THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Honorable DeAndrea G. Benjamin, Circuit Court Judge
12-GS-40-01889
Appellate Case No. 2012-213457

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SEP 13 2013
S.C. Supreme Court

THE STATE,

RESPONDENT,

vs.

ANTHONY T. MCWILSON

APPELLANT

PETITION FOR REHEARING

On September 6, 2013, four justices of this Court agreed to dismiss Appellant's notice of appeal based upon this Court's opinion in State v. Isaac, Op. No. 27302 (S.C. Sup. Ct. filed Aug. 21, 2013). In the order dismissing Appellant's notice of appeal along with seven others, this Court ordered Appellant to file his petition for re-hearing by September 13, 2013. Appellant respectfully requests this Court rehear the matter pursuant to Rule 221, SCACR, in light of relevant case law and constitutional jurisprudence overlooked or misapprehended in this Court's order of dismissal, including the fact that the retroactive dismissal of Appellant's appeal, which was timely filed and

served pursuant the existing law of State v. Duncan, 392 S.C. 404, 407 n.2, 709 S.E.2d 662, 663 n.2 (2011), violates due process because the procedural change in the law can only be applied prospectively. In short, it is a denial of due process to retroactively dismiss an appeal properly filed under existing law where Appellant's liberty is at stake.

Procedural background

During its May 2012 term, a Richland County grand jury indicted Appellant for murder (2012-GS-40-1889). Appellant, through his trial attorneys, Brian Shealey and Luke Shealey, moved the trial court to grant him immunity from prosecution under the Protection of Persons and Property Act found at section 16-11-410, et seq., of the South Carolina Code of Laws. The prosecution, represented by April Sampson and Raia Hirsch, opposed the request. A hearing on the matter was convened on August 31, 2012 through September 6, 2012 before the Honorable DeAndrea G. Benjamin. In a written order filed on November 2, 2012, Judge Benjamin denied Appellant's request for immunity.

On November 9, 2012, Appellant filed a notice of appeal concerning Judge Benjamin's order. Undersigned counsel was assigned to represent Appellant on June 11, 2013 after receipt of the transcript of the September 4-6, 2012 hearing. When undersigned counsel reviewed the transcript, she discovered that the prosecution incorporated the evidence produced at a hearing held on August 31, 2012 hearing. As a result, undersigned counsel asked this Court to hold the time lines in abeyance pending receipt of the additional transcript. On June 12, 2013, undersigned counsel received the transcript and informed the Court. On August 21, 2013, this Court issued its opinion in Isaac, supra. On August 27, 2013, the state filed a motion to dismiss Appellant's appeal.

On September 6, 2013, undersigned counsel requested an extension of time to respond. This Court's order of dismissal was issued on the same date.

Factual background

The state alleged on that on September 11, 2011, Appellant stabbed Michael Smith, the deceased, while both were passengers in a car that was owned and operated by Elizabeth Brewer. Both the state and Appellant presented witnesses on the issue. In fact, Appellant testified. The prosecution introduced seven exhibits, Appellant introduced twelve exhibits, and Appellant's statement was made a court's exhibit. On September 10, 2011, Appellant and Brewer attended a party. After the party, the two and another friend, Cornelia Hopkins, decided to go to Five Points in Columbia, S.C. Brewer drove her car while Appellant and Hopkins were passengers. They picked up Ricardo Tucker and Michael Smith, the deceased, along the way.[1] Prior to entering a pub to watch the deceased, a well-known rap artist, perform, Tucker asked Hopkins to place his gun in her purse, which was secured in the trunk of Brewer's car. However, the deceased had a small pistol, which remained on his person. After leaving the pub, the deceased was very intoxicated,[2] and he began using profanity and making threats toward Appellant.

The group then went to a lounge on Garners Ferry Road. Everyone exited the vehicle except Appellant, who called his brother to pick him up because he was frightened by the deceased's conduct. The foursome, unable to get into the lounge, returned to the car. Appellant and the foursome then left. Appellant was concerned for Brewer's safety and remained with the group, despite having his brother on the way to pick him up. Appellant and Smith argued over who should

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[1] Appellant and the deceased had a tumultuous history – Smith and others had attacked Appellant in 2005.

[2] The pathologist testified his blood alcohol level was 0.235.

be dropped off first. The two also argued over the 2005 attack.[3] Smith repeatedly punched Appellant, who was in the backseat, in the face. Appellant called 911 for help. This angered Smith. Smith pulled up his shirt, and Appellant believed he was reaching for his gun. Appellant pulled out his small pocketknife. Appellant testified that he and Smith struggled. Appellant cut Smith repeatedly during the struggle. Smith, Hopkins, and Tucker exited the car. Appellant and Brewer left the area. Thereafter, Appellant called 911 twice asking for help. Appellant informed the police of where he was and waited for them to arrive.

