THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jerome Campbell, Petitioner

v.

State of South Carolina, Respondent

Appellate Case № 2018-000464

Appeal from Charleston County
William H. Seals, Jr., Circuit Judge

Opinion № 5999
Heard February 16, 2023 - Filed July 19, 2023
Withdrawn, Substituted and Refiled October 18, 2023

Petition for Rehearing

Jerome Campbell, the Petitioner above, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court to Rehear this matter based upon the following:

1. This Court again erred in equating this case to the principles established in *State v. Graham,* 260 S.C. 449, 196 S.E.2d (1973) for the following reasons:

The record in this case does not established a willingness to fight as to both parties which was shown in the *Graham* case. This Court acknowledges that Mr. Campbell told Michael Allen not to come to the Plantation Apartments, the residence of his niece. *Campbell v. State*, Op. № 5999 (S.C.Ct.App. filed October 18, 2023)(Howard Adv.Sh. № 41 at 11, 13. This does not

indicate a willingness to fight. Nothing in the record establishes a willingness by both side to fight. The opinion cites no facts from which Mr. Campbell had any reason to believe the four men would in fact come to the Plantation Apartments where Mr. Campbell was located with a willingness to fight. He never encouraged them to come. No evidence suggests he knew they would be armed even if for some reason he should have anticipated they would come to the Plantation Apartment.

Likewise, the record establishes that the four men did not go to the Plantation apartments seeking a fight. Frank Haigler testified he went to the Plantation Apartment seeking to keep the matter from escalating. He stated, "I didn't want nothing to escalate that was already -- I didn't want the fire to start burning again that had been out, been put out." Rec. on App. at 311, ll 8-11. At the encounter between Mr. Campbell and Mr. Haigler at the Plantation Apartments, Mr. Haigler said, "Yo, just call your mom and your sister. This thing has been alleviated." Rec. at 313, ll 6-7. This does not even suggest a willingness to fight on the part of both parties.

Frank Heigler did not know Anthony German had a firearm until they were on the way to the Plantation Apartments. He stated, "I didn't realize – I didn't know Anthony had the gun until we was on the way back to my brother's house." Rec. on App. at 335, ll 4-6. Michael Allen also did not know Anthony had a firearm. He testified:

> Q. (By Mr. Voight) Did you know Anthony had a weapon?
> A. (By Mr. Allen) No, I didn't.
> Rec. on App. at 428, 11-13.

The record does not establish that any of the four men went to the Plantation Apartment to engage in mutual combat. Only one brought a firearm. Rec. on App. at 462, ll-16-23. If such had been the intent of Mr German, logic would dictate that he would have mentioned he had a

firearm or one of the other people would have testified they told him to bring a firearm. No such testimony exists.

In *Graham* the defendant was armed. The victim in the case knew the defendant was armed. The defendant knew the victim was armed. Knowing that the victim was armed, the defendant elected to take his firearm with him from the barber shop into a public street to confront the armed victim. *Graham* is a classic case of mutual combat. The court in *Graham* said, "Under the circumstances the apparent willingness of each to engage in an armed encounter with the other, sustained an inference that they were engaged in mutual combat at the time of the killing . . . ." *Id.* at 451, 196 S.E2ed at 496. Under the facts of *Graham,* the "apparent willingness" came from the fact that each knew the other was armed and each took an affirmative action to invoke an encounter. In this case, the record is totally devoid of any basis for Mr. Campbell to know the other party had a firearm. Knowledge by Mr. Campbell that the other side had a firearm cannot be inferred. Nor does the record establish any intent on the part of Mr. Campbell to have a confrontation at the Plantation Apartments. In fact, the record shows Mr. Campbell had told the four men to stay away from Plantation Apartments in order to avoid a confrontation. As this Court has said, "Moreover, it is essential that the agreement to fight be 'entered into prior to the beginning of combat, also described as an antecedent agreement to fight." *State v. Bowers*, 428 S.C. 21, 32, 832 S.E.2d 623, 629 (Ct. App. 2019), aff'd, 436 S.C. 640, 875 S.E.2d 608 (2022). No such antecedent agreement to fight has been shown in this case.

As noted above, in this case there is no such affirmative knowledge of the possession of a deadly weapon by each party. Nor does evidence exist of an "apparent willingness of each party to engage in an armed encounter." In *Graham,* the evidence was clear and unequivocal that each

party knew the other to be armed at the time of the encounter. The same cannot be said of the facts in this case. As there is no direct testimony that each party knew the other was armed, this court, contrary to the clear holding in *Graham*, has impermissibly inferred the fact that both parties knew the other was armed. The facts in *Graham* establish that each party knowing the other to be armed was objectively proven. In *Graham,* the knowledge was not inferred from ambiguous testimony. If such an inference is permissible simply because a firearm is later found on both parties, then mutual combat could be charged in any case where both sides are armed. This is not the law in South Carolina. As mutual combat eliminates self defense, the fact that both parties knew the other to be armed should not be left to an inference. This fact must be objectively proven.

