

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable C. Victor Pyle, Jr., Circuit Court Judge
Appeal Case No. 2011-203746

RECEIVED

MAY 08 2014

SC Court of Appeals

THE STATE

RESPONDENT,

V.

JULIAN DEANDRE BATTLE,

APPELLANT.

PETITION FOR REHEARING

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 221(a), SCACR, hereby respectfully petitions this Court to rehear this matter.

1. Respondent respectfully submits this Court overlooked some key facts in finding there "was not overwhelming evidence that Appellant intentionally killed Victim..." Specifically, Respondent submits this Court did not take into consideration the fact that the jury also had the opportunity to view the firearm, its magazine, and all of the unfired cartridges that were recovered from it at the scene. (R. pp. 198-201, 245-46). That evidence corroborated the testimony that the gun was fully loaded with one in the chamber, which further supported the

contention that the victim's gun had not been fired the night of the shooting.¹ There was no testimony or evidence that indicated the gun had been tampered with at the scene after the shooting.

Further, this Court found that its assessment was supported by the fact that no testing was done on the victim's gun to confirm that it was ever fired that night. Respondent submits the lack of testing does not support the Court's conclusion because it ignores the reasoning provided for why testing was not done. Investigator Jones testified she did not have the gun tested because she knew the victim had fired the gun at a range two to three days before the incident, and the gun would have still been dirty. (R. p. 255). Thus, a test to see if the gun had been fired would not have conclusively shown whether the gun was fired that night. There was no testimony or evidence presented that indicated there is a test that could pinpoint when the gun was fired.

2. Respondent respectfully submits the finding that there was evidence Appellant recklessly mishandled the gun because his hand may have touched the trigger as he struggled for control of the gun is not supported by the record. Appellant claims the victim pulled out his gun. (R. p. 326). Appellant indicated he grabbed the victim's right hand and twisted his other hand. (R. p. 326). He

¹ Iona Ooten, the forensics officer who recovered the victim's gun from the scene, testified that when she secured the pistol for transport, she removed an unfired cartridge from the chamber of the gun. (R. p. 197). She also removed the magazine from the firearm, and subsequently removed the unfired cartridges that were in the magazine. (R. p. 198). Ooten indicated there were six unfired cartridges in the magazine. (R. p. 199). James Armstrong, a criminalist for the Greenville County Department of Public Safety who was qualified as an expert in firearms examination and ballistics at trial, testified that the maximum capacity for the victim's gun was seven cartridges, six in the magazine and one in the chamber. (R. pp. 269-70, 273, 274).

grabbed the right hand because that was the one with the gun in it. (R. p. 326). Appellant contended that the gun was pointed at Appellant and Owens, and he was trying to get it away from their direction. (R. pp. 326-27, 333). Appellant testified that he twisted, and the gun went off. (R. p. 327). He stated that he did not intend to pull the trigger of that gun, and he did not intend for the gun to fire. (R. p. 327). Appellant also indicated that he did not know where the gun was pointed during the struggle. (R. p. 333).

When I twisted the gun, Mr. Dodd was pulling back trying to take the gun back. He was trying to pull his arm back and that's when the gun actually went off so I wasn't sure if his hand or my hand or his finger or my finger actually pulled the trigger. I know I did not intend to do it.

(R. p. 327, ll 13-8).

Appellant stated that he never held the victim's pistol in his hand. (R. p. 346). He also denied that he fired the gun into the victim's body. (R. p. 346). Appellant claimed he never actually grabbed the gun; instead, he grabbed the victim's hand and twisted it towards him. (R. p. 346). He maintained that he could not say for sure that he touched the trigger of the gun. (R. p. 346). At no point in time did he ever claim to have handled the weapon. There was no evidence the gun was ever in his possession. Thus, Respondent respectfully submits this Court's finding that there was evidence to support a finding Appellant recklessly handled the weapon is not supported by the record.

3. Respondent respectfully submits there is a key distinction between Appellant's case and other cases in which a struggle over the weapon that killed the victim warranted an involuntary manslaughter jury instruction. Here,

Appellant was not the one in possession of the firearm when it fired, and he did not exert control over the weapon before it was fired.

