

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

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Diane S. Goodstein, Circuit Court Judge

S.C. Supreme Court

Opinion No. 2015-UP-212 (S.C. Ct. App. filed April 22, 2015)

Appellate Case No: 2015-001533

State of South Carolina, Respondent,

v.

Jabari Linnen, Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

| | Page |
|---|-------------|
| Index | i |
| Questions Presented | 1 |
| Statement of the Case..... | 2 |
| Statement of Facts..... | 3 |
| Certiorari | 8 |
| Argument: | |
| I. The Court of Appeals properly affirmed the trial court’s decision to deny Petitioner’s request to give the jury a charge under the Protection of Persons and Property Act where Petitioner never sought a pretrial determination from the trial court regarding immunity under the Act. | 10 |
| II. The Court of Appeals properly affirmed the trial court’s decision to deny Petitioner’s request to give the jury a charge under the Protection of Persons and Property Act where the evidence presented at trial could not, as a matter of law, establish immunity under any specific terms of the Act..... | 12 |
| Conclusion | 14 |

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the trial court's decision to deny Petitioner's request to give the jury a charge under the Protection of Persons and Property Act where Petitioner never sought a pretrial determination from the trial court regarding immunity under the Act.
2. Whether the Court of Appeals properly affirmed the trial court's decision to deny Petitioner's request to give the jury a charge under the Protection of Persons and Property Act where the evidence presented at trial could not, as a matter of law, establish immunity under any specific terms of the Act.

STATEMENT OF THE CASE

Jabari Linnen (Petitioner) was indicted at the May 19, 2011, term of the grand jury for Beaufort County for attempted murder (2011-GS-07-946) and possession of a weapon during the commission of a violent crime (PWDCVC) (2011-GS-07-947). He was represented by Jim Brown, Esquire, of the Beaufort County Bar. Respondent (the State) was represented by Deputy Solicitor Sean P. Thornton of the Fourteenth Judicial Circuit Solicitor's Office. (R.p.7). On September 17, 2012, jury qualification and selection were held before the Honorable Stephanie McDonald and on September 18-21, 2012, Petitioner proceeded to trial by jury before the Honorable Diane S. Goodstein. The jury found Petitioner guilty of assault and battery of a high and aggravated nature (ABHAN) as a lesser included offense of attempted murder and guilty of PWDCVC. He was sentenced to twenty (20) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for PWDCVC. (R.p.1-6; p.374, line 16-p.375, line 5). Petitioner timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a brief in support of his appeal. (App.p.398-p.420). The State filed a brief in response and Petitioner filed a reply brief. (App.p.421-p.452). Petitioner's convictions were subsequently affirmed in an unpublished opinion from the Court of Appeals. State v. Linnen, Op. No. 2015-UP-212 (S.C. Ct. App. filed April 22, 2015). (App.p.453-p.454). Petitioner submitted a timely petition for rehearing and the State submitted a return. (App.p.455-p.472). By Order filed June 18, 2015, the Petition was denied. (App.p.473). On July 17, 2015, Petitioner submitted a Petition for a Writ of Certiorari to this Court. This Return on behalf of the State now follows.

STATEMENT OF FACTS

On April 21, 2011, King David Williams was driving Petitioner's car down Luther Warren Drive on St. Helena Island in Beaufort County, with Petitioner in the passenger seat. When they stopped at the corner of Seaside Road and Luther Warren Drive, they encountered the victim, Trey Nichols, standing next to an oak tree and cursing at Petitioner. Nichols threw an empty Coke can at the car. Petitioner then retrieved a pistol from the glove compartment, exited the passenger's side of the car, walked around to the driver's side and fired multiple shots at the victim. Nichols was struck at least six times in the arms, legs and chest, and suffered at least three life-threatening wounds; however, he survived the attack. (R.p.50, line 11-SROA.p.2-3, line 13; p.52, line 12-p.53, line 14; p.54, line 4-p.57, line 15; p.60, line 23-p.61, line 3; R.p.121, line 6-SROA.p.7; p.133, line 21; p.167, line 17-p.182, line 9; p.208, line 21-p.210, line 6; p.238, line 18-SROA.p.20; SROA.p.21; p.294, line 25).¹

