

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2015-000204

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S.C. Supreme Court

THE STATE,

RESPONDENT/PETITIONER,

V.

THEODORE MANNING,

PETITIONER/RESPONDENT

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED BY RESPONDENT/PETITIONER

Did the Court of Appeals err in finding the trial court was required to grant a full testimonial evidentiary hearing to Manning prior to determining the immunity provision of the Protection of Persons and Property Act, section 16-11-450 of the South Carolina Code, does not apply in the instant case and in remanding for a determination by the trial court after all evidence was presented at trial and any possible error was clearly harmless?

QUESTIONS PRESENTED BY PETITIONER/RESPONDENT

Did the Court of Appeals correctly remanded the case for an evidentiary hearing to determine if Manning is entitled to immunity under the Protection of Persons and Property Act, as it applies in this case, holding the evidentiary hearing is necessary to determine if Manning has met his burden under the Act by a preponderance of the evidence.

STATEMENT OF THE CASE

Appellant Theodore Manning (Manning) was indicted by the Richland County Grand Jury on September 15, 2010, for murder. The charge arose from the death of Nikki McPhatter (McPhatter) on May 6, 2009. Manning's case proceeded to trial from October 4 through 14, 2010, before the Honorable G. Thomas Cooper, Jr., and a jury. Luke Shealey, James May, and Fielding Pringle represented Manning, while the State was represented by W. Barney Giese, Luck Campbell, and Joanne McDuffie.

The jury found Manning guilty of the lesser included offense of voluntary manslaughter. R. 1813, ll. 6-9. Manning was sentenced to thirty years imprisonment, with credit for time served. R. 1829, ll. 4-17. The direct appeal followed. On December 10, 2013 the Court heard oral arguments. On May 7, 2014 the Court of Appeals published an opinion affirming Mr. Manning's conviction. *State v. Manning*, Op. No. 5228 (S.C. Ct. App. May 7, 2014). Manning filed a Petition for Rehearing on May 20, 2014. The State filed a Petition for Rehearing on May 22, 2014. On June 26, 2014, the Court of Appeals granted both petitions for rehearing and withdrew the opinion filed May 7, 2014 pending further order by the court as to oral arguments or a new opinion. On October 15, 2014 the Court heard a second round of oral arguments. On November 19, 2014, the Court of Appeals issued its final opinion and Affirmed in Part and Reversed in Part. In this final opinion, the Court reversed the trial court's refusal to grant an immunity hearing under the Protections of Persons and Property Act and remanded the case for an immunity hearing and evidentiary ruling on the issue of immunity. As to Manning's remaining issues on appeal, the Court affirmed. Both Manning and the State filed Petitions for Certiorari. This return follows.

ARGUMENT

1. The Court of Appeals correctly remanded the case for an evidentiary hearing to determine if Manning is entitled to immunity under the Protection of Persons and Property Act, as it applies in this case, holding the evidentiary hearing is necessary to determine if Manning has met his burden under the Act by a preponderance of the evidence.

At the onset of the case, before the jury was sworn, defense counsel moved for an immunity hearing to determine if Manning was entitled to immunity under the Protection of Persons and Property Act (hereinafter Act), South Carolina Code Sections 16-11-410 through 450. R. 192, ll 5-24 The motion was continued until later in pretrial. Defense counsel made a formal motion requesting the Trial Court to hold a hearing to determine if Manning was entitled to immunity under the Act under scenarios set for in either 16-11-440(A) or 16-11-440(C). R. 466 ll 17-23. The Trial Court did not allow for an evidentiary hearing and declared that due to the fact that McPhatter was not an intruder the Act did not apply and no evidentiary hearing would be allowed. R. 462-471, ln 10. The Defense argued that when McPhatter pulled the gun on Manning she transformed legally from guest to intruder and trespasser, thus affording Manning the protections of the Act. R. 466, ln 2 – R. 467, ln 9.

Approximately one year after the conclusion of Manning's trial the South Carolina Supreme Court has issued the opinion of State v. Duncan, 392 S.C. 404, 709 S.E.2d 402 (S.C. 2011). In Duncan, the South Carolina Supreme Court examined the Act and its implications on trials such as Mr. Manning's. The Court found a pre-trial determination is required as immunity granted by the statute is designed to prevent prosecution. The Court found that the Duncan Trial Court properly conducted a pre-trial determination, and it set forth that the standard used by the trial court to make the

determination on the issue of immunity would be by the preponderance of the evidence, Id. at 411. This is an appropriate and logical standard for trial courts to employ as the facts and versions of events presented by the State and the Defense during these immunity hearings are usually in dispute and contested vigorously. The State argues in its Petition for Certiorari that Duncan only requires a “pretrial determination” and not a full evidentiary hearing, but to do so would ignore the preponderance of the evidence standard that has been set forth and require trial courts to make an immunity determination based on the weight of lawyer’s arguments, and not by competent evidence coming from the witness stand. Additionally, of the handful of cases addressing the Act by our Appellate Courts since Duncan, not one has ruled that a full evidentiary hearing is not what was intended to determine immunity claims under the Act.