In cases relied upon by this Court where a struggle over a weapon was sufficient to warrant an involuntary manslaughter charge, there were facts that reflected the defendant was the one who in possession of the firearm before the struggle ensued, and that the defendant exerted some control over the weapon before it was fired. In State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), the defendant testified that he took a shotgun away from the victim, and the gun fired as he was stumbling away from the victim with the gun. Id. at 646, 664 S.E.2d at 467. In Casey v. State, 305 S.C. 445, 446, 409 S.E.2d 391 (1991), the only available eyewitness indicated the victim threatened to "cut" Casey as he sat in his car in Marlowe's front yard. Id. at 446, 409 S.E.2d at 391. When the victim approached the car, Casey exited with a shotgun. Id. The witness observed a scuffle over the gun between Casey and his cousin, a third party to the confrontation. Id.

In State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986), the case cited by Casey for the proposition that a struggle over a weapon may be sufficient for an involuntary manslaughter charge, the defendant claimed that when he was putting the gun back into his car, the victim, apparently thinking that the appellant was going to shoot him, grabbed the end of the barrel causing the gun to fire. Patrick, 289 S.C. at 306, 345 S.E.2d at 483-84 (overruled by Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) and overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999)).

Similarly, in State v. Brayboy, this Court noted that in his statement, the defendant indicated that he and the victim initially struggled over the gun, the gun hit the floor, and both the defendant and victim both reached for the gun. Brayboy, 387 S.C. 174, 177-78, 691 S.E.2d 482, 484 (Ct. App. 2010). The defendant obtained the gun, and in his statement, he indicated that gun went off as he was swinging his arms while arguing with the victim. Id. at 178, 691 S.E.2d at 484.

Even in Tisdale v. State, 378 S.C. 122, 662 S.E.2d 410 (2008), there was some indication that the defendant was in possession of the weapon that killed the victim at least at the very end of the confrontation. Id. at 124, 662 S.E.2d at 412 (2008). In Tisdale, Tisdale's co-defendant had testified that the Tisdale and the victim struggled over the victim's gun, and during the course of that confrontation, two shots were fired. Tisdale, 378 S.C. at 124, 662 S.E.2d at 411. The co-defendant noted that he was not sure who had the gun when the shots were fired, but the defendant had the gun afterwards. Id. The defendant in Tisdale alleged that he and the victim struggled over the victim's gun, the gun discharged, and the victim went still. Tisdale, 378 S.C. at 124, 662 S.E.2d at 412. In all of those cases, there was some testimony or evidence reflecting the defendant exerted some sort of control over the weapon utilized in the homicide.

4. Since Appellant was never in possession of the victim's weapon and never had control of the weapon, even under his position that the victim's weapon was the one that killed the victim, Appellant could not show that he was engaged in a lawful activity with reckless disregard for the safety of others. According to

Appellant's testimony he was not acting in reckless disregard for the safety of others. To the contrary, his testimony indicated that he was specifically attempting to protect himself and his cousin because, according to Appellant, the victim had the gun pointed in their direction before he grabbed the victim's arm. (R. pp. 326-27). Appellant never admitted that he pulled the trigger. (See R. pp. 326-28, 346). In fact, Appellant testified that he never actually grabbed the gun. (R. p. 346). Instead, he maintained that he only grabbed the victim's hand. (R. p. 346). In all, there was no evidence that Appellant negligently handled a loaded gun, indicating his actions were clearly distinguishable from cases like Brayboy, 387 S.C. at 180, 691 S.E.2d at 485; State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008); and Light, 378 S.C. at 648-49, 664 S.E.2d at 468-69. By his account, he never actually handled the gun.

Altogether, Respondent submits the trial court did not abuse its discretion in denying the request for an involuntary manslaughter charge. If Appellant's testimony was to be believed, he would have been entitled to a self-defense charge, which he received. However, nothing in his testimony reflected that he acted negligently or in reckless disregard for the safety of others. As a result, Respondent requests this Court reconsider its opinion and affirm Appellant's conviction.

Respectfully submitted,

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May 8, 2014

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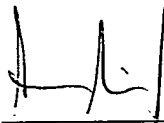
APPELLANT.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Petition for Rehearing on Appellant by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, David Alexander, Esq., SCCID/Division of Appellate Defense, 1330 Lady St., Suite #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 8th day of May, 2014.



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ATTORNEY FOR RESPONDENT



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SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *State v. Julian Deandre Battle*
Appeal from Greenville County
Appellate Case No. 2011-203746

Dear Ms. Kitchings:

Enclosed for filing in your office is the original and six (6) copies of the Petition for Rehearing in the above-referenced case.

Thank you for your assistance in this matter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

Enclosures

cc: David Alexander, Esq.(w/ two copies of encls.)
The Honorable W. Walter Wilkins, Solicitor 13th Judicial Circuit (w/copy of encls.)
Sandi Wofford, Victim Services (w/copy of encls.)