

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Jan 15 2025**

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

**S.C. SUPREME COURT**

Robin B. Stilwell, Circuit Court Judge

2015-CP-42-05198

Antwon M. Baker..... Appellant,  
v.  
The State, ..... Respondent.

NOTICE OF APPEAL

Antwon M. Baker appeals the Honorable Robin B. Stilwell's Order on Remand filed November 14, 2024, and Order on Applicant's Motion to Alter or Amend filed January 3, 2025.

This fifteenth day of January, 2025.

s/Susannah Ross  
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STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

Antwon M. Baker, Jr #355673  
Applicant,

2015CP4205198

v.

Order on Remand

State of South Carolina  
Respondent.

This matter comes before the Court pursuant to an Order for Remand filed 1 April 2024 by the South Carolina Court of Appeals. The Court of Appeals remanded the case to the trial court to rule on the question of whether "trial counsel was ineffective for refusing to call Baker to testify during the hearing on Baker's claim for immunity pursuant to section 16-11-440(C) of the South Carolina Code (2015)." This Order is a supplement to that prior Order of the Court dated 8 July 2018 and relies upon the applicable legal standards articulated therein.

This Court finds that trial counsel was not ineffective for refusing to call Baker to testify during the hearing on Baker's claim for immunity. Trial attorneys are often required to make difficult decisions regarding whether a Defendant in a criminal proceeding should testify. Balancing a Defendant's Fifth Amendment privileges against the desire to offer potentially helpful testimony is difficult. These strategic decisions are not made by trial attorneys in a vacuum and must be considered in the context of a Defendant's best interests given specific circumstances. Ultimately, the decision to testify or not is solely that of the Defendant.

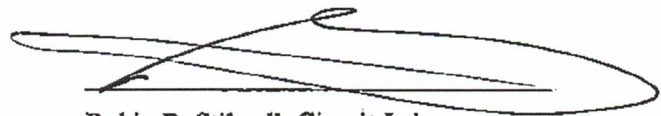
After a review of the record and evidence presented, this Court finds that the Applicant has failed to meet the requisite burden of proof that trial counsel was ineffective for refusing to call Baker to testify during the hearing on Baker's claim for immunity. The Applicant's Application is, therefore, denied.

AND IT IS SO ORDERED.

CLERK OF COURT  
SPARTANBURG COUNTY  
SOUTH CAROLINA

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Robin B. Stilwell, Circuit Judge

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
	)	CASE NUMBER 2015-CP-42-5198
ANTWON M. BAKER,	)	
APPLICANT,	)	
	)	<b>SUPPLEMENTAL ORDER</b>
VS.	)	<b>GRANTING POST-CONVICTION RELIEF</b>
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	

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The Court of Appeals remanded this matter for a supplemental order to address whether trial counsel was ineffective for failing to call the Applicant during a pre-trial hearing. The hearing was based on Baker’s claim of immunity pursuant to a stand your ground defense pursuant to South Carolina Code § 16-11-440(C). See Baker v. State, Op. No. 2024-UP-118 (S.C. Ct. App. Filed April 17, 2024).

**PROCEDURAL HISTORY**

On June 6, 2013, Baker was found guilty following a trial where he asserted immunity and self-defense; he was sentenced to eighteen years for voluntary manslaughter and one year for unlawfully carrying a pistol. He appealed his conviction and sentence. The South Carolina Court of Appeals affirmed the Applicant’s conviction and denied his Petition for Rehearing. State v. Baker, Op. No. 2015-UP-178 (S.C. Ct. App. Filed April 8, 2015). The Supreme Court denied Applicant’s Petition for Writ of Certiorari October 8, 2015, and the Remittitur was returned on November 20, 2015.

