

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAY 28 2014

Appeal from Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case Tracking No. 2010-176707

SC Court of Appeals

The State,

Respondent,

vs.

Theodore Manning,

Appellant.

RETURN TO PETITION FOR REHEARING

On May 7, 2014, this Court properly affirmed Appellant's conviction and sentence. Petitioner filed a Petition for Rehearing on all four grounds raised in his initial brief. This Court correctly decided the issues of whether the photographs and evidence obtained based on the search warrant were properly admitted. Further, this Court correctly determined Appellant was not entitled to a jury charge emanating from section 16-11-440 of the South Carolina Code. Finally, while the Court incorrectly determined an evidentiary hearing must be held pre-trial in all cases in which the Protection of Persons and Property Act is implicated, the Court correctly determined if a hearing must be held it was not error in this case because Appellant could not qualify for immunity under the Act.

Immunity under the Act

Appellant contends in his Petition for Rehearing this Court erred in its interpretation of the Act and in finding he was not entitled to immunity. First, the State submits the trial court specifically found he was not entitled to immunity¹ and Appellant did not contest that issue. He merely asserted he was denied an evidentiary hearing², not that the trial court's determination the Act did not apply was incorrect. The issue of whether the trial court correctly determined whether he was entitled to immunity is not preserved for review on appeal and should not be allowed to be addressed in the Petition for Rehearing. State v. Sweat, 386 S.C. 339, 688 S.E.2d 569 (2010) (noting issue cannot be raised for first time in a petition for rehearing); Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of South Carolina, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (finding an issue raised for the first time in a petition for rehearing was not preserved). Further, because Appellant failed to appeal from the trial court's determination the Act did not apply and he was not entitled to immunity, the issue is the law of the case. State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case). This Court correctly concluded that Appellant failed to present argument on appeal that he was entitled to immunity and any analysis under the Act by this Court was unnecessary.

¹ Mr. May: So, I'm sorry, Your Honor. Are you ruling that this is not – that the act – the defense of Property and Person's Act is not applicable to this case?

Court: Yes.

Mr. May: Okay. (R.471).

² The State notes it filed a Petition for Rehearing regarding the Court's determination that Appellant was entitled to an evidentiary hearing and believes this Court incorrectly construed the statute to require a hearing. Even if a hearing is required, the trial court found he was not entitled to immunity and this Court properly affirmed that finding.

While the Court could have relied on the trial court's determination that Appellant was not entitled to immunity and the fact it is the law of the case to determine any error³ in failing to have an evidentiary hearing was harmless, the Court properly analyzed the provisions of section 16-11-440(A) and (C) and ultimately reached the correct conclusion Appellant was not entitled to immunity under section 16-11-450. Sections 16-11-440(A) and (C) create presumptions for use in determining whether a defendant is entitled to immunity from prosecution.

Section 16-11-440(A) provides:

(A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle;

S.C. Code Ann. § 16-11-440(A) (Supp. 2013). This subsection creates a presumption a person has a reasonable fear of imminent peril of death or great bodily injury when someone has unlawfully entered, is unlawfully entering, or is attempting to remove a person from a residence, dwelling, or occupied vehicle. The provision, does not on its

³ The State of course submits there was no error committed by the trial court in the procedure utilized because Appellant was able to submit the statement and facts relied on to support his claim of immunity, Appellant was allowed to make argument, and the State was allowed to provide its argument. At no time, at the pre-trial hearing or on appeal in his Brief, did Appellant provide this Court with any information regarding the evidence he would have submitted so the issue was not preserved for review. The State has submitted a Petition for Rehearing for consideration on this issue and, at this time, the Petition is still pending.

own, entitle a person to immunity. See State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013).

This Court properly analyzed whether Appellant was entitled to the presumption under subsection A. There was no evidence the victim had unlawfully entered, was entering at the time she was shot, or was attempting to remove anyone from the residence. As a result, this Court properly found subsection A did not apply.

