THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 13 2013
S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Robin B. Stilwell, Circuit Court Judge

Appellant Case No.: 2012-208587

The State, ... Respondent,

v.

Terry Dean Gregory, ... Appellant.

PETITION FOR REHEARING

Appellant, through the undersigned counsel, petitions the Court for a rehearing in the above-captioned appeal from this Court's Order dated September 6, 2013, dismissing the appeal as interlocutory.

I. *State v. Duncan* Clearly Permitted Immediate Appeal From Denial Of Immunity

In *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011), this Court held that "an order granting **or denying** a motion to dismiss under the [Protection of Persons and Property] Act is immediately appealable, as it is in the nature of an injunction." Id. at 407, n.2, at 663, n. 2. As support for the immediate appealability of a grant or denial of immunity under the Act, this Court cited to S.C. Code § 14-3-330(4) (Supp. 2010) and quoted the following language: "The Supreme Court . . . shall review upon appeal . . . an interlocutory order or decree . . . granting, continuing, modifying, or refusing an injunction . . . ." Id. By permitting an immediate appeal

from an order granting or denying immunity, this Court joined with Florida, which, at the time, had produced the most reported decisions on "Stand Your Ground" immunity. *See, e.g., Little v. State*, 111 So.3d 214, 216 (Fla. App. 2nd Dist. 2013) (discussing the immediate appealability of orders denying immunity under the "Stand Your Ground" law). *Duncan* was so clear on the immediate appealability from the denial of immunity that the issue of appealability was never raised by the State in the Trial Court, in the Respondent's Brief, or during oral argument. (R. at 48-585; Respondent's Brief; Oral Argument *State v. Terry Dean Gregory*, Appellant Case No.: 2012-208587).

This Court's unexpected holding in *State v. Isaac*, Op. No. 27302 (S.C. Sup. Ct. filed August 21, 2013) Shearouse Adv. Sh. No. 37 at 15-25 that an order denying immunity under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, *et seq.* was no longer immediately appealable can only, consistent with Due Process, be applied prospectively and not retroactively. To do otherwise would deny Appellant the benefit of an existing substantive right that he relied upon to his potential detriment.

The implications of his reliance on *Duncan* go beyond the time, cost, and human capital necessary to the process of this Appeal. The Defendant may have waived his 5th Amendment rights by testifying at the hearing on immunity. At a minimum, he provided the State with a detailed explanation of his conduct and intent for the entire relevant time period. In the event of trial, this testimony will provide the State with information they would not have been entitled to prior to the Defendant taking the stand. In addition to the Defendant's testimony, the Defendant produced evidence, witnesses and other information that would never have been required pursuant to the Rules of Criminal Procedure. *See*, Rule 5(b), S.C. Crim. P. (limited reciprocity for Defendant's required production). The attorney work-product that makes up the Appellant's

entire theory and theme of his case is in the hearing transcript. The immediate appealability pursuant to *Duncan*, the chance to end the case prior to trial, and the knowledge that an adverse trial decision was not the end of immunity, played a primary role in the Defendant's decision to pursue immunity in a pre-trial hearing at the earliest stage possible with all available resources. Without an immediate appeal from an order denying immunity under the Act, the strategic decision to "show the Defendant's hand" so early in the process would have been different. (Ex. 1 Affidavit of Trial Counsel).

II. EXTRAORDINARY PROCEDURAL POSTURE

The day following this Court's opinion in *State v. Isaac*, Op. No. 27302 (S.C. Sup. Ct. filed August 21, 2013) (Shearouse Adv. Sh. No. 37 at 15-25, the State filed a motion to dismiss Appellant's appeal. Appellant filed a request for an extension of time to research and present issues that would be unique to this Appellant.

When the Court's Order dated September 6, 2013, dismissed this Appeal and seven others as interlocutory, the Court retroactively overruled its holding in *Duncan* which previously allowed the immediate appealability of a denial of immunity under the Protection of Persons and Property Act. Despite *Isaac*'s statement that "the language in *State v. Duncan* addressing appealability was dicta and regrettable", *Isaac*, at *6, there was nothing in *Duncan* to suggest it was dicta. Furthermore, the distinction made in *Isaac*, i.e. that *Duncan* involved the grant of immunity and did not apply to the denial of immunity, was directly contradicted by the phrase in *Duncan* asserting that the "denial of immunity" was immediately appealable. *See, Isaac*, at *4. In addition, *Isaac* overruled *Duncan*'s stated basis for the immediate appealability of a grant or denial of immunity with the following conclusion:

> Although we indicated in *Duncan* that an immediate appeal is allowed because the order is in the nature of an injunction, we now clarify that an order granting a

> request for immunity under the Act is immediately appealable because it is a final order in the case.