The Applicant filed for post-conviction relief (PCR) on December 21, 2015. The PCR hearing was convened on March 12, 2017, at the Spartanburg County Courthouse. Susannah C. Ross represented the Applicant and Assistant Attorney General Alicia A. Olive represented the

State. The Applicant, trial counsel Robert Ianuario, and Assistant Solicitor, Derrick Balsa testified at the hearing. An Order of Dismissal was filed July 16, 2018. The Applicant timely filed a Motion to Alter or Amend pursuant to Rule 59 (e) arguing that the Order of Dismissal failed to address the argument that the trial attorney was ineffective for advising the applicant not to testify during the immunity hearing. The motion was denied by Order signed August 16, 2018. The Applicant appealed the denial of post-conviction relief filing a petition of writ of certiorari on March 26, 2019. Certiorari was granted on the issue of:

“Whether the PCR court erred in finding defense counsel was not ineffective, where counsel admitted he “screwed up” in not calling petitioner to testify during the “stand your ground” immunity hearing, where petitioner was attacked at a place he had a right to be, the Waffle House, where petitioner fired his gun in fear for his life after he was hit in the back of the head and trapped in a small doorway of the Waffle House, since defense counsel’s expectation that a police investigator as the only witness could carry petitioner’s burden of proof on immunity, including that petitioner was in fear of losing his life, was objectively unreasonable?”

The Court of Appeals found the PCR court did not make specific findings of fact and conclusions of law on the issue and remanded for a supplemental order addressing the issue.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has considered the testimony that was presented at the PCR hearing and read the salient portions of the transcript, appellate briefs, the appellate appendix (used in citation herein) and opinions. Reviewing the case on remand and looking at the record and the evidence in its totality, this Court finds that counsel was deficient in presenting the stand your ground defense. Counsel should have called Mr. Baker as a witness. His failure to do so was not reasonable under the circumstances where Mr. Baker carried the burden of proof, did not have an impeachable record, and had made prior statements which were consistent with asserting his

right to stand his ground. Appellate Appendix pages 303, Line 25 to page 307, Line 22 (App. 303, l. 25 – 307, l. 22).

Trial Counsel Ianuario admitted at the PCR hearing that not calling Applicant as a witness at the "stand your ground" hearing was "one of the screw ups I've made in this case and I'm not denying I screwed up some things in this case but I'm gonna (sic) leave it to His Honor [to] determine whether or not that amounts to ineffective assistance." App. 644, l. 15 - 645, l. 3. Counsel also said this at the PCR hearing that this case was his first murder trial: "I freely admit that I should have put Antwon on the stand and leave it to Your Honor's, uh, or not [whether] that was ineffective, I at the time thought I could get all the necessary elements [of immunity] established through Detective Foster's testimony without havin' (sic) to expose Antwon to any cross-examination and expose the case to anything that was beyond the knowledge that was already inside discovery." App. 657, ll. 9-20.

During the pretrial immunity hearing, Ianuario asked the trial judge, Judge Cole: "Can you take the police reports without the witness being present, or the witness statements?" Judge Cole responded, "Well, I mean, I think you've got the burden of proof." Ianuario then asked for permission to speak "to the prosecutor." App. 17, ll. 16- 25.

Defense counsel then called Investigator Richie Foster as a witness at trial. App. 24, ll. 17-21. Counsel asked Foster, "Would you provide a brief summary for the court of the events that took place on the night of June 3, the early morning hours?" Investigator Foster answered that he understood Baker stopped to get something to eat and noticed a crowd in the parking lot. The trial judge interjected at this point: "He's not going to be able just to testify as to what everybody else told him." App. 25, ll. 4-12.

The following then occurred between defense counsel and the judge:

Mr. Ianuario: Shouldn't he be allowed to testify on the information he gathered at the location in the course of his investigation, not the authenticity of it but what he was told?

The Court: Well, he can testify what everybody told him if you don't want me to consider it as evidence that would support a grant of immunity.

Mr. Ianuario: Understood, Your Honor.

The Court: I mean, this hearing is not different than the trial. I mean, you have a burden to establish that he's entitled to immunity, and you do that through competent evidence, not just hearsay testimony.

Mr. Ianuario: Understood, Your Honor.

App. 25, ll. 13-25.

