

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

DEC 04 2014

**SC Court of Appeals**

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

The State,

Respondent,

vs.

Theodore Manning,

Appellant.

PETITION FOR REHEARING

On November 19, 2014, this Court affirmed in part and remanded this case for the trial court to hold an evidentiary hearing regarding Appellant's claim for immunity under the Protection of Persons and Property Act. The Court found a full evidentiary hearing was required pre-trial, and also found it could not review the trial court's determination the Act did not apply even though a complete and total evidentiary hearing was held—the trial. This Court misapprehended or overlooked relevant facts of this case and the applicable law. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find an evidentiary hearing is not required, affirm the trial court's ruling, and affirm Appellant's conviction and sentence.

This Court found the trial court erred in failing to provide Appellant with a full evidentiary hearing pre-trial in order to determine whether he is entitled to immunity under the Protection of Persons and Property Act, Sections 16-11-410 through -450 of the South Carolina Code (the Act). The trial court allowed argument by both counsel

including allowing Appellant's counsel to argue what evidence indicated Appellant was entitled to immunity under the Act. As a result, Appellant received all the consideration pre-trial that is required under State v. Duncan, 392 S.C. 404, 709 S.E.2d 402 (2011). Finally, Appellant received a ruling from the trial court that he was not entitled to immunity, which he was able to appeal.

Similar to the ruling in Duncan and the Protection of Persons and Property Act, the Sexually Violent Predator Act allows a judge to make a determination under the Act. Under section 44-48-30(2) of the South Carolina Code, the trial judge is entitled to make a determination of whether the crime for which a person is charged qualifies as sexually violent even when it is not specifically listed under the Act. In State v. Wessinger, 408 S.C. 416, 759 S.E.2d 405 (2014), the South Carolina Supreme Court considered whether an individual is entitled to a full evidentiary hearing prior to the judge making a determination under the SVP Act. The Court specifically held: "We hold that the scope and necessity of a separate evidentiary hearing is to be determined on a case-by-case basis." Id. at 420. This holding demonstrates the desire to allow a trial judge to determine the extent of a hearing necessary to make a discretionary ruling, such as the ruling under the SVP Act or a ruling regarding immunity under the Protection of Persons and Property Act.

As in Wessinger, the trial court in this case was presented with evidence by Appellant which was uncontradicted by the State. Appellant acknowledged his statement contained the facts surrounding his shooting of the victim. The trial court considered those facts, the arguments of Appellant's counsel regarding any theories under which he believed his client would be entitled to immunity under the Act, and all

statements by the State prior to making a clear ruling that Appellant was not entitled to immunity. The trial court in this case heard all that was necessary to know the facts as presented by Appellant's counsel did not and would never rise to the standard necessary to provide for immunity under the Act. The court did not need to hold an evidentiary hearing with testimony from witnesses in order to reach the conclusion it reached and requiring such a hearing places an unnecessary burden on the trial court when the issue is straightforward as this Court even found in its opinion.

Appellant never asked to call any witnesses in support of his position, and never objected to the trial court's hearing the motion without witnesses being called. (T.462-471; R. 462-471). He never asked to proffer additional testimony or indicate to the trial court the additional testimony he would have presented had he been entitled to a full testimonial evidentiary hearing. As a result, Appellant received a determination prior to trial as he was entitled to under Duncan.

Additionally, this case is similar to the case of Peterson v. State, 983 So.2d 27 (Fla. App. 1 Dist. 2008). In that case, the Florida Court approved a trial court's procedure in which the "trial court conducted a hearing at which the parties did not present live evidence but, instead, presented the deposition of an eyewitness-petitioner's and the victim's sister-as well as the deposition of the alleged victim." Id. at 28.

Further, this Court erred in requiring a remand for a determination to be made by the trial court.<sup>1</sup> First, no more extensive evidentiary hearing can be held than the trial in which Appellant testified and presented all evidence he desired to present. As a result,

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<sup>1</sup> Again, the State does not believe any further hearing beyond that conducted by the trial court is necessary, but in the event the Court disagrees and finds further evidentiary hearing is warranted, the State submits any error is harmless because Appellant presented all evidence including his own testimony at trial and none of the evidence supports a claim for immunity.

there can be no different evidence presented at the hearing from that presented under oath at the trial. At a minimum, this Court can review the conclusion by the trial court that the Protection of Persons and Property Act does not apply based on the fullest evidentiary hearing presented, the trial.

This is exactly what took place in Dennis v. State, 51 So.3d 456 (Fla. 2010), when the trial court held no hearing at all. The Court considered the evidence presented at trial because it found that all evidence to be presented related to the claim of immunity was presented at trial. The Court then found based on the evidence presented at trial that the defendant was not entitled to immunity. The same determination should be made in this case if this Court concludes a hearing beyond that conducted by the trial court is required.

Additionally, it makes no sense in remanding for a determination by the trial court when his ruling can be reviewed based on the same evidence considered by the jury. The jury specifically rejected any defense raised by Appellant and found beyond a reasonable doubt the State disproved any defense and proved Appellant guilty of the charges. Further, the trial court already made the legal determination no provisions under section 16-11-440 applied to Appellant's case so the only remaining considerations would be the common law provisions considered and rejected by the jury.

As a result, there is no need to remand and instead the Court should consider the facts presented at trial and whether there is any evidence to support a conclusion that Appellant is not entitled to immunity. If this analysis is undertaken, it is clear there is evidence to support the trial court's finding Appellant is not entitled to immunity and, therefore, Appellant's conviction and sentence should be affirmed without resort to remand for an unnecessary second determination by the trial court.

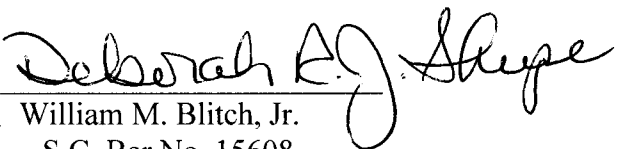
**CONCLUSION**

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the trial court properly considered Appellant's request for immunity, and affirm Appellant's conviction and sentence.

Respectfully submitted,

ALAN WILSON  
Attorney General

WILLIAM M. BLITCH, JR.  
Assistant Attorney General

BY:   
for William M. Blitch, Jr.  
S.C. Bar No. 15608  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

December 4, 2014

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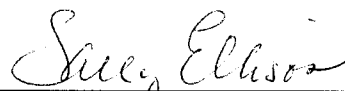
Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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

I further certify that all parties required by Rule to be served have been served.  
This 4<sup>th</sup> day of December, 2014.

  
\_\_\_\_\_  
SALLY ELLISON  
Legal Assistant  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727



ALAN WILSON  
ATTORNEY GENERAL

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December 4, 2014

**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 No. 2010-176707

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of the Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

for William M. Blich, Jr.  
Assistant Attorney General  
S.C. Bar No. 15608

Enclosures

cc: Luke A. Shealey, Esquire (2 copies enclosed)  
Victim's Services (enclosure)