Prior to the jury being sworn, Petitioner sought a pretrial ruling on the admissibility of evidence of specific instances of violence on the part of Nichols. Petitioner wanted to introduce this evidence in support of his theory of justifiable homicide by showing he had a reasonable apprehension of fear from Nichols at the time of the shooting. The trial court ruled it would allow testimony about three specific prior instances of violence committed by Nichols within three months of the shooting but would exclude evidence of two other prior instances which were significantly older in

¹ Although the accounts given by Nichols, Williams, and Petitioner differ in some details about what happened immediately prior to the shooting, it is undisputed that Petitioner was outside his vehicle when he pulled a pistol from behind his back and shot Nichols multiple times. Thus, Nichols had not unlawfully and forcibly entered Petitioner's vehicle, was not in the process of unlawfully and forcefully entering Petitioner's vehicle, and was not removing or attempting to remove another person against his will from Petitioner's vehicle.

time. The court also ruled Petitioner would be allowed to elicit opinion or reputation evidence about Nichols if Petitioner laid the proper foundation. (R.p.14, line 20-p.28, line 17). Petitioner did not make a pretrial motion for immunity from prosecution under the “Protection of Persons and Property Act” (the Act), S.C. Code Ann. §§ 16-11-410 to -450 (2007).²

After the jury was sworn, the trial judge made preliminary remarks to the jury and the parties made opening statements briefly outlining the forthcoming evidence and their respective theories of the case. (SROA.p.1, line 20-R.p.49, line 24). Petitioner’s counsel stated in part:

April 21st, 2011. Mr. Nichols attacked Jabari Linnen using hostile words and harsh facts at the corner of Luther Warren Drive and Seaside Road. Jabari was without fault in bringing on that difficulty. Jabari stood his ground, because he reasonably believed that force was necessary to prevent great bodily injury or death.

Now, you’ll find out that Mr. Nichols has a reputation for violence. Mr. Nichols has earned this reputation. What are you going to find out about Mr. Nichols? We know that he has physically attacked his mother, grandmother, and grandfather within two-and-a-half months of April 21st, including one incident with his mother the very morning that this happened.

Now, why is Mr. Nichols’ reputation for violence or instances of violence important? Because a person in South Carolina has the right to expect to remain free from molestation and attack. We know that a person in South Carolina has a right to stand their ground. As a person in this State that has not engaged in any unlawful activity and who is in a place where he has a right to be, has the right to stand his ground and has no duty to retreat as long as he reasonably believes that the force used is necessary to prevent harm, death, great bodily injury, or death to himself or others or to prevent the commission of a violent crime.

So it is important to understand that while Jabari Linnen tried to raise a family, Mr. Nichols was raising hell on Seaside Road.

² “Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial.” State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (emphasis added).

(R.p.47, line 25-p.49, line 2) (emphasis added). In cross-examining the State's second witness, Brandon Beaton, Petitioner's counsel asked Beaton if he had any information to present to the jury indicating Petitioner was not justified in standing his ground that day; however, the State's objection to the question was sustained. (R.p.51, lines 18-25).

