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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ANTWON M. BAKER, JR.,

APPELLANT

APPELLATE CASE NO. 2013-001366

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

Opinion No. 2015-UP-178

PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, the undersigned counsel would petition for rehearing in this appeal based on this Court's denial of appellant's self-defense and castle doctrine claims because apparently this Court relied on the jury's rejection of appellant's self-defense case and overlooked evidence presented at trial that established self-defense as a matter of law as well as evidence in support of appellant's qualification for immunity under the castle doctrine since he was attacked in a restaurant, which is a place where he had a right to be protected. In support of this petition, counsel submits the following.

A.) Self Defense as a Matter of Law

Upon entering a Waffle House Restaurant, appellant was attacked by Brandon Glover at the entrance door. Appellant was alone, but Brandon Glover was at the Waffle House with his friends Anthony Young and Justin Davis. Apparently, Glover took it upon himself to take revenge upon appellant based on Young's story (a prior misdeed involving appellant) and hit appellant on his head as he entered the Waffle House. Appellant responded in self-defense by firing a weapon. Young was killed when the gunshots were fired. At trial, the jury rejected appellant's self-defense claim and the judge failed to grant appellant's directed verdict motion requesting a ruling that the shooting was in self-defense as a matter of law. This Court affirmed the trial judge's denial of appellant's request for a ruling of not guilty as charged due to self-defense as a matter of law under the ruling of State v. Butler, 407 S.C. 376, 755 S.E.2d 457 (2014), to the extent that a jury verdict is controlling when there are "inconsistent accounts of an incident" or where the "evidence is susceptible of more than one reasonable inference." However, in the case at bar, the accounts establishing that appellant was not the aggressor, i.e., that he (appellant) was hit first, are uncontroverted, and not inconsistent, and thus proved appellant acted in self-defense as a matter of law based on the life or death situation that followed his assault. Therefore, Butler was inapplicable this case. The facts from the trial support this position.

At trial, state's witness Justin Davis testified that around 2:00 am on June 3, 2012, Brandon Glover drove him (Davis) and Anthony Young to a Waffle House located in Spartanburg County, and that appellant arrived there at the restaurant later while they were still there. Upon seeing appellant, Anthony Young declared that appellant previously pulled a gun on him. Davis testified that Brandon Glover went outside to talk with appellant and told him (appellant) that a fight would commence presumably out of loyalty to and revenge for Anthony Young. Appellant responded by

stating that Glover robbed one of his (appellant's) friends and that Anthony Young attacked him (appellant) previously with a gun. Then, as appellant moved to re-enter the Waffle House, Brandon Glover hit appellant about the head. Thereafter, appellant pulled out his gun and started shooting. Everyone ran as shots were fired. Anthony Young was shot in the crossfire and died. Tr. 101, l. 101 – p. 107, l. 25.

State's witness Joshua Hance testified that he was working as a cook at the Waffle House on that same morning and witnessed the events in question. Hance stated that appellant was ordering his food when another man approached and "had words" with him (appellant). Hance added that appellant made an exit, but that when he (appellant) re-entered, another man ran up and hit appellant, and that appellant responded by pulling out a gun and firing gunshots. Tr. 210, l. 15 – p. 217, l. 18.

Appellant did not testify at trial, but note that Brandon Glover testified at trial on behalf of the defense. Defense witness Glover testified that he was there along with Anthony Young and Justin Davis when the shooting at the Waffle House occurred. When appellant arrived and Young stated that appellant pulled a gun on him previously then he (Glover) went outside and argued with appellant. Glover stated that he threw the first punch at Glover at the Waffle house door and the shooting began afterwards. Tr. 388, l. 1 – p. 395, l. 11.

