

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable Brooks Goldsmith, Circuit Court Judge
2012-GS-30-508, 509
Appellate Case No. 2013-000373

RECEIVED

SEP 05 2013

SC Court of Appeals

THE STATE,

Respondent,

vs.

Derrick A. McIlwain,

Appellant.

MOTION TO DISMISS APPEAL PURSUANT TO STATE V. ISAAC

Respondent ("the State"), through its undersigned counsel, would respectfully move to dismiss the appeal from as an improper interlocutory appeal from an order denying immunity under the Protection of Person's and Property Act pursuant to State v. Isaac, Op. No. 27302 (S.C. Sup. Ct. filed August 21, 2013) (Shearouse Adv. Sh. No. 37 at 15, 17). Respondent would show this Court the following:

I.

This case involves an appeal by Derrick A. McIlwain from a March 21, 2013 Order of the Honorable Brooks Goldsmith denying a motion to dismiss the Lancaster County indictment for murder and award immunity from prosecution pursuant to the Protection of Person's and Property Act, S.C. Code Ann. 16-11-410, et seq. A motion to dismiss pursuant to S.C. Code Section 16-11-450 was made by McIlwain through counsel William P. Frick on February 28,

2013. (copy attached). A hearing was held on March 21, 2013. The Appellant was represented by William Frick and the State was represented by Douglas A. Barfield of the 6th Circuit Solicitor's Office. Judge Goldsmith entered his written order denying the motion seeking immunity dated March 21, 2013. (copy attached).

The Appellant, through counsel Frick filed a notice of appeal in the South Carolina Court of Appeals on March 25, 2013. The matter has not been tried. The matter is presently awaiting briefing.

On September 4, 2013, a third extension request was made by counsel for the Appellant.¹ Respondent submit that this appeal must be dismissed because the Court lacks jurisdiction under State v. Isaac.

II.

In South Carolina, the right to appeal is conferred by S.C. Code Ann. § 14-3-330. State v. Miller, 289 S.C. 426, 426, 346 S.E.2d 705, 705 (1986). Ordinarily, an appeal may only be pursued after a party has obtained a final judgment or has otherwise satisfied the terms of Section 14-3-330. State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010); see Miller, 289 S.C. at 426, 346 S.E.2d at 705 ("In order to exercise his statutory right to appeal, a defendant must come within the terms of the applicable statute."). In criminal cases, judgment for a criminal defendant is not final until a sentence is imposed. State v. Robinson, 287 S.C. 173, 174, 337 S.E.2d 204, 204 (1985); see Berman v. United States, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence. The sentence is the judgment."). Thus, a criminal defendant may **not** appeal until **after** a sentence has been imposed. Parsons v. State, 289 S.C. 542, 542, 347 S.E.2d 504, 504 (1986).

¹ This extension request was signed by Assistant Attorney General Salley Elliott due to the unavailability of below-signed counsel.

III.

On August 21, 2013, in State v. Isaac, the South Carolina Supreme Court instructed that an order denying a request for immunity from prosecution under the South Carolina Protection of Persons and Property Act does not fall within any category of orders that are immediately appealable under Section 14-3-330. State v. Isaac, Op. No. 27302 (S.C. Sup. Ct. filed August 21, 2013) (Shearouse Adv. Sh. No. 37 at 15, 17). In reaching that conclusion, the Supreme Court explained that an order denying a request for immunity was not a final order and was not an interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver. Id., (Shearouse Adv. Sh. No. 37 at 18-19). As a result, the Supreme Court held that “the denial of a request for immunity under the Act is not immediately appealable.” Id., (Shearouse Adv. Sh. No. 37 at 21).

IV.

In the case sub judice, Appellant is appealing from Judge Goldsmith’s order denying his motion to dismiss based upon request for immunity from prosecution. However, Appellant’s case has not yet gone to trial, and Appellant has not yet been convicted or sentenced. See State v. Hughes, 56 S.C. 540, 35 S.E. 214, 215 (1900) (recognizing that the general rule is that a criminal defendant cannot appeal until he has been convicted and sentenced), cited in State v. Isaac, infra.

Accordingly, Appellant’s appeal is an improper interlocutory appeal from an order that is not immediately appealable and should be dismissed, and Appellant’s case should be remanded for trial. See Isaac, (Shearouse Adv. Sh. No. 37 at 23) (instructing that the denial of a defendant’s request for immunity pursuant to the South Carolina Protection of Persons and

Property Act is not subject to immediate appeal, dismissing Isaac's appeal, and remanding for trial); see also State v. Hubbard, 277 S.C. 568, 569, 290 S.E.2d 817, 817 (1982) ("The appellants have not yet gone to trial. An appeal in a criminal case must attend the final judgment rendered on the indictment. No final judgment has occurred in this case and the order appealed from is interlocutory. Therefore, we dismiss the appeal and remand the case for trial." (citations omitted)).