The State cites State v. Wessinger, 408 S.C. 416, 159 S.E.2d 405 (2014) in an attempt to assert by analogy that trial courts are allowed to make “determinations” under Acts without holding a full evidentiary hearing. In Wessinger, the appellant plead guilty to two counts of indecent exposure, agreeing under oath to the solicitor’s recitation of the facts, and as a matter of public record acknowledged that he was already on the sex offender registry from a 1994 conviction, Wessinger at 406. At the solicitor’s request, and over appellant’s objection, the trial judge classified the appellant as a sexually violent predator under the Sexually Violent Predator Act, S.C. Code 44-48-10. The issue on appeal was whether a trial court could classify a defendant under that act without first holding a full evidentiary hearing. The Supreme Court held that whether an evidentiary hearing was necessary in these cases was to be determined on a “case by case basis,” but that it was not necessary in Wessinger given that the facts were uncontested and the

appellant was a registered sex offender since 1994, Id. at 407. Additionally, the Court goes on to note in footnote three that there is no burden of proof or persuasion by either party under the Sexually Violent Predator Act. The State's attempt at analogy is misapprehended and easily distinguished, as unlike the facts of Wessinger, the facts surrounding Manning's claim of immunity under the Act are disputed and not a matter of public record that both sides agree upon. Unlike the Sexually Violent Predator Act and applicable case law, the burden of proof for determining immunity under the Act is that of a preponderance of the evidence as set forth in Duncan.

The State's Petition for Certiorari also cites Peterson v. State, 983 So.2d 27 (Fla. App. 1 Dist. 2008) in an attempt to support its contention that full evidentiary hearings are not required under the Act. South Carolina's Act is almost identical to Florida's statutory provision for immunity, and there the trial court conducted the pre-trial hearing by allowing the parties to present deposition evidence of an eye witness to the incident and the victim. There is no indication in Peterson whether the parties consented to holding the immunity hearing in this fashion, or if it was ordered by the trial court, but this appears to be a case of first impression in Florida where the trial court "observed that no rule or procedure had yet been enacted to guide trial courts in deciding a claim of immunity," Id. at 28. Unlike South Carolina, Florida allows for videotaped depositions in criminal cases where the person being deposed is subject to cross examination. Given the fact that South Carolina does not allow for videotaped depositions in criminal matters, the State's suggestion of using the Peterson trial court's method is a model that could not be replicated in South Carolina. Additionally, the State fails to mention how the Peterson court ultimately adopts a preponderance of the evidence standard for determining

immunity after looking for guidance from other states with similar immunity statutes. Adoption of such a standard for weighing evidence, as discussed supra, dictates that trial courts are instructed to decide claims for immunity after hearing competent evidence from the witness stand, and not simply arguments from lawyers regarding their opinions of the evidence.

The State also asserts in its Petition for Certiorari that Dennis v. State, 51 So.3d 456 (Fla. 2010), a case out of Florida's Supreme Court, supports its contention that a remand is not necessary. The Dennis case is the seminal case from Florida's highest court that settles the question of whether full pretrial evidentiary hearings are required for immunity claims under Florida's "Stand Your Ground" law. Dennis affirmed the rationale set forth in Peterson, discussed supra, by confirming that full pretrial evidentiary hearings are required to decide immunity claims; however, it decided under the facts of that particular case the error was harmless. It does not imply a blanket rule that failure to provide full evidentiary hearings for immunity claims is somehow always harmless error. The State goes on to claim in its Petition that a remand for an evidentiary hearing in Manning's case would be a waste of judicial resources, and that the reviewing appellate court can simply review the cold transcript of the trial and be able to decide the issue of immunity. This is misguided because in immunity claims under the Act the trial court is the designated fact finder. An appellate court, just like the trial court, is tasked with using its own in person observations to decide the matter. In immunity cases, as in Manning's case, the state and defense have polar opposite versions of what transpired during the fatal altercation. It is absolutely crucial that a judge be allowed to use her life experiences to gage a witness's credibility and truthfulness during these evidentiary hearings. A cold

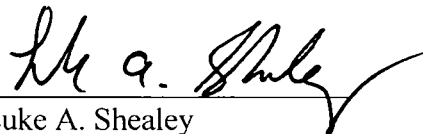
reading of a transcript concerning a disputed factual issue does not afford the opportunity to observe the witness's inflection, tone of voice, or hesitancy to answer questions, which are all things that help determine credibility and believability.

In Manning's case, the Defense specifically requested that an evidentiary hearing be conducted. R. 463, In 25 – R. 464, In 3. The fact that Mr. Manning did not receive this hearing constitutes reversible error, as the trial court refused to apply the protections afforded by the Act as to Manning's case. The refusal to grant the hearing is not harmless error as Manning was deprived of the added protections of the Act, which fundamentally changed the self defense and defense of habitation law in South Carolina by adding further protections such as immunity. The Court of Appeals was correct in determining that it was error for the trial court to refuse Manning an evidentiary hearing, as he should not have been exposed to the full gauntlet of trial without first being afforded a full evidentiary hearing under the Act.

CONCLUSION

Based on the above arguments, the petition for writ of certiorari should be denied.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER/RESPONDENT

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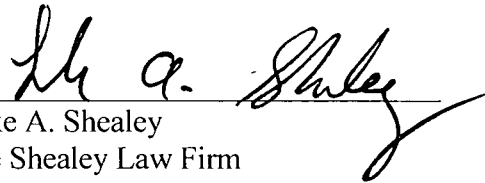
V.

THEODORE MANNING,

PETITIONER/RESPONDENT.

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on William Blich, Esquire, this 9th th day of March, 2015.



Luke A. Shealey
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ATTORNEY FOR PETITIONER/RESPONDENT

SWORN TO BEFORE ME this 9th day
of March, 2015.

 (L.S.)

Notary Public for South Carolina
My Commission Expires:

April 4, 2024