STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenwood County
Frank R. Addy, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

XZARIERA OKEVIS GRAY,

Appellant.

Appellate Case No. 2017-002011

RETURN TO PETITION FOR REHEARING

On November 23, 2022, this Court issued its opinion in the captioned appeal. The Court affirmed in part, finding no error in the admission of the video of the shooting or in denying Gray's post-trial motion without a hearing, but remanded for Judge Addy "to make specific findings that support [a] determination of whether Gray is, or is not, entitled to immunity under the Act." (Op. No. 5951 at [unnumbered] p. 2). Appellant, Xzariera Okevis Gray, filed a petition for rehearing on December 9, 2022. This Court has called for a response.

In his petition, Gray argues that this Court's determination of his trial issues may be rendered "advisory" if on remand Judge Addy should grant immunity; therefore, Gray requests this Court withdraw its opinion and reissue only as to the immunity issue. (Pet. at 1-2). He further submits, alternatively, there is error in the resolution of those issues. Respondent submits that

Gray is incorrect in his suggestion that it is somehow inappropriate to resolve all the issues Gray raised in his appeal, and further, that the Court did not err in affirming on the remaining issues. In support of this position, Respondent would respectfully show the Court:

1. As a general principle, appellate courts do not answer merely academic questions. *See, e.g., Wallace v. City of York*, 276 S.C. 693, 694, 281 S.E.2d 487, 488 (1981)("The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation."). The question of whether an issue is "real" and available for review is tied to whether a ruling has impact on the rights of the parties. Stated differently, "[a] justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Pee Dee Elec. Co-op., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983) (citing *Orr v. Clyburn,* S.C., 290 S.E.2d 804 (1982)). A question answered that would "settle no legal rights of the parties" would result merely in an "advisory" opinion, thus would not be appropriate for an appellate court to address. *Id.*

This Court properly ruled on all the issues Gray raised in his appeal. A pre-trial immunity ruling is part and parcel of the lower court proceedings. Gray attempts a hybrid approach that does not acknowledge this fact. His error is best shown by considering the interlocutory nature of an attempted appeal on an unsuccessful immunity argument. While the State may appeal an order granting immunity, as it would essentially end the proceedings at that point, a defendant may not appeal directly from an order denying immunity. *State v. Isaac*, 405 S.C. 177, 182, 747 S.E.2d 677, 679 (2013) ("an order ***denying*** a request for immunity is not a final order in the case") (emphasis in original). In other words, a defendant must bring all of his issues to the appellate court at one time.

This is what Gray has done, and this Court has properly ruled upon all the issues Gray presented.

Gray's present argument attempting to sever the rulings now depends on an artificial separation at best, and, at worst, an argument offensive to the principles set out in *Isaac*. If one finds, apart from *Isaac*'s interlocutory appeal distinction, that the remand would allow Gray to revive this appeal should immunity be denied, which he presumably would wish to do (and indicates as such, Pet. at 2), he would then return to this Court and *re-argue* his trial issues. Such a procedure would needlessly waste time and resources – both that of the Court and the parties. Gray's second-bite-at-the-apple theory essentially grants a new appeal without finding error in the first one. Further, his suggestion is premised on a *potential future* event. True, "cases or issues *which have become moot or academic* in nature are not a proper subject of review." *Sloan v. Greenville Cnty.*, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) (quoting *Wallace,* 276 S.C. at 694, 281 S.E.2d at 488) (emphasis added). Avoidance of an adverse decision, though, based upon a hopeful argument that an issue "might" become moot simply lacks a sound basis in the law. There is no principled reason for the Court to follow the course Gray suggests.

2. Moreover, the only relief granted in Gray's appeal is limited to the ruling regarding immunity. In this Court's view, the record is insufficient for appellate review. This Court agreed that the record reflects that Judge Addy "ruled that Gray did not prove by a preponderance of the evidence that he was entitled to immunity," but found that the record lacked "specific findings that support that determination." (Op. at 8). Several key elements of the circuit court ruling are not in question. There is no doubt that Judge Addy utilized the proper burden, *see State v. Andrews,* 427 S.C. 178, 181, 830 S.E.2d 12, 13 (2019); and, the record revealed that Judge Addy did not find Gray's version of events credible so that he could carry his burden of proof, (R. 78-79). What this Court apparently found lacking was the specific reason why Judge Addy did not credit Gray's

version of events. This would be consistent with the treatment of the record in immunity ruling review in other cases.