Investigator Foster then said he was unable to determine whether anyone else at the Waffle House that early morning had a firearm. App. 26, ll. 2-5. He testified:

"a crowd of folks outside. Mr. Baker came up, noticed that he had problems with one fellow in the past. He retrieved his firearm from his dash of his car, walked in and ordered. Apparently some words were exchanged between one or two or three of the group and him. And he came outside onetime, *started to come back in. He was hit in the back of the head and at that time turned around and started shooting and*, per the witnesses, chased the victim around in the parking lot and stood over him and kicked him.

App. 26, ll. 24 - 27. (emphasis added).

Foster described where the Applicant was attacked as the front doorway of the Waffle House and as "not much bigger than that desk you're in front of -- behind." App. 28, ll. 9-18. Foster acknowledged he did not have any indication that Applicant started the altercation or difficulties. "He kept telling the individuals . . . to "leave it alone." App. 29, ll. 20-24. "Leave it alone," was said on more than one occasion by Baker to the agitators at the Waffle House before he was attacked.

Foster recalled, "I believe one of the females did say or was trying to also keep them [the men who wanted to fight Applicant] calmed down. Without reading through them again, I can't be exactly sure." Applicant told Foster that the men said they were going to rob him. App. 30, ll. 1-10. Foster testified that the Applicant did refuse to fight, and according to statements and his investigation, Applicant came into the restaurant to escape the difficulties. However, the investigator refused to admit that Applicant could not have avoided the difficulty, "given that we never found another weapon ... " App. 31, ll. 3-21. Foster was told that Applicant was hit on the back of the head when he came into the Waffle House. App. 33, ll. 4-8. Foster also related his understanding that Applicant felt trapped by the men at the time he fired his gun. App. 34, ll. 20-23.

On cross-examination by Assistant Solicitor Balsa, Foster said he understood six or seven shots were fired. App. 36, l. 10 - 37, l. 1. Foster related that in Baker's first statement to the police he said, "The boys didn't say nothing at first, so I went on in and ordered my food." App. 38, l. 16 - 39, l. 5. When petitioner came back outside the Waffle House, "He walked outside to a crowd of people, I think." App. 40, ll. 11-24. Foster said that he did not think Baker had a concealed weapons permit, but that only one victim was shot when Applicant fired his gun that morning. App. 42, l. 14 - 43, l. 20.

On redirect examination, Foster offered that, "I don't think I would have pulled into the parking lot if I had a problem with somebody that was there." App. 44, ll. 12-16. When asked whether he thought Applicant had a duty to avoid the men and not go to the Waffle House, Foster answered, "I didn't get to go to law school that long." App. 44, ll. 17-21.

After Foster's testimony, defense counsel told the judge he had no further witnesses. Counsel then argued that the "stand your ground law applies." He argued Applicant was not

engaged in unlawful activity. He noted there was no indication Applicant was at fault and that Applicant "even attempted to walk away." "Once you enter into the Waffle House, the only way he would have any sort of cover that would have stopped a bullet would have been to jump over the counter. ... Also, I believe there is evidence that there was another firearm present." App. 51, l. 2-52, l. 20.

Counsel asserted, "Based on that I don't see that there's enough to *disprove that Antwon Baker was within his rights to defend himself as he was being jumped by numerous men*. And at least one of them was flashing a firearm toward Mr. Baker. And the testimony -- the independent statement from the Waffle House manager also confirms that." The judge told defense counsel, "*Well, I don't have that statement.*" App. 51, l. 2- 52, l. 20. (emphasis added).

Assistant solicitor Balsa argued that "by stepping out of the car and arming himself he was not engaged in unlawful activity (sic) -- he was engaged in unlawful activity. He had no right to possess that firearm. He is therefore not entitled to immunity under this statute, nor can he reasonably believe it was necessary to fire that gun that many times." App. 52, l. 15 - 53, l. 24. The assistant solicitor argued that self-defense was a jury issue or decision.

The judge then ruled, "I'm not satisfied that this statute applies to these circumstances." The judge said that the General Assembly intended to include occupied vehicles and a person's place of business (but apparently not a business where Applicant was a customer). App. 55, ll. 4-19.