Later, while cross-examining Investigator Jeremiah Fraser of the Beaufort County Sheriff's Office, Petitioner asked if there had been any investigation into whether the shooting was lawful or unlawful. Fraser explained the police simply investigate the facts and present those facts to the solicitor's office in regard to whether a shooting might have been lawful. He acknowledged he was familiar with the term "justified shooting." (R.p.58, line 8-p.59, line 8; p.62, line 7-p.63, line 5; p.64, lines 18-25). Petitioner was then allowed to cross-examine Investigator Fraser about the three previously admitted specific instances of violence committed by Nichols prior to the shooting. (R.p.65, line 13-SROA.p.4; SROA.p.5; p.93, line 7). On re-direct, Fraser noted that none of the three incidents had anything to do with Petitioner. (R.p.94, line 10-SROAp.6, line 1). On re-cross, Petitioner attempted to elicit reputation or opinion testimony about Nichols as a result of Fraser's knowledge of police investigations of prior incidents, but Fraser said he had not formed any opinion about Nichols' reputation for violence. Petitioner's counsel then advised the trial court he had a matter of law. The judge excused the jury to allow the proffer of testimony and arguments regarding whether Petitioner would be allowed to impeach Fraser's claim with extrinsic evidence not previously admitted. This evidence consisted of a DVD recording of the police interview of King David Williams, arrest warrants of Trey Nichols, and a Sheriff's Department summary of Trey Nichols. Petitioner appeared to want to introduce this evidence to support his contention that

Fraser actually does or should have an opinion about Nichols being a violent person. Petitioner argued in part that he believed the questions were admissible to prove his defense of “justification” and argued self-defense was merely a subset of justification. He claimed “justification” would include self-defense, “the right to stand your ground, statutorily,” and the defense of others. Ultimately, the trial court allowed Petitioner to ask whether the incident reports from the previously admitted specific acts of violence led Fraser to form an opinion about Nichols but prohibited any attempts to ask Fraser about the other three pieces of extrinsic evidence. (SROA.p.6, line 6-p.121, line 2).

During his subsequent cross-examination of Williams, Petitioner tried to show Nichols was a violent person who had an ongoing “beef” with Petitioner. He also tried to establish that Petitioner was in a place he had a right to be when he fired on Nichols in self-defense. (R.p.182, line 14-SROA.p.8; p.207, line 18). After the State rested, Petitioner moved for a directed verdict on the attempted murder charge, arguing there was no evidence in the record of malice aforethought. He also noted the defense theory that his shooting of Nichols was justified, but he did not seek to invoke immunity under the terms of the Act. (R.p.213, lines 1-21).³

Petitioner then presented evidence in his own defense. He further developed his theme that Nichols was a violent person by calling witnesses Regina Blanding, Paul Mitchell, Robert Blanding, and Desiree Blanding on his behalf. (R.p.214, line 11-p.233, line 22; p.234, line 3-SROA.p.9-16; p.235, line 25; p.236, line 1-SROA.p.17-19; p.237,

³ In State v. Curry, our supreme court treated a challenge to the denial of immunity under the Act as preserved for review even though Curry improperly moved for immunity at the directed verdict stage rather than prior to trial, because the required pretrial procedure had not been established by the court at the time of Curry’s trial. 406 S.C. 364, 370 n.3, 752 S.E.2d 263, 266 n.3 (2013) (citing State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011)). Here, Petitioner’s trial was held in September of 2012, more than a year after the published opinion in Duncan. Thus, any attempt by Petitioner to invoke immunity under the Act at the directed verdict stage or any other time after the trial commenced would have been untimely.

line 21; R.p.300, line 12-p.308, line 10). Petitioner also testified in his own defense, claiming he was scared of Nichols and got out of the car only because he wanted to talk to Nichols about his behavior. (R.p.238, line 18-SROA.p.20; p.294, line 25).

After the defense rested, the State called Investigator Fraser in rebuttal. (R.p.308, line 11-p.312, line 19). Prior to closing arguments, the trial court held an informal charge conference in chambers, after which Petitioner submitted a set of seventeen requests to charge as Court's Exhibit Two. (R.p.289, line 1-p.317, line 17). Petitioner's fourth request to charge states:

The Castle Doctrine, which recognizes that a person's home is his castle, has been extended to include an occupied vehicle. Residents and visitors of South Carolina have the right to remain unmolested and safe within their vehicles. A person who is engaged in an unlawful activity and who is attacked in another place where he has a right to be 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 crime.