Additionally, section 16-11-440(C) provides:

A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, 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 or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

S.C. Code Ann. § 16-11-440(C)(Supp. 2013). Again, this provision does not create immunity for Appellant, but merely establishes there is no duty to retreat in the event the provision is met. In this case, this Court correctly concluded the provision cannot be met because the incident took place in Appellant's residence, not "another place where he has a right to be."

While immunity must be premised on a defense such as self-defense, defense of habitation, Curry, 406 S.C. at 371, 752 S.E.2d at 266, this Court correctly found none of the presumptions of section 16-11-440 apply in Appellant's case. Section 16-11-440 does not provide the basis for immunity, but merely provides either a presumption of reasonableness as in 16-11-440(A) or the elimination of the required element of retreat for self-defense as in 16-11-440(C). He must still establish some basis for immunity

based on his actions. Appellant has failed to provide any evidence sufficient to establish he was entitled to immunity under any provision of law. For additional argument, the State incorporates and craves reference to its Brief. Accordingly, this Court should deny the petition for rehearing as to this issue.

Jury Charge

This Court correctly determined Appellant was not entitled to a jury charge regarding section 16-11-440(A). This Court properly relied on the holding in Curry to determine a charge regarding the Act should not be given. See Curry, 406 S.C. at 373, 752 S.E.2d at 267.

Appellant attempts to distinguish Curry by arguing because he did not receive a testimonial evidentiary hearing he should have received the jury charge. Whether he did or did not receive a hearing is irrelevant to whether the trial court charged the jury with the appropriate law for them to consider. It is not for the jury to decide whether Appellant is entitled to immunity or the benefit of 16-11-440(A). The statutory provisions of the Act only apply in the pre-trial immunity hearing.

Further, the State submits Appellant received a hearing, one in which he presented evidence in the form of his statement and argument to the court. Additionally, there is no requirement in the Act or any case law requiring the hearing and so none should be required.⁴ Finally, the trial court specifically found, and Appellant's counsel even clarified the trial court's holding, that Appellant was not entitled to immunity and the Act did not apply in this case. As a result, there is nothing to distinguish Curry and Appellant

⁴ The State notes it has submitted a petition for rehearing arguing this Court's finding that the trial court erred in the type of hearing it provided Appellant was insufficient and instead requiring a full testimonial evidentiary hearing which has no basis in the Act.

received the charge he was entitled to receive—one based on the common law castle doctrine eliminating the requirement he retreat because he was in his own home. For additional argument, the State incorporates and craves reference to its Brief. Accordingly, this Court should deny the petition for rehearing as to this issue.

Picture and Search Warrant

The State submits this Court correctly determined the picture of the crime scene and evidence seized during the search warrant were properly admissible and no error occurred. The State incorporates and craves reference to its Brief for argument related to these issues. Accordingly, this Court should deny the petition for rehearing as to these issues.


CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for Rehearing be denied, and the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

May 28, 2014

STATE OF SOUTH CAROLINA

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The State,

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the Return to Petition for Rehearing on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

E. Fielding Pringle, Chief Public Defender
Richland County Public Defender's Office
1701 Main Street
Columbia, South Carolina 29201

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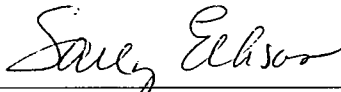
MAY 28 2014

Luke A. Shealey, Esquire
The Shealey Law Firm, LLC
2008 Lincoln Street
Columbia, SC 29201

SC Court of Appeals

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

This 28th day of May, 2014.



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ALAN WILSON
ATTORNEY GENERAL

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VIA HAND DELIVERY

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Theodore Manning,
Appellate Case Tracking No. 2010-176707

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of a Return to Petition for Rehearing along with proof of service for filing in the above-referenced appeal.

Sincerely,

William M. Blich, Jr.
Assistant Attorney General

Enclosures

cc: Luke A. Shealey, Esquire
E. Fielding Pringle, Chief Public Defender
Victim Services

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