For example, this Court found, without the need for remand and a written order, that a trial judge's reference to a defendant's "inability to explain" the victim's "twenty-four additional stab wounds" when the defendant related his version of events was sufficient to show and support the required fact-finding. *State v. Chhith-Berry*, 437 S.C. 527, 544, 878 S.E.2d 352, 361 (Ct. App. 2022), *reh'g denied* (Oct. 20, 2022). *Accord State v. Marshall*, 428 S.C. 11, 19–20, 832 S.E.2d 618, 623 (Ct. App. 2019) (noting "the circuit court found numerous inconsistencies called Marshall's credibility into question and resulted in Marshall failing to establish entitlement to immunity by the preponderance of the evidence"). *See also Andrews*, 427 S.C. at 182, 830 S.E.2d at 14 ("while the circuit court may not have set forth every detail of its analysis in the record, the record is nevertheless adequate for a reviewing court to determine that the circuit court applied the correct burden of proof *and made findings* that supported its denial of immunity consistent with a correct application of this Court's precedent") (emphasis added).

Here, while Judge Addy acknowledged that he did not find Gray's version of events credible, he did not cite to a discrete fact or circumstance that supported that broad finding. Essentially, though the reasoning may be logically (and the State submitted fairly) inferred by the trial judge's handling of the hearing and comments in the hearing, there were no explicit fact-findings that this Court could quote or reference. In essence, this case falls in the murky area appellate courts have struggled to navigate. To be sure, there is no requirement for a formal written order. *See State v. Cervantes-Pavon,* 426 S.C. 442, 452 n. 4, 827 S.E.2d 564, 569 n. 4 (2019). Yet, regarding oral rulings, our Supreme Court has cautioned that the trial court "should *at least* make specific findings on the elements" of self-defense. *State v. Glenn*, 429 S.C. 108, 123,

838 S.E.2d 491, 499 (2019) (emphasis added). Consequently, it presently falls to the appellate court reviewing the ruling as to whether the record is sufficient for appellate review. Here, the Court found that the record was not sufficient and remanded for specific fact-findings to ensure that the trial judge's role as fact-finder was actually and properly performed.

In these discrete circumstances, the State has not challenged this decision in its own petition for rehearing given the limited relief granted. Though it fairly relied upon reasonable inferences (as compared to explicit references, for example, in *Chhith-Berry* noted above), and the recognition of the correct legal principles expressly set out in the ruling, *Andrews, supra*, nevertheless, it has resolved in this instance that to allow Judge Addy to announce his findings explicitly may bring closure to this issue in the most efficient manner.[1] Indeed, Judge Addy's subsequent letter to this Court, dated December 9, 2022, underscores that he stands willing to place those findings that he previously made and recalls on the record by written order. (Attachment 1). Respondent agrees with Judge Addy that this will allow this Court to more fully review the ruling on appeal without causing undue delay.

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[1] The Court did not find Gray was denied an opportunity to present evidence, or the process of the pre-trial hearing was somehow infirm such that a new hearing is warranted; rather, the finding of error is distinctly narrowed only to the trial judge's ruling. In contrast, in *Glenn,* our Supreme Court found "reversible legal error" in the structure of the circuit court's ruling and ordered a new hearing. 429 S.C. at 120, 838 S.E.2d at 499. Likewise, in *Cervantes-Pavon*, our Supreme Court found that the trial judge's findings did not warrant denial of immunity, and specifically ordered a new hearing. 426 S.C. at 452, 827 S.E.2d at 569. No such direction for a new hearing is included in this Court's opinion. Quite the opposite. This Court resolved: "we remand for the trial court to make specific findings that support its determination of whether Gray is, or is not, entitled to immunity under the Act." (Op. at 9). *Accord State v. McCarty*, 437 S.C. 355, 374, 878 S.E.2d 902, 913 (2022) (resolving "there are no specific findings by the circuit court to enable th[e] Court to adequately undertake its appellate review" but recognizing either a written order or additional testimony as sufficient methods to remedy error). Consequently, the evidence is closed and only the ruling remains open at this time. Gray has not asked the Court to reconsider its ruling in this regard and the matter of whether a new hearing should be held is similarly closed.