Shortly after the shooting, appellant was apprehended by police at the apartment complex nearby where he resided and gave them statements about what happened at the Waffle House. In his first statement, appellant explained that when he parked in the Waffle House parking lot on that night, he saw "ten to twelve boys" in the parking lot so he retrieved his gun. Then, appellant stated that as he was ordering and paying for his food and exiting, one male said he had a problem with him and another male said if he (appellant) didn't fight they would rob him. Appellant explained

that he pleaded with them to let it go, but that when he turned to re-enter the Waffle House, "two of them hit [him] in the back of the head" and that he "pulled out [his] gun and fired three to eight shots." Tr. 304, lines 1-25. Appellant's second statement was almost identical to his first statement except that he added that after he was approached by the male in the blue shirt who insisted that they fight.

Compare the holdings in State v. Dickey, 394 S.C. 491, 716 S.E.2d 97 (2011), and State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), where the Court in both cases found self-defense existed as a matter of law, which in effect meant that the state's evidence was insufficient to disprove self-defense. In Dickey, the defendant, i.e. Dickey, who was a security guard in a housing complex, responded to a call regarding a male guest that was angry and drunk and made attempts to assault a resident of the complex. Dickey asked the angry and drunk man to exit the complex and when the man did so, he (Dickey) followed him outside in order to advise police of the man's whereabouts if needed because the police had already been called and notified of the pending event. When the angry man, who had a liquor bottle in his possession, started walking back toward Dickey, threatening to fight, and asking why he was being followed, Dickey pulled out a gun and fired because the angry and drunk man continued to advance aggressively and reached under his shirt (presumably for a weapon). Thereafter, the man continued to march toward Dickey and did not stop moving forward until the second gunshot slowed him and after the third gunshot made him drop to his knees. The Dickey Court held that Dickey was entitled to a directed verdicts of acquittal on the charges on the ground of self-defense as Dickey was not the aggressor as he walked outside to inform police of this man's location, and because Dickey believed he was in danger and had the

right to act (shoot) on appearances[1] due to this angry and drunk man's aggressive behavior, especially where it appeared as though the man was armed. There was no duty to retreat since there was no other means of avoiding the danger (could not turn back) without losing his life or sustaining injuries.

Moreover, in Hendrix, supra, defendant Hendrix, whose relationship with the aggressive intoxicated man who accosted him on the day in question was not good, was approached by this drunk on the day in question threatening to fight him, and thereafter drove to Hendrix's property, pulled out a gun, walked up, pointed the gun, and threatened to kill Hendrix. This occurred despite Hendrix's pleas for him to leave the property. Ultimately, Hendrix shot (four times) and killed the man. The Hendrix Court held that the intoxicated man was the aggressor and that Hendrix acted on appearances in believing he was in danger of losing his life or sustaining serious bodily injury and had no duty to retreat.

Likewise, appellant's case was one of self-defense as a matter of law.

B.) Protection of Persons and Property Act

Also, this Court's use of the holding in Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005), to support its holding in appellant's appeal that the Waffle House did not meet the qualifications of the "possessory status of a home or place of business" that would invoke the protection of the castle doctrine was inapplicable because equating a dance club from the Gilchrist case, which was the place where Gilchrist argued he had a right to protection under the Act, to a restaurant (Waffle House) where appellant argued he should have been protected under the Act,

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[1] A person has the right to act on appearances even if the person's belief is ultimately mistaken. State v. Fuller, 297 S.C. 440 443-44, 377 S.E. 2d 328, 331 (1989). "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." Dickey v. State citing to State v. Starnes, 340 S.C.

constituted an unequal match. The Gilchrist Court overruled State v. Marlowe, 120 S.C. 205, 112 S.e.921 (1922), which found that a member of an Elk Club enjoyed immunity from retreating, and held contrary to Marlowe that with respect to the issue of immunity from the retreating, a club could not be elevated to the possessory status of a home or place of business. First, the holding in Gilchrist is not squarely on point with the immunity connected to the castle doctrine as Gilchrist addresses immunity from the duty to retreat. Next, a restaurant is characterized as a place where one has a right to be inside per the castle doctrine in the same vein as one's home vehicle or business. A restaurant is a place where meals are served to the public[2]. A dance club is the equivalent of a night club, which is a place that stays open late at night and provides food, drink, and entertainment.[3] The differences in the nature of these two venues cannot be viewed as equivalent to each other. A restaurant involves the activity of feeding, which encompasses a basic human need. One's attendance at a club involves a voluntary decision of a human being to place himself in an environment that does not meet a human need and where alcohol may be served and where dancing is a part of the scenery, which in turn most likely would encompass the potential for immoral behavior. Clearly, the castle doctrine protection would not apply to a night/dance club, but this protection would certainly apply to a restaurant. The Gilchrist holding was inapplicable in this case.

