

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JUN 25 2015

APPEAL FROM MARION COUNTY
The Honorable D. Craig Brown, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2013-001769

THE STATE

APPELLANT,

V.

CALVIN JERMAINE POMPEY,

RESPONDENT.

PETITION FOR REHEARING

Comes now Appellant, 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.

Appellant respectfully submits this Court has misapprehended what constitutes evidence of a forceful entry under the Protection of Persons and Property Act. Whether a defendant is entitled to immunity under the Protection of Persons and Property Act must be decided prior to trial if either party moves for a determination regarding the Act's application to a defendant's case. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). "[W]hen a party raises the question of statutory immunity prior to trial, the proper standard for the circuit

court to use in determining immunity under the Act is a preponderance of the evidence.” Id. at 411, 709 S.E.2d at 665. S.C. Code § 16-11-440(A) states,

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; **and**

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-440(A)(emphasis added).

While the Act does not specifically define what constitutes a forcible entry for the purposes of the presumption afforded in S.C. Code Ann. § 16-11-440(A), the ordinary meaning of the words used in the statute would clearly indicate that something more than leaning into an open door is necessary to support a finding of forcible entry. The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. Duncan, 392 S.C. at 408, 709 S.E.2d at 664 (citing Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. Id.

Appellant respectfully submits that in its finding there was evidence of a forceful entry, this Court implicitly and improperly conflates the concept of one’s right to act on appearances when acting in self-defense with the nature of the

evidence that must be presented to establish a forcible entry occurred or was occurring. Respondent's belief the victim may have had a weapon and the reasonableness of that belief may be relevant in the court's determination of the existence of evidence to support S.C. Code Ann. § 16-11-440(A)(2). That belief is not relevant to the factual analysis required by S.C. Code Ann. § 16-11-440(A)(1).

As noted by this Court, the testimony presented at the hearing reflected that Respondent was sitting in the front passenger seat of a parked car with the door open. There was no testimony at the motion hearing that indicated the victim had any physical contact with Respondent before the shooting. None of the witnesses, including Respondent, heard the victim make any threats towards Respondent. (R. pp. 22, 27, 47, 62, see R. p. 73). Furthermore, no one saw the victim with a weapon. (R. pp. 63, 73; see R. p. 26). Altogether, there was no evidence the victim used unlawful force when he leaned into the open car door. There is no evidence in the record to support a finding that the victim was forcefully entering the vehicle as required under S.C. Code Ann. § 16-11-440(A)(1).

Altogether, for the reasons stated above, Appellant requests this Court reconsider its opinion and reverse the circuit court's Order Granting Immunity.

Respectfully submitted,

ALAN WILSON
Attorney General

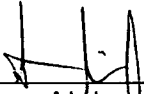
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ATTORNEYS FOR RESPONDENT

By:  _____
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June 25, 2015

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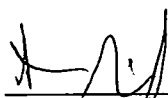
RESPONDENT.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Appellant, certify that I have served the within Petition for Rehearing on Respondent by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Robert M. Dudek, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201.

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

This 25th day of June, 2015.



ALPHONSO SIMON, JR.
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ATTORNEY FOR APPELLANT



ALAN WILSON
ATTORNEY GENERAL

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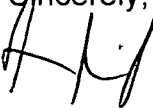
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *State v. Calvin Jermaine Pompey*
Appeal from Marion County
Appellate Case No. 2013-001769

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Appellant's Petition for Rehearing in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Thank you for your assistance in this matter.

Sincerely,


Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

Enclosures

cc: Robert M. Dudek, Esq. (w/two 2 copies of encls.)
The Honorable E. L. Clements, III, Solicitor, Twelfth Judicial Circuit
(w/copy of encls.)
Trisha Allen, Victim Services (w/copy of encls.)