Id.

Appellant submits that *Isaac* is, in fact, a reversal of the holding in *Duncan*, and a change in the law. As with any significant change in the law, the question becomes whether the change should be applied retroactively or prospectively. *See, e.g., State v. Dickey*, 380 S.C. 384, 404, 669 S.E.2d 917, 928 (Ct. App. 2008), *rev'd on other grounds*, 394 S.C. 491, 716 S.E.2d 97 (2011) (declining to apply the Protection of Persons and Property Act retroactively). Based on this Court's order dismissing the appeal, the change in the law is being applied retroactively. Appellant has had no opportunity, other than this Petition, to address retroactive application of this change in the law.

This Court has recognized that "although the *ex post facto* clause itself does not apply to actions of the judicial branch, judicial decisions applied retroactively can violate the Due Process Clause." *State v. Collins*, 329 S.C. 23, 28, 495 S.E.2d 202, 205 (1998).

The United States Supreme Court has placed due process limitations on the retroactive application of judicial interpretations of criminal statutes and the alteration of common law offenses. *See, Rogers v. Tennessee*, 532 U.S. 451 (2001). In particular, the Court ruled that a judicial interpretation or alteration may not be given retroactive effect where it "violates the principle of fair warning" and is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers* at 462.

In *Rogers*, the Court rejected the petitioner's claim that the Tennessee Supreme Court erred in retroactively abolishing the common law year and a day rule.[1] *Id.* at 453-56. The Court held that the Tennessee Supreme Court's abolition of the rule was not unexpected and indefensible, since the rule was widely viewed as an outdated relic of the common law; the rule was not part of Tennessee's statutory criminal code; it had only been mentioned three times in all reported Tennessee cases – each time in dicta; and it had never served as a ground of decision for a murder case in Tennessee. *Id.* at 462-64. In affirming the decision, the Court described the Tennessee Supreme Court's decision as "[f]ar from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense." *Id.* at 467.

In a more recent case, *Metrish v. Lancaster*, 133 S.Ct.1781 (2013), the Supreme Court held, in a federal habeas corpus case, that the retroactive application of a Michigan Supreme Court decision, *People v. Carpenter*, 464 Mich. 223, 627 N.W.2d 276 (2001), abolishing the diminished capacity defense did not violate due process and was not an unreasonable application of federal law.

When the defendant in *Lancaster* was retried in 2005, the Michigan Supreme Court had previously disapproved a series of Michigan Court of Appeals decisions recognizing the diminished–capacity defense. In rejecting the defense, the Michigan Supreme Court observed, in 1975, the Michigan Legislature had enacted "a comprehensive statutory scheme concerning defenses based on either mental illness or mental retardation." That scheme, the Michigan Supreme Court concluded, "demonstrated the Legislature's intent to preclude the use of any

---

[1] The "year and a day rule" is a common law rule providing that no defendant could be convicted of murder unless the victim died by the defendant's act within a year and a day of the act. *Rogers* at 453.

evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility" *People v. Carpenter*, 464 Mich at. 235, 627 N.W.2d at 282 (2001). *See Metrish v. Lancaster,* 133 S. Ct. at1785.

In Lancaster's appeal to the Michigan Court of Appeals he asserted that the retroactive application of the Michigan Supreme Court's decision in *People v. Carpenter*, 464 Mich. 223, 627 N.W.2d 276 (2001) violated his right to due process. "[D]ue process concerns prevent retroactive application [of judicial decisions] in some cases," the court acknowledged, "especially... where the decision is unforeseeable and has the effect of changing existing law." However, the Court of Appeals reasoned that the Michigan Supreme Court's decision in *People v. Carpenter*, 464 Mich. 223, 627 N.W.2d 276 (2001) "did not involve a change in the law" since "it concerned an unambiguous statute that was interpreted by the [Michigan] Supreme Court for the first time." *Metrish v. Lancaster*, 133 S. Ct. at1786.