Further, this appeal is not appropriate to be delayed until December 2, 2013 for treatment as a so-called "pool" case.

WHEREFORE, Respondent moves this Court to dismiss Appellant's notice of appeal and appeal as an improper interlocutory appeal from an order that is not immediately appealable and remand the case to the circuit court for trial; and vacate any intervening order holding this appeal in abeyance as a "pool" case.

Respectfully submitted,
ALAN WILSON
Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

By: 
Donald J. Zelenka

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
S.C. Bar Number 5758
(803) 734-3601

September 5, 2013

ATTACHMENTS TO MOTION

1. Motion to Dismiss Pursuant to South Carolina Code Section 16-11-450
2. State v. McIlwain, 2010-GS-29-508, 509, Order (Goldsmith, March 21, 2013) (denying immunity)
3. Notice of Appeal, March 25, 2013.

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STATE OF SOUTH CAROLINA)

COUNTY OF LANCASTER)

THE STATE,)

vs.)

Derrick L. McIlwain)

Defendant.)
_____)

IN THE COURT OF GENERAL SESSIONS

FILED
OFFICE OF CLERK
OF COURT

2013 FEB 28 AM 9:10

CLERK OF COURT
LANCASTER, SC

MOTION TO DISMISS PURSUANT TO
SOUTH CAROLINA CODE SECTION 16-11-450

Warrants

M701596 & M701597

TO: Douglas A. Barfield, Jr.
Solicitor, Sixth Judicial Circuit

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YOU WILL PLEASE TAKE NOTICE that the Defendant will move before the Presiding Judge, on March 11, 2013, at 9:00 a.m., or whenever the court shall direct, for an order dismissing the above referenced warrants pursuant to South Carolina Code Section 16-11-450 on the ground that the defendant is entitled to immunity from prosecution as a matter of law.

The defendant is charged on the above referenced warrant with Murder and Possession of a Weapon during a Crime of Violence with an incident date of February 7, 2012. The defendant intends to show that his actions were in conformity with defense of his home or to prevent great bodily injury to himself or others. pursuant to South Carolina Code Section 16-11-440 and prevailing common law of the State and, therefore, the defendant is entitled to immunity from prosecution pursuant to South Carolina Code Section 16-11-450.

Respectfully submitted,



William P. Frick
Attorney for Defendant
Deputy Public Defender
6th Judicial Circuit

This 28 day of February, 2013
Lancaster, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

DERRICK MCILWAIN

Defendant.

) IN THE COURT OF GENERAL SESSIONS

)
) CASE NO: 2012-GS-29-508 &
) 2012-GS-29-509
)

ORDER

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2013 MAR 21 PM 3:26
CLERK OF COURT
LANCASTER, SC

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This matter came before the Court the week of March 21, 2013 on Defendant's Motion to Bar Prosecution under the Protection of Persons and Property Act ("the Act"). S.C. Code Ann. §16-11-410, et. seq. Defendant asserts that he is immune from prosecution because he was attacked in a place where he was allowed to be when he shot the victim and he reasonably believed the deadly force was necessary to prevent death or great bodily injury to himself. After conducting a hearing on the matter and reviewing applicable authority, the Court denies Defendant's Motion to Bar Prosecution based on the following.

The Act codifies the common law "Castle Doctrine" and justifies a person's use of deadly force and grants a person immunity from prosecution when a person "uses deadly force as permitted by the provisions of [the Act] or another applicable provision of law." S.C. Code Ann. § 16-11-420. One such provision states that "a person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be...has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself." S.C. Code Ann. § 16-11-440(C). Defendants who claim immunity are entitled to a pre-trial immunity hearing, rather than a mere affirmative defense, to determine whether or not their actions fall under the

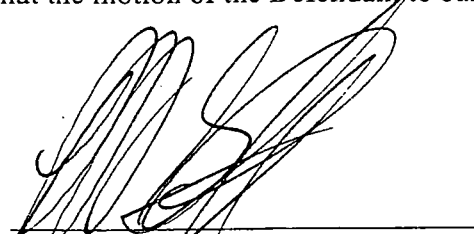


protection of the Act. *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). During such hearing, the Defendant has the burden of proof and must prove by a preponderance of the evidence that his actions fall within the protection of the Act. *Duncan*, 392 S.C. at 411, 709 S.E.2d at 665.