Georgia, which uses mutual combat to reduce murder to manslaughter, requires that the mutual intent to fight must be affirmatively shown. "In order to reduce the homicide from murder to voluntary manslaughter, as relates to the doctrine of mutual combat, it should affirmatively appear that at the time of the homicide both parties were in position and manifested intention to fight. Mere threats on the part of one party at the time of a fatal shot by the other will not suffice." *Cornelious v. State*, 193 Ga. 25, 28–29, 17 S.E.2d 156, 158 (1941.[1] This court erred in holding the evidence established mutual combat. This Court further erred in relying upon *Carreker v. State*, 273 Ga. 371, 541 S.E.2d 364 (2001). In affirming the case, the court cited *Sinkfield v. State*, 266 Ga. 726, 727, 470 S.E.2d 649, 651 (1996) which held, "Moreover, we note

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[1] The early South Carolina cases also indicate this was applicable in South Carolina. "where the parties are engaged in mutual combat-inasmuch as it is committed in hot blood, it is manslaughter. It is not every killing in passion that the law mitigates down to manslaughter; it must be passion, justly excited by legal provocation." *State v. Smith*, 44 S.C.L. 341, 344 (S.C. App. L. 1857)

that a charge on mutual combat enables a jury to find a criminal defendant guilty of voluntary manslaughter in lieu of murder. Hence, the mutual combat charge could only have benefitted Sinkfield, and we reject this enumeration as meritless." A charge that benefits a defendant will not be held to be reversible error.

2. This court incorrectly stated, "Campbell and the unknown gunmen entered Campbell's Impala and drove toward the convenience store across the street." *Campbell*, at 13. The record does not establish who was in the automobile. As Officer Burkhardt stated, "We knew we had at least one person in the car, unknown if we had others." Rec. 281, ll 3-4. Mr. Campbell was identified as being in the Impala. Rec. 229, ll 8-9.

3. The exhibits show that the convenience store was across the street from an entrance to the Plantation Apartments. The most logical exit from the apartments is to drive toward the store. The testimony established that the Impala took a right turn out of the apartments and sped away. Anthony German stated, "[Y]ou could see a white Impala coming and then it made a right turn onto Carriage Lane coming from Plantation Apartments . . . ." Rec. on App. at 464, ll 12-14. Simply pulling out of an apartment complex and making a required turn is not evidence of a willingness to engage in mutual combat. In fact, leaving the scene of a confrontation is actually strong evidence of a desire not to engage in any altercation. No testimony exists that establishes affirmatively or by inference that Mr. Campbell knew the other four men would be at the convenience store.[2]

If Mr. Campbell had a desire to engage in mutual combat, he simply would have waited

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[2] The record is also devoid of any evidence that Mr. Campbell fired a weapon, other than the weapon was fired from his automobile. For this reason, the lower court charged the law as to accomplice liability. App. at 756, l 16 to 758, l 4. *See, State v. Washington,* 431 S.C. 394, 848 S.E.2d 779 (2020).

were he was. He would not have left. The record offers no evidence that Mr. Campbell knew three other people would be at the convenience store. He was not, therefore, going toward trouble, but away from it. To the extent this court used the claim that Mr. Campbell was going toward the convenience store to establish that he had a willingness to fight, such use was improper.

3. This Court correctly states in the opinion the long established principle that each party in mutual combat must know the other is armed to make mutual combat applicable. *Campbell* at 14. *See, also,* "Appellant could see the weapon in the possession of the deceased, and the deceased knew that appellant was armed." *State v. Graham*, 260 S.C. 449, 451, 196 S.E.2d 495, 496 (1973); "The State is required to prove the rival combatants were armed for the mutual combat with deadly weapons and each combatant knew the others were armed." *State v. Young*, 429 S.C. 155, 160, 838 S.E.2d 516, 519 (2020). What this court has not done is demonstrate that Mr. Campbell knew that any of the four individuals were armed. This Court correctly noted that at the contact at the Georgetown Apartments, the four individuals there were not armed. *Campbell*, at 17. The opinion does not explain how Mr. Campbell obtained the knowledge that any of the four individuals were armed when they came to the Plantation Apartments. Without this knowledge by Mr. Campbell, a mutual combat charge is not proper.

5. This Court improperly concluded, "The facts in the present case created an inference of mutual combat that necessitated a corresponding charge to be submitted to the jury." *Campbell* at 18. This Court failed to state what facts permitted the jury to infer Mr. Campbell knew the other side was armed. Under such an analysis, the jury would be permitted to find mutual combat even when one side was not armed simply because they inferred it or believe one

party could infer the other side was armed even when they were not.

4. After *State v. Young,* 429 S.C. 155, 838 S.E.2d 516 (2020), the solicitor in this case could have prosecuted Anthony German, Michael Allen and Frank Haigler for murder. If they had been convicted, the convictions would have been virtually impossible to uphold on appeal because of the arguments now made by Mr. Campbell. As noted above, neither Frank Haigler nor Michael Allen knew Anthony German had a firearm. None showed a willingness to fight. Under the logic of this court as to finding mutual combat existed, Frank Haigler, the man who approached Mr. Campbell for the sole purpose of stopping any controversy, would be guilty of murder. Michael Allen, who knew nothing about Mr. German being armed and who stayed at the store, would be guilty of murder. Anthony German would have been guilty of the murder of his brother. These convictions could not have been sustained under the facts of this case. And as the convictions could not have been sustained, then the charge of mutual combat was improper.

CONCLUSION

For the foregoing reasons, this court should re-hear this matter, amend the factual findings and conclusions of law, and reverse the denial of the Post Conviction Relief application in this matter.

October 31, 2023

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