The Supreme Court observed that it had never found a due process violation where a State Supreme Court, squarely addressing a particular issue for the first time, rejected a consistent line of lower court decisions based on the Supreme Court's reasonable interpretation of the language of a controlling statute. *Metrish v. Lancaster*, 133 S. Ct. at 1792.

There can be no doubt that this Court's decision in *Isaac* that an order denying immunity under the Protection of Persons and Property Act was an unexpected departure from its 2011 opinion in *Duncan*. For two years, *Duncan* remained the law of the State unmolested by judicial decision or by legislative action. The lack of legislative action gives some indication that *Duncan* was, in fact, a correct statement of legislative intent. In any event, *Isaac* is a marked and unpredictable departure from *Duncan*.

The unintended result for this Appellant is an impermissible "bait and switch" scenario which violates fundamental fairness. *See State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001) (fundamentally unfair to promise to give a particular reasonable doubt instruction prior to closing argument and then change it to defense counsel's detriment following his closing argument stressing that promised reasonable doubt instruction); *Knox v. Collins*, 928 F.2d 657 (5th Cir. 1991) (trial court violated defendant's right to due process by promising to give a parole ineligibility instruction and then refusing to give that instruction where defense counsel relied on it in utilizing his peremptory challenges); *Doyle v. Ohio*, 426 U.S.610 (1976) (it is a violation of due process to implicitly promise that a defendant's silence will carry no penalty and to then question his post-arrest silence on cross-examination).

The decision in *Isaac* also, respectfully, does not bring the law into conformity with "reason and common sense" as did the decision of the Tennessee Supreme Court in *Rogers, supra.* A defendant denied immunity in the lower court in this state must now stand trial, with its attendant costs and strain, be convicted of murder or another serious criminal offense, be sentenced, incarcerated, and then raise immunity as a defense after the substantial damage has already been done. The purpose of immunity is to save the defendant from all of the above, because the Legislature deemed that he was entitled to such protection when acting lawfully in a place he had the right to be, including on his own property. *See*, S.C. Code Ann. § 16-11-410, et seq.

Further, unlike the decision in *Lancaster* the issue is not to be measured under an extremely deferential federal habeas standard. The right to an immediate appeal from the denial of immunity in the lower court under the Protection of Persons and Property Act is the only way

to assure true immunity from prosecution where a defendant lawfully protects himself or his property pursuant to S.C. Code Ann. §16-11-410, et seq.

A denial of an immediate appeal to appellant, who was already lawfully on appeal pursuant to *Duncan*, and where the incident occurred while *Duncan* was in effect, denies appellant his right to due process of law. An accused who previously would avoid the rigors of a trial by successfully pleading his rights under the statute will now undergo one.

The accused would thus be deprived, retroactively, of a very significant right. Moreover, no case currently extant indicates that trial judges will charge, e.g. that the duty to retreat has been modified when the accused does stand trial. Thus, a significant statutory right has been abrogated to the prejudice of the accused, here appellant.

The Court's ruling that the incident at issue in the *Isaac* case arose before the passage of the Protection of Persons and Property Act and, therefore, was not covered by it was sufficient to dispose of the case. *See, Dickey, supra.* It is no secret that Isaac's claim fell within neither the letter of the law nor spirit of the statute. Hard cases are said to make bad law; ridiculous cases should not drag legitimate claimants down with them.

WHEREFORE the Appellant seeks a rehearing to determine the issues, previously unaddressed, relating to the retroactive application of *Isaac* to this appeal.

Respectfully Submitted:

James W. Bannister
S.C. Bar No.: 8895
Fed. Bar No.: 6902
P.O. Box 10007
Greenville, SC 29603
864 298-0084
Attorney for the Appellant

September 12, 2013

Ex. 1

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Robin B. Stilwell, Circuit Court Judge

Appellate Case No.: 2012-208587

The State,.....Respondent.

v.

Terry Dean Gregory,.....Appellant.