Defense counsel then argued under subsection (C), that the statute applied because Applicant was acting lawfully in a place that he had a right to be. The judge asked the solicitor and defense counsel then if they were aware of any case under S.C. Code § 16-11-440 and 450

that did not involve a person's home, vehicle, or place of business. The attorneys said they could not think of or find such a case. App. 55, ll. 4-19.

The judge then ruled that the statute was not applicable to these circumstances and that even if it was, Applicant had failed to prove by a preponderance of the evidence that he was entitled to immunity. The judge therefore denied the immunity motion. App. 55, l. 20 - 56, l. 6.

During the PCR hearing, Applicant testified that he wanted to testify at the immunity hearing and if he had testified, he would have told the judge he feared for his life after he was attacked in the Waffle House. "I was outnumbered and there [were] multiple people out there with guns, I was by myself and they try to hurt me." Applicant named Brandon Glover, Justin Davis, and Anthony Young as the people who were trying to hurt him. Anthony Young was the person shot. Applicant testified that there was an altercation where Anthony Young tried to attack him about two months before the altercation at the Waffle House. Applicant said he regularly carried a gun for his own protection because he worried he would be attacked. App. 620, l. 16 - 622, l. 6.

Applicant said when he first pulled up at the Waffle House, he did not notice the troublemakers. When he went inside, he heard one of them say, "That's him," and Applicant said he knew these men carried guns. Nonetheless, "I was tryin' to diffuse the situation and try not to have no problem that night 'cause it [had] been too much 'cause I thought he let it go and I was tryin' [to] tell him let it go." Applicant said he would have testified consistently with his PCR testimony if he had been called as a witness during his immunity hearing. App. 622, l. 1 - 623, l. 25.

At the PCR hearing, Applicant also explained how he was trapped in a small doorway inside the Waffle House and that he could not push or pull his way out of being trapped. App.

630, l. 3 - 632, l. 7. Glover was the man who punched Applicant in the back of his head. Again, Applicant thought one of the men was armed. Applicant finally said he did not even remember defense counsel discussing with him whether he thought Applicant would make a good witness at the immunity hearing or before the jury. App. 632, l. 2 - 634, l. 4.

Applicant testified he was trapped by the men inside the Waffle House doorway, that he was in fear of his life, and that is why he pulled the gun out and shot in self-defense. App. 637, l. 3 - 638, l. 19. Applicant said if he did not shoot that evening that "I'd end up dead." App 638, ll. 22-24. Had the Applicant testified at his trial, the outcome of his case would likely been different.

Again, defense counsel Ianuario said that looking back, "It's one of the screw ups I've made in this case and I'm not denying I screwed up some things in this case but I'm gonna leave it to His Honor to determine whether or not that amounts to ineffective assistance" in not calling Applicant as a witness during the immunity hearing. App. 644, l. 15 - 645, l. 2. Counsel also added, "I freely admit I should have put Antwan on the stand and leave it to Your Honor's, uh ... [whether] or not that was ineffective, I at the time thought I could get all the necessary elements established through Detective Foster's testimony without havin' to expose Antwan to any cross examination and expose the case to anything that was beyond the knowledge that was already inside discovery." App. 656, l. 15 - 657, l. 20.

Counsel's reasoning for failing to have Applicant testify at the immunity hearing and advising him not to testify at trial was flawed and amounted to ineffective assistance of counsel which likely effected the outcome of the case. Applicant's prior convictions of driving under suspension and disorderly conduct were not admissible for impeachment purposes under Rule 609 (a)(1), SCRE. App. 620, ll. 13-15. Though he could be impeached with his prior statements,

they were not inconsistent with an immunity defense or self-defense as he said he thought they were trying to gang him and had a gun. App. 303-307. Applicant said that he wanted to testify but counsel advised him not to. App. 633. This was bad advice in this situation because only the person under attack could testify as to whether he was in fear of losing his life or suffering great bodily harm to satisfy the elements immunity or support a self-defense claim. See State v. Light, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) (the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life).

