

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LANCASTER COUNTY
Court of General Sessions

Brooks P. Goldsmith, Circuit Court Judge

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

FILED
OFFICE OF CLERK
OF COURT

2013 MAR 25 AM 9:52

CLERK OF COURT
LANCASTER, SC

The State of South Carolina,

Derrick L. McIlwain,

v.

Respondent.

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

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MAR 27 2013

SC Court of Appeals

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v.

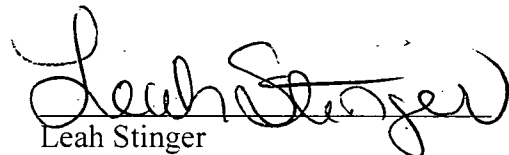
Derrick L. McIlwain,

Appellant.

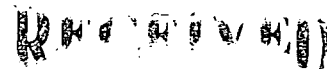
PROOF OF SERVICE

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



MAR 27 2013

SC Court of Appeals

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

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.

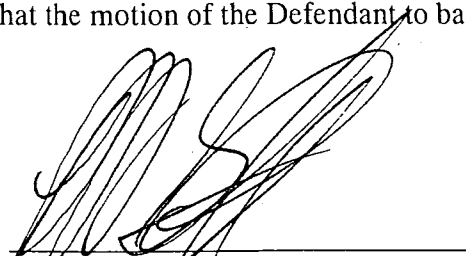
The Act codifies the common law "Castle Doctrine" and justifies a person's use of deadly force and grants a person immunity from prosecution when a person "uses deadly force as permitted by the provisions of [the Act] or another applicable provision of law." S.C. Code Ann. § 16-11-420. One such provision 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.

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

**SIXTH JUDICIAL CIRCUIT
PUBLIC DEFENDER'S OFFICE**

Post Office Box 1809
Lancaster, South Carolina 29720
Telephone/Fax No.: (803) 285-5585

March 25, 2013

The Honorable Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: State of South Carolina, Respondent vs. Derrick L. McIlwain, Appellant

Dear Ms. Kitchings:

Please be advised that with this letter I am filing:

1. Notice of Appeal and two (2) copies; and
2. Proof of Service of Notice of Appeal and two (2) copies
3. Order from Protection of Persons & Property Immunity Hearing

Please return clocked copies of the Notice of Appeal and Proof of Service in the envelope provided.

Yours very truly,



William Frick
Attorney for the Appellant

Enclosures

cc: Solicitor Douglas A. Barfield (w/ enclosures)

RECEIVED
MAR 27 2013

SC Court of Appeals