AFFIDAVIT

---

1. My name is James W. Bannister. I am over the age of 18 and competent to give this Affidavit.

2. I am the attorney of record for Terry Dean Gregory. I have been involved in this case since the defendant's arrest on October 10, 2009. As counsel for Terry Dean Gregory, a lot of time and effort has been expended in constructing an overall strategy for the defense of his case. Primary to the defense was a strategy decision to proceed with a pretrial hearing seeking immunity under the Protection of Persons and Property Act.

3. This decision was not made lightly or without careful and calculated consideration. Specifically, the concern for the defendant's case centered around the fact that at a pretrial immunity hearing he would be exposing his entire defense early in the litigation. This exposure would include the defendant's testimony, the witnesses that had been obtained through

defense investigation, expert testimony that had been developed through pretrial preparation and documentary evidence.

4. While the decision to "show our hand" early may appear insignificant, in retrospect, it is a decision that will have impact on the trial of this case more so than any other. Because of the limited access,

5. The decision to "show our hand" early in this case was based almost entirely on the fact that the decision was immediately appealable. Under State v. Duncan was decided on May 9, 2011. While Mr. Gregory's request for a pretrial immunity hearing was made sometime prior to that decision, no decision had been made regarding how the defendant would proceed if the Pretrial hearing was granted. After State v. Duncan, the decision to proceed with a complete defense presentation was made in large part because of the fact that any adverse decision with the trial court could be immediately appealed.

6. Under our current rules of criminal procedure, there is very little opportunity to obtain in depth discovery. The current state of criminal procedure stands in stark contrast to the Rules of Civil Procedure that a litigant in a civil case would have available. A criminal defendant has no ability to depose witnesses or opposing parties. A criminal defendant has very limited ability to subpoena documents prior to the trial of the case.

7. In Mr. Gregory's case, unlike most other criminal cases, the defense had the added benefit of having participated in a number of depositions in a parallel civil case. Specifically, the Estate of the deceased had sued Mr. Gregory under a wrongful death claim. Most of the witnesses that were at the incident location were deposed during the discovery process of that civil case. Therefore, the pretrial hearing on immunity was less about finding out specifics relating to prosecution witnesses and solely about making the strongest presentation possible for immunity.

8. Because of the fact that the defendant had depositions of most of the on-scene witnesses, *Isaac* eliminates any legitimate strategy to go forward prior to any trial date with an immunity hearing. Because of the decision in *Isaac*, immunity is now more akin to a standard motion made after the jury is selected. There simply would be no reason, in this case with the added benefits of previous civil discovery, to "show our hand" at any point significantly in advance of the actual trial of the case. The ability to present a defendant's case for the first time at the trial of the case is one of the few mechanisms available to a defendant to offset the investigatory power of the State.

Therefore, in some cases a pretrial immunity hearing might have the added benefit of allowing a defendant to gain much needed information.

9. It is my sincere opinion that to deny Terry Dean Gregory the ability to appeal after his reliance in State v. Duncan works a significant and severe hardship on his ability to defend himself.

10. If this case is remitted without a final decision on the issues raised in Mr. Gregory's appeal, he will have foregone a significant strategic tool to his detriment. His pretrial hearing will be used by the State to prepare themselves in a way that they would never have been entitled to under the circumstances that *Isaac* now creates.

Further, Affiant sayeth not.

SWORN TO BEFORE ME this 12th
day of September, 2013.

Notary Public for South Carolina
My Commission Expires: 04/30/18

JAMES W. BANNISTER
ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 13 2013
S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Robin B. Stilwell, Circuit Court Judge

Appellate Case No.: 2012-208587

The State,.....Respondent.

v.

Terry Dean Gregory,.....Appellant.

PROOF OF SERVICE

I certify that I have served the Petition For Rehearing on Alphonso Simon, Jr. and Walter W. Wilkins, III by depositing a copy of it in the United States Mail, postage prepaid, on September 13, 2013, addressed to Alphonso Simon, Jr., Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211-1549 and addressed to Walter W. Wilkins, III, 13th Circuit Solicitor's Office, 305 E. North Street, Suite 325, Greenville, South Carolina 29601.

September 12, 2013

James W. Bannister
(S.C. Bar#8895) (Fed. 6902)
Post Office Box 10007
Greenville, South Carolina 29603
Ph: (864) 298-0084
Fax: (864) 298-0146
Attorney for Appellant