.p.620, line 20 - p.623, line 15) (transcript).

The jury found Mr. Torrence guilty of voluntary manslaughter. (R.p.617). Because voluntary manslaughter is a violent crime by statute, see S.C. Code Ann. § 16-1-60, this conviction necessitated a finding that Mr. Torrence was guilty of possessing a firearm during a violent crime. See S.C. Code Ann. § 16-23-490(A).

Judge McMahon sentenced Mr. Torrence to 25 years imprisonment for manslaughter. Torrence received shorter sentences on his other convictions, which the judge directed him to serve concurrently. (R.p.642).

Mr. Torrence filed a motion for a new trial and for reconsideration, see (R.p.2), and the trial court denied this motion in a written order. See (R.p.1). The written order was dated June 11, 2011.

On June 21, 2011, Mr. Torrence served and filed a notice of appeal.

The only issue Mr. Torrence raised on appeal was whether the court erred in refusing to charge involuntary manslaughter. See (App.pp.9-32; pp.51-64) (his appellate briefs).

The Court of Appeals affirmed in a unanimous unpublished decision. In the court's view, all of the evidence tended to show that Mr. Torrence had intentionally fired his weapon at Chaplin. The court then reasoned that intentionally firing a weapon precludes a charge on involuntary manslaughter. (App.pp.1-3).

ARGUMENTS

Since *State v. Morris*, the law of this State has suggested that when someone admits intentionally discharging a firearm, involuntary manslaughter is not an appropriate jury charge. The *Morris* decision offers a one sentence rationale for this rule. It provides "the act must be unintentional." 307 S.C. 480, 483, 415 S.E.2d 819, 821 (Ct. App. 1991).

Mr. Torrence respectfully requests that the Court grant certiorari to decide whether this rule is correct. There are three reasons the Court should consider the question.

First, this has not always been the rule in South Carolina. In fact, the *Morris* decision favorably cites a previous decision from this Court in which the Court affirmed an involuntary manslaughter conviction of a defendant who admitted intentionally firing a weapon. That decision has never been overruled.

Second, the justification offered in *Morris* cannot be the true justification for this rule. If the act that gives rise to a criminal charge is truly unintentional, there cannot be any criminal liability at all. The state of North Carolina has recognized this, and it has also rejected the idea that intentionally discharging a firearm precludes an involuntary manslaughter charge. North Carolina and South Carolina have the same definition of involuntary manslaughter. These decisions should be persuasive.

Finally, there are several arguable flaws with the rule South Carolina seems to be following. This case exhibits some of them. A reasonable jury could find the facts in a way that would take murder, voluntary manslaughter, and self-defense off of the table. This should not be—there is not a category of killings that qualify as "nothing." In similar fashion, voluntary manslaughter carries a possible prison sentence of 30 years, and it seems

wrong to say that once he made the stupid decision to take a gun inside the bar, Torrence's only options for avoiding this sort of criminal liability were to surrender his weapon to his charging adversary or to make sure he won the struggle for the gun.

A. South Carolina Law Is Not Completely Consistent on this Question.

After the defendant and the victim in *State v. Morris* had a verbal altercation, the victim asked the defendant to leave the premises. When Morris refused, the victim punched him. Morris then said that he was leaving, but after the victim turned and began to walk away, Morris shot the victim in the back. Morris asked the judge to charge involuntary manslaughter, and on appeal, the Court of Appeals affirmed the trial judge's denial of Morris' request. 307 S.C. at 482-83, 415 S.E.2d at 821.

The Court of Appeals reasoned that while the negligent use of a deadly weapon would support involuntary manslaughter if the death was unintentional, "the act" had to be unintentional as well. *Id.* at 483, 415 S.E.2d at 821. On an number of occasions, South Carolina's appellate court's have cited *Morris* to support the principle that when a defendant admits firing a gun, an involuntary manslaughter charge is not appropriate. See, e.g., *State v. Gibson*, 390 S.C. 347, 357-58, 701 S.E.2d 766, 771-72 (Ct. App. 2010); *Douglas v. State*, 332 S.C. 67, 74, 504 S.E.2d 307, 310-311 (1998); *State v. Pickens*, 320 S.C. 528, 531-32, 466 S.E.2d 364, 366 (1996).