S.C Code Ann § 16-11-440(c) allows for immunity where one is not engaged in an unlawful activity and is attacked in another place (other than his home, vehicle or bushes) where he had a right to be inside, i.e. in a restaurant such as the Waffle House. In the case at bar, appellant

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312, 322, 531 S.E.2d 907, 913 (2000) (citing State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978)).

[2]The American Heritage Dictionary Second College Edition (1985) p. 1053.

[3] The American Heritage Dictionary Second College Edition (1985)p. 841.

established by a preponderance of the evidence that he was entitled to immunity under the Protection of Persons and Property Act. S.C. Code Ann § 16 -11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act. Similarly, this case involves a right to immunity in a public place where appellant had a right to be present, i.e., a restaurant known as the Waffle House. Specifically, under 16-11-440 (c) the Act provides that one is justified in using deadly force if:

> 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...

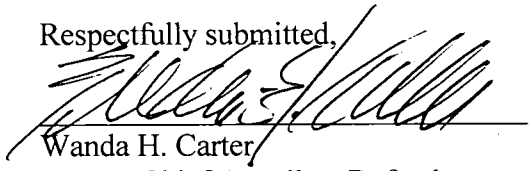
Moreover, unlike the case of Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), where there was no valid self-defense claim; here, appellant was not engaged in an unlawful activity and also, appellant's self-defense claim was established as a matter of law. Appellant was in a public restaurant, i.e., a public accommodation that was a place where he had a right to be and was attacked from behind by Glover. These are the uncontroverted facts. Glover himself admitted that he attacked appellant from behind at the Waffle House entrance. Also, appellant was confronted by a gang-like posse waiting to defend and attack; and clearly, appellant was outmanned and outnumbered. Appellant lawfully used deadly force to defend himself. Therefore, the trial judge erred in denying appellant immunity under the Act.

During the pretrial hearing held in the matter, Detective Richie Foster testified that in the course of his investigation into the Waffle House shooting, he learned that words were exchanged between appellant and a group of men, one of whom appellant had difficulty with previously, and that after these words were exchanged between the members of the group (including their threat to

rob him) and appellant, one of the members of the group hit appellant in the back of his head upon his entry into the restaurant. Then, appellant responded by firing gunshots. Tr. 26, l. 1 – p. 29, l. 24. Detective Foster added that appellant was neither trespassing nor banned from the Waffle House and was rightfully at the restaurant, and that appellant pleaded with the gang to leave it alone. Tr. 30, lines 4-20. g that the Act was inapplicable to appellant's case and in not reaching a ruling on the merits via S.C. Code Ann § 16-11-440 (c). Again, appellant was protected from prosecution because he defended himself in self-defense after being attacked in a place where he had a right to be at the time of the attack upon him.

WHEREFORE, based on the foregoing arguments, appellant requests a rehearing on the issues of appellant's proof of self-defense as a matter of law and statutory immunity under the castle doctrine.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

This 22nd day of April, 2015.

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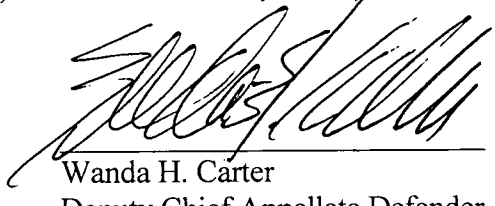
CERTIFICATE OF SERVICE

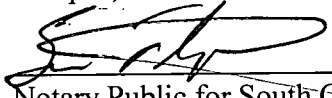
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Antwon M. Baker #355673, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 22nd day of April, 2015.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 22nd day
of April, 2015.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.