State v. Jones dealt with a stand-your-ground case under S.C. Code §16-11-440 (C) finding that Whitley Jones' residence that she shared with her decedent boyfriend and the adjoining parking lot qualified as "another place" where she had a right to be under the immunity statute. See State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). Subsection (C) states, "A person who is (1) not engaged in an unlawful activity and (2) who is attacked in another place where he as a right to be, including, but not limited to, his place of business, (3) has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, (4) if he 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 as defined in Section 16-1-60." Id. at 139.

Here, S.C. Code § 16-11-440(C), applied to Applicant being attacked in a Waffle House, because it was a place he had a right to be even though it was not his business. Trial counsel correctly made a motion to obtain immunity from prosecution for Applicant but failed to realize that he should not and could not establish immunity through the testimony of Investigator Foster. It was ineffective for counsel to rely on Foster's testimony in the immunity hearing and objectively unreasonable for defense counsel to expect a law enforcement investigator's testimony to undercut the State's case and establish immunity from prosecution.

Foster testified that the Applicant illegally possessed a handgun. App. 43, l. 20. Yet, being in possession of a gun without a concealed weapons permit does not prevent an individual from being entitled to immunity under the statute. In State v. Burriss, the Court found that the defendant's unlawful possession of a gun did not disqualify him from his right to act in self-defense. State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). See also State v. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018) (Scott did not own a gun and "borrowed" his roommate's gun to return fire and the Court found Scott was entitled to immunity under the statute). Foster testified he thought Applicant could have escaped the danger without shooting when defense counsel pressed him on the subject. Foster's testimony that Applicant could have avoided that Waffle House on that night misses the point that the Baker had the right to stand his ground once he was attacked because (1) he was not engaged in an unlawful activity and (2) he was attacked in another place where he has a right to be (3) he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, and (4) his PCR testimony revealed he reasonably believed it was necessary to prevent death or great bodily injury to himself... S.C. Code § 16-11-440(C).

Counsel could not carry the burden of proof by calling Investigator Foster because Foster could not establish the elements necessary for immunity, most specifically that Applicant was in fear of great bodily harm or death. See State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013). While Curry was not decided until six months after the immunity hearing, it did not lay out the fundamental law of immunity for the first time. It did not require defense counsel to be clairvoyant to know that Baker's testimony was necessary to support his immunity argument under the statute. As he admitted it at the PCR hearing, counsel simply bungled his handling of the immunity hearing in this case which was ineffective assistance of counsel.

Applicant's PCR testimony clearly shows he would have testified that he was in fear of great bodily harm, and, indeed, death, if he did not act as he did when he was attacked and trapped at the Waffle House. It is evident from the record that defense counsel did not understand that he had the burden of proof at the immunity hearing and, as seen supra, he even spoke of the state disproving self-defense at the immunity hearing. This shows counsel did not understand the difference between a jury charge on self-defense, and the burden of proof requirement on the defendant in an immunity hearing. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). Counsel should have realized that the only way he could satisfy the burden of establishing self-defense, or having the judge understand that Applicant was scared for his life was by having Applicant testify at the immunity hearing. Failing to do so was ineffective. If Applicant had testified at the immunity hearing, as he did at the PCR hearing, and had defense counsel understood the burden of proof at the immunity hearing, the outcome of the proceeding would likely have been different. Had trial counsel advised Applicant to testify to support a competent argument for immunity, there was a reasonable likelihood Applicant would have been

granted immunity from prosecution at the trial level or prevailed on appeal with a proper trial level immunity record in existence. See Strickland v. Washington, 466 U.S. 690 (1984).

**IT IS THEREFOR ORDERED:**

1. This application for post-conviction relief is granted; and
2. Applicant's sentence and conviction is vacated.

**AND IT IS ORDERED** this \_\_\_\_\_ day of \_\_\_\_\_, 2024.

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Robin B. Stilwell  
Circuit Court Judge

Greenville, South Carolina