Here is the problem: *Morris* cannot mean what it says. In the sentence that immediately precedes the statement that "the act" must be unintentional, the *Morris* court cited this Court's decision in *State v. Quick*. See *Morris*, 307 S.C. at 483, 415 S.E.2d at 821.

The *Quick* decision affirmed the involuntary manslaughter conviction of a defendant who admitted firing her gun. 168 S.C. 76, 167 S.E. 19 (1932). *Morris* cannot mean that the act of pulling the trigger must be unintentional, because if it did, *Morris* would have overruled *Quick* instead of citing it. As it stands, *Quick* has never been limited, vacated, or overruled.

This creates a problem in terms of discerning the true rule that governs these cases. If several cases cited one rule, yet there were also one or two different cases saying the opposite, there might be a tendency to view cases in the smaller camp as either outdated or outliers. The circumstances of a case might even suggest that this view would be more than possible, but highly probable.

What makes the present case different is that the *Morris* decision is the foundation of this relatively recent feature of involuntary manslaughter doctrine, yet it also favorably cites the same decision that calls this new rule into question. *Morris* cannot mean that the act of pulling the trigger must be unintentional, because the *Morris* decision cites the very case that shows this is not true.

B. North Carolina's Involuntary Manslaughter Doctrine Is Identical to South Carolina's, and North Carolina Has Rejected the Notion That Shooting the Firearm must Be Unintentional.

North Carolina and South Carolina have the same definition of involuntary manslaughter. Both states hinge this level of criminal liability on whether the circumstances of a killing show reckless disregard for the safety of other people. See (App.pp.12, 54) (the relevant sections of Torrence's briefs to the Court of Appeals).

In *State v. Brewer*, the Supreme Court of North Carolina rejected the argument that the discharge of a weapon had to be unintentional in order for an involuntary manslaughter

charge to be appropriate. 386 S.E.2d 569, 583 (N.C. 1989). The court called this proposition an "invalid premise." *Id.* The *Brewer* court explained "[w]hile involuntary manslaughter imports an unintentional killing, i.e., the absence of a specific intent to kill, it is . . . accomplished by means of some intentional act." *Id.* at 583 (quoting *State v. Wilkerson*, 247 S.E.2d 905, 918 (N.C. 1978)). Drawing from its own precedent, the court wrote that without some intentional act in the chain of causation, there could not be any criminal liability. *Id.*

Brewer dealt with a defendant who claimed he had been intentionally shooting at objects—not people. However, the rule has been applied in circumstances that are fairly comparable to Mr. Torrence's case. See, e.g., *State v. Debiase*, 711 S.E.2d 436 (N.C. Ct. App. 2011) (the use of the dangerous object—a glass bottle—was intentional, but it could also have been negligent and without intent to inflict serious injury or death). The guiding principle of this doctrine is that an involuntary manslaughter instruction is appropriate if a reasonable jury could find that the infliction of the fatal would was unintentional—notwithstanding the fact that the defendant intentionally carried a dangerous instrument during the encounter in question. See *id.* at 442-43 (citing *State v. Drew*, 592 S.E.2d 27 (N.C. Ct. App. 2004); *State v. Daniels*, 360 S.E.2d 470 (N.C. Ct. App. 1987); *State v. Buck*, 313 S.E.2d 550 (N.C. 1984); and *State v. Fleming*, 251 S.E.2d 430 (N.C. 1979)).

Torrence respectfully submits that in deciding whether to consider his case, it should say something that North Carolina and South Carolina appear to have the same basic involuntary manslaughter doctrine, but have reached opposite conclusions with respect to how intentionally shooting a firearm relates to that doctrine. This may be an area where these two jurisdictions part ways, but they should do so only after deliberate consideration.

C. There Are Several Arguable Flaws in the Rule That Intentionally Shooting a Firearm Bars an Involuntary Manslaughter Charge.