Discussion

South Carolina provides for the protection of person and property through an immunity provision in its Code of Laws. In essence, South Carolina shields law-abiding citizens, who "protect themselves, their families, and others from intruders and attackers" from "prosecution or civil action for acting in defense of themselves or others." S.C. Code Ann. § 16-11-440(B). The Protection of Persons and Property Act is the codification of the common law "Castle Doctrine." S.C. Code Ann. § 16-11-420(A). Additionally, the legislature extended the doctrine to "include an occupied vehicle." Id. The statutory scheme provides that a person who uses deadly force as permitted by the Code "is immune from criminal prosecution." S.C. Code Ann. § 16-11-450(A).

Immunity extends to "[a] person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be." The law provides this person "has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he

[3] Appellant testified that at a gas station, the deceased confronted him over an alleged slight regarding a girl in whom the deceased had shown an interest. The deceased and his friends attacked Appellant – punching, kicking, and hitting him with beer bottles. Appellant called police about the attack, but the deceased was never arrested. Appellant introduced the police report, photographs of his injuries, as well as his statement, during the immunity hearing.

reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime." S.C. Code Ann. § 16-11-440(C).

In 2011, this Court reviewed a trial court's grant of immunity pursuant to the Protection of Persons and Property Act in Duncan, supra. This Court held "an order granting or denying a motion to dismiss under the Act is immediately appealable, as it is in the nature of an injunction." Id. at 407 n.2, 709 S.E.2d at 663. This Court further found that immunity under the Act should be determined prior to trial because "the legislature intended to create a true immunity, and not simply an affirmative defense." Id. at 410, 709 S.E.2d at 665.

This Court's recent unexpected holding in Isaac, supra, 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 deny Appellant an existing substantial right to an immediate appeal from an order denying immunity under the Act. The effect of this Court's order dismissing Appellant's notice of appeal is to retrospectively apply a newly announced judicial rule to Appellant, which deprives him of a substantial existing right. 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, 532 U.S. 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.[4] Id. at 453-56. The Court held that the Tennessee Supreme Court's abolition of the rule was not unexpected and indefensible because 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, 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 re-tried in 2005, the Michigan Supreme Court had disapproved a series of Michigan Court of Appeals decisions recognizing the diminished capacity defense. In rejecting the defense, the Michigan Supreme Court had observed that in

[4] 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, 532 U.S. at 453.

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 evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility" Carpenter, 627 N.W.2d at 282 (2001); see Lancaster, 133 S.Ct. at 1785.

In Lancaster's appeal to the Michigan Court of Appeals he asserted that the retroactive application of the Michigan Supreme Court's decision in Carpenter, supra, 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 Carpenter, supra, "did not involve a change in the law" because "it concerned an unambiguous statute that was interpreted by the [Michigan] Supreme Court for the first time." Lancaster, 133 S.Ct. at 1786.

The United States 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 state supreme court's reasonable interpretation of the language of a controlling statute. 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 no longer immediately appealable was an unexpected departure from its 2011 opinion in Duncan. As explained, this Court held that an order granting or denying immunity under the protection of persons and properties act was immediately appealable. Duncan, 392 S.C. at 407 n.2, 709 S.E.2d at 663 n.2. Nevertheless, this

Court, only two years later, with no intervening statutory or court decisions, held that an order denying immunity is not immediately appealable. Isaac is a marked and unpredictable departure from Duncan.

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 can now be put to trial with its attendant costs and strain, be convicted of murder or another serious criminal offense, be sentenced, incarcerated, and only 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 citizens are entitled to such protection when acting lawfully in a place where they had the right to be, including on their own property. See S.C. Code Ann. § 16-11-410, et seq.

Further, unlike the decision in Lancaster, the issue here 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. Thus, the accused would be deprived, retroactively, of a very significant right. Moreover, no case currently extant indicates that trial judges will charge that the duty to retreat has been modified

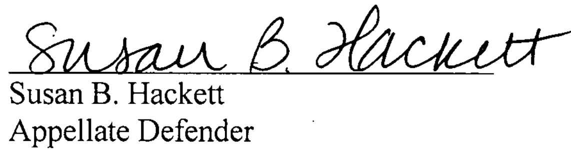
when the accused does stand trial. Thus, a significant statutory right has been abrogated to the prejudice of the accused, here Appellant.

Finally, Appellant testified in his own defense at the immunity hearing and he has shown the state his defense to the prosecution to his detriment while relying on the fact that if Judge Benjamin denied him immunity under the statute that he would have an immediate right to appeal under Duncan. That is a vastly different strategic decision than the situation of facing the jury immediately being called into the courtroom if the motion were denied. To now deny Appellant that appeal, which was timely filed and served under the existing case law of Duncan, which he relied on to his detriment where that right to appeal was the law at the time of the immunity hearing, violates the essential demands of 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).

This Court's ruling that Isaac's case arose before the passage of the statute and was not covered by it was sufficient to dispose of the case. Also, it is no secret that Isaac's claim fell within neither the letter nor spirit of the statute. Hard cases are said to make bad law; ridiculous cases should not drag legitimate claimants down with them.

WHEREFORE, counsel for Appellant petitions this Court for rehearing in the above-entitled appeal, and requests the reinstatement of his timely appeal under Duncan.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

This 13th day of September, 2013.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Anthony McWilson at 7123 Teague Road. Columbia, SC 29209, this 13th day of September, 2013.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 13th day
of September, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.