g In this case, Defendant did not prove by a preponderance of the evidence that his use of deadly force fell under the protection of the Act. Defendant was cousins and lifelong friends with the victim and had spent much of the day with the victim. As Defendant and victim continued drinking, Defendant claims that he and the victim began arguing. The victim "mushed" Defendant, which caused Defendant to fall back onto the couch. Defendant then stood up and both Defendant and victim began speaking as if they were about to get into a fight. Defendant, who claims he was afraid of the victim due to his size and a previous altercation between the two years earlier, then pulled a gun out of his pocket and shot the victim. Based on Defendant's story and the testimony of witnesses, the victim was not charging at Defendant or beating Defendant when Defendant shot him. Thus, the evidence fails to show that Defendant could have reasonably believed that deadly force was necessary to prevent death or great bodily injury to himself. Therefore, Defendant failed to meet his burden and thus the Court denies his motion.

IT IS ORDERED, ADJUDGED AND DECREED that the motion of the Defendant to bar prosecution is hereby denied.

IT IS SO ORDERED.



Brooks P. Goldsmith, Judge

Lancaster, South Carolina
March 21, 2013

IN THE COURT OF APPEAL

APPEAL FROM LANCASTER COUNTY
Court of General Sessions

FILED
OFFICE OF CLERK
OF COURT

2013 MAR 25 AM 9-52

Brooks P. Goldsmith, Circuit Court Judge

CLERK OF COURT
LANCASTER, SC

Case No(s): 2012-GS-29-508 & 509

The State of South Carolina,

Respondent.

v.

Derrick L. McIlwain,

Appellant.

NOTICE OF APPEAL

Derrick L. McIlwain appeals the denial of immunity from prosecution pursuant to Protection of Person and Property Act. At a hearing on March 21, 2013, the Honorable Brooks Goldsmith issued an order ruling that the defendant was not entitled to immunity from prosecution pursuant to Section 16-11-440 and 450 of the South Carolina Code for Mr. McIlwain's actions that resulted in the charge of Murder. This notice of appeal is filed in accord with the ruling in State v. Duncan, 709 S.E.2d 662, 392 S.C. 404.

PLEASE TAKE FURTHER NOTICE THAT this appeal shall be upon a case and exceptions to be served upon you and filed hereafter in accordance with the rules of the court and laws in such cases made and provided.

Date: March 25, 2013



William Frick, Esq.
Public Defender
Post Office Box 1809
Lancaster, SC 29721

Other Counsel of Record:
Douglas A. Barfield, Jr., Solicitor
Office of the Solicitor
6th Judicial Circuit
Post Office 607
Lancaster, SC 29720

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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OF COURT

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APPEAL FROM LANCASTER COUNTY
Court of General Sessions

CLERK OF COURT
LANCASTER, SC

Brooks P. Goldsmith, Circuit Court Judge

Case No(s): 2012-GS-29-508 & 509

The State of South Carolina,

Respondent.

v.

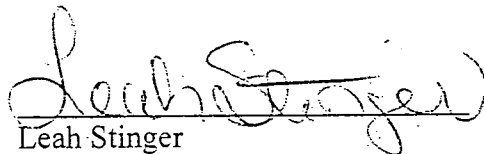
Derrick L. McIlwain,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on March 25, 2013, addressed to Douglas A. Barfield, Jr., Esquire, Solicitor, Office of the Solicitor, 6th Judicial Circuit, Post Office Box 607, Lancaster, SC 29720.

Date: March 25, 2013



Leah Stinger
Secretary for William P. Frick, Esq.
Post Office Box 1809
Lancaster, SC 29721

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
Honorable Brooks Goldsmith, Circuit Court Judge
2012-GS-30-508, 509
Appellate Case No. 2013-000373

THE STATE,

Respondent,

vs.

Derrick A. McIlwain,

Appellant.

PROOF OF SERVICE

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I, Donald J. Zelenka, certify that I have served the within Motion to Dismiss Appeal on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S. C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, S.C. 29201

Robert M. Dudek, Esquire
S. C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, S.C. 29201

I further certify that all parties required by Rule to be served have been served.
This 5th day of September, 2013.


Donald J. Zelenka

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
S.C. Bar # 5758
(803) 734-3601

September 5, 2013

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ALAN WILSON
ATTORNEY GENERAL

September 5, 2013

C.S.
RECEIVED
SEP 05 2013
SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

RE: State v. Derrick A. McIlwain – Appellate Case No. 2013-000373

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Motion to Dismiss Appeal, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General
Bar No. 5758

DJZ/
Enclosures

cc: Wanda H. Carter, Esquire
Robert M. Dudek, Esquire
S. C. Attorney General Office Victim Services
Honorable Douglas A. Barfield, Solicitor of the Sixth Judicial Circuit.