Involuntary manslaughter is the lowest level of a criminal killing in South Carolina. Murder is an unlawful killing with malice aforethought. S.C. Code Ann. § 16-3-10. Voluntary manslaughter is an intentional and unlawful killing committed in a sudden heat of passion upon sufficient legal provocation. *State v. Smith*, 391 S.C. 408, 412-13, 706 S.E.2d 12, 14-15 (2011). Involuntary manslaughter is an unintentional killing under circumstances that do not show malice but demonstrate reckless disregard for the safety of others. See S.C. Code Ann. § 16-3-60. It is statutorily defined as criminal negligence.

In terms of pure doctrine, all killings are either justified by self-defense, excused as an accident, or some sort of crime. But under this new aspect of South Carolina's involuntary manslaughter doctrine, there is a class of killings in limbo. Andrew Torrence's case is a case in point. A reasonable jury could find that Torrence was at least partially at-fault in bringing on the difficulty. This finding would take self-defense out of play. See *State v. Slater*, 373 S.C. 66, 70, 644 S.E.2d 50, 52 (2007) (self-defense requires the defendant to be without fault in bringing on the difficulty). The same jury could find Torrence acted without malice (disqualifying murder), and also that Torrence made an instantaneous decision to shoot without intending to kill or seriously injure Mr. Chaplin (disqualifying voluntary manslaughter). If involuntary manslaughter is not a possibility, there is no means left to criminalize the killing, but it seems wrong to excuse the killing if the jury has specifically determined that self-defense does not apply. Following the principle that "the act must be intentional" is arguably creating illogical holes in this area of the law.

Consider also previous decisions involving defendants who intentionally pointed firearms at other people but claimed that the discharge of the firearm was unintentional. This Court's decisions in *State v. Crosby* and *State v. Burriss* are examples of such cases. See *Crosby*, 355 S.C. 47, 50, 584 S.E.2d 110, 111 (2003) ("I closed my eyes and pulled the trigger. I didn't even know I pulled the trigger."); *Burriss*, 334 S.C. 256, 263, 513 S.E.2d 104, 108 (1999) (defendant intentionally grabbed his gun and "it fired"). The point is that while one possible justification for barring involuntary manslaughter in all intentional shootings is that firearms are dangerous, a reasonable person might say the same of the decision to point a firearm at someone else. This person would object to the law commanding a distinction between intentionally pointing the firearm and intentionally pulling the trigger; he or she sees serious injury as a consequence of both courses of action. Here, the law is usurping the jury's role of determining reasonableness.

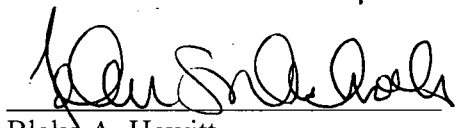
Finally, if involuntary manslaughter is disqualified because Torrence pulled the trigger the moment before a struggle began and not "during" the struggle itself, the criminal law is attaching enhanced liability in a way that seems unprincipled. It seems wrong to say that once Torrence made the stupid decision to take a gun inside the bar, Torrence's only options for avoiding a conviction of murder or voluntary manslaughter were to surrender his weapon to his charging adversary or to make sure he won the fight for the gun. All intentional shootings are not created equal. There is a difference between deliberately raising a firearm and shooting someone for the purpose of injuring them and a decision to shoot that is made in an instant and based on a reaction. A jury is capable of distinguishing between intentional and unintentional killings. The note from Torrence's jury arguably shows this.

CONCLUSION

The rule that governed this Court's decision in *State v. Quick* is a rational rule. Though *Quick* does state the rule in this manner, the underlying rationale is that there is a difference between deliberately shooting a gun at somebody, perhaps even for the specific purpose of injuring or killing them, and firing a gun without such intent.

Quick has never been expressly overruled, but several of this State's more recent decisions state the law in a way that is opposite to *Quick*'s holding. While it is certainly possible that the Court has experienced a change of heart and rejected this approach, it seems equally possible that these decisions have latched on to an awkward or incorrect description of the law and inadvertently marched this piece of South Carolina's jurisprudence in a new direction. Torrence submits that this is a question worth considering, and he therefore respectfully requests that this Court exercise its discretion to review his conviction.

Respectfully submitted,



June 12, 2013

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with the *Petition for a Writ of Certiorari* and *Appendix* by United States Mail with first class postage prepaid to the following address:

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