3. In light of the foregoing, Respondent offers this suggested resolution: this Court should withdraw the opinion and order a limited remand for entry of the written order as offered by Judge Addy. Respondent suggests a 60 day time frame in which to supplement the record with the order. At that time, the Court may invite supplemental briefing only on the immunity issue, the remaining issues having already been fully briefed and fairly decided. [2]

4. As to Gray's remaining challenges to the Court's resolution of his two other issues, Gray points to no specific error in law or fact by this Court. Rather, he merely disagrees with the ruling. Gray has failed to show cause for this Court to revisit its resolution of the claims. See Rule 221 (a), SCACR ("petition for rehearing … shall state with particularity the points supposed to have been overlooked or misapprehended by the court"). Moreover, the record and controlling law fully support the Court's disposition of the issues.

As to the video, this Court correctly noted the personal knowledge that Vacquec had as to his own security system, including the position of the camera that faced the street where the shooting occurred. (Op. at 9). While Gray disagrees that should be enough, that is no basis to show an abuse of discretion in Judge's Addy's ruling on authentication. There is no error of law in the ruling. As this Court found, "[a] witness with knowledge may authenticate evidence by testifying that 'a matter is what it claimed to be.'" (Op. at 9, quoting Rule 901(b)(1), SCRE). Further, Gray's argument as to Rule 403, SCRE was equally unavailable where "the surveillance video clearly contradicted some of Gray's testimony." (Op. at 10). Again, Gray could not show an abuse of discretion in admitting this probative evidence simply because he submits the video

[2] Further, withdrawal of the opinion and ordering this suggested, limited remand procedure would avoid the unwarranted repetition of appellate arguments that would result if the Court embraced Gray's request to set aside the rulings on his other appellate issues.

was not of the best quality or reflective of the sharpest of images. The Court did not misapprehend either the relevant law or any fact at issue. There is no apparent error in the Court's disposition. The issue does not support relief.

As to the post-trial motion issue, again, Gray again simply failed to show an abuse of discretion. Indeed, it would have been error to allow the jurors to be questioned about their deliberations. (Op. at 11, citing Rule 606(b), SCRE). Gray contends that he could properly question the jurors on the circumstances of deliberations and "any misunderstandings" of the law as provided through the trial judge's instructions, (Pet. at 7-8), but he has yet to reach the narrow area in which courts have allowed the inquiry: allegations of "extraneous prejudicial information," intimidation, or premature deliberations. (Op. at 11). *See State v. Hunter*, 320 S.C. 85, 463 S.E.2d 314 (1995) (noting racial prejudice exception); *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999) (noting premature jury deliberations exception). Allegations of general "misunderstandings" of the law are not enough. *State v. Pittman*, 373 S.C. 527, 555, 647 S.E.2d 144, 158 (2007) ("a jury's misapprehension of the law is not enough to impeach a verdict"). Gray, again, cannot show an abuse of discretion based on an error of law. The Court did not misapprehend either the relevant law or any fact at issue. The issue does not support relief. There is no apparent error in the Court's disposition. The issue does not support relief.

CONCLUSION

For all the above reasons, Respondent submits that this Court should withdraw the opinion, but, contrary to Gray's request, should order a limited remand for the trial judge to issue an order in accordance with this Court's directions.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

December 19, 2022
Columbia, South Carolina.

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CERTIFICATE OF SERVICE

I, Angela Brown, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Rehearing, and Certificate of Service has been forwarded to Appellant's counsel, Susan B. Hackett, Esquire and Sarah E. Shipe, Esquire via email today, December 19, 2022 to shackett@sccid.sc.gov and sshipe@sccid.sc.gov, and to their assistants Scott Leverett and Chris Stock, at sleverett@sccid.sc.gov and cstock@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 19th day of December, 2022.

s/ Angela Brown

Angela Brown
Legal Assistant to Melody J. Brown
Senior Assistant Deputy Attorney General