(Court's Exhibit Two). In his closing argument, Petitioner focused on the theory that he was justified in shooting Nichols in self-defense. He argued he was without fault in bringing on the difficulty, that he believed he was in imminent danger of great bodily danger or death, that he was in fact in imminent danger of great bodily injury or death, and that even though he had a duty to retreat, he did not reasonably believe retreat was possible. Petitioner also focused on Nichols' violent nature and his allegedly aggressive approach towards Petitioner once Petitioner was outside the car. (R.p.318, line 19-p.329, line 1).

Next, the State made its closing argument and the trial court charged the jury on the law, including a detailed charge on the law of self-defense. The trial court did not charge the common law Castle Doctrine or any provisions from the Act. (R.p.329, line 8-

p.364, line 19). Following the jury charge, the trial judge asked if there were any additions or exceptions from either the State or Petitioner. Petitioner referenced Court's Exhibit Two and specifically asked that the trial judge charge the jury on "the right to stand your ground." He noted there were three particular sentences listed as the defendant's request for instructions number four, all or any part of which he wanted the trial court to charge. (R.p.364, line 20-p.365, line 10). The trial court ruled as follows:

Thank you so much, it is appropriate to put those on the record right now; so thank you so much for doing that. And thank you Mr. Brown for having filed this as a Court's Exhibit, that way it's very clear for our record of what those are. We addressed those yesterday and let me just say that I do not believe that the Castle doctrine, with regards to the vehicle, applies to those facts. Given the dictates of the Castle doctrine, given the facts of this matter that there was the Coke can that was thrown, and then this gentleman chose to get out of his car while on the public way, get out of the car, walk around the car, and walk towards the alleged victim and begin shooting. I don't believe that that is what is contemplated by the Castle doctrine. We will know one day, because it is a developing theory, so we will know.

(R.p.365, line 20-p.366, line 9). The jury ultimately found Petitioner guilty of assault and battery of a high and aggravated nature (ABHAN) as a lesser included offense of attempted murder and guilty of possession of a weapon during the commission of a violent crime. He was sentenced to twenty (20) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for the weapon charge. (R.p.1-6; R.p.374, line 16-p.375, line 5).

CERTIORARI

Petitioner claims there are special and important reasons for this Court to grant certiorari and resolve what he contends is a single, novel question of law at the heart of his appeal: whether the Act substantively expands the common law Castle Doctrine independent of the Act's procedural mechanism for seeking immunity from prosecution.

Despite the spate of recent opinions from both this Court and the Court of Appeals which have clearly defined the parameters and the reach of the Act in regard to jury charges, Petitioner contends “South Carolina’s appellate courts have rarely had occasion to consider the Act.” He argues that rather than dictating the result reached by the Court of Appeals, the existing published opinions in South Carolina expressly left open the precise question posed by this case. Petitioner argues the Court of Appeals misconstrued Curry,⁴ ignored the Act’s material expansion of the common law Castle Doctrine’s right to “stand your ground,” and significantly diminished the General Assembly’s intention for the Act.

The State disagrees and respectfully asks this Court to deny the petition for a writ of certiorari pursuant to Rule 242(b), SCACR. There are no special and important reasons to grant certiorari where the Court of Appeals did not overlook or misapprehend any points that would warrant further consideration of this matter. Indeed, the Court of Appeals employed a straightforward application of the provisions of the Act, as interpreted by our courts, in concluding the trial court did not err in denying Petitioner’s request for a jury charge on the Act. The Court of Appeals properly relied upon this Court’s opinion in Curry, and its own opinion in State v. Marin, 404 S.C. 615, 745 S.E.2d 148 (Ct. App. 2013) cert. granted, in concluding the Act creates a true immunity that must be decided prior to trial by the judge, and therefore does not establish a right to a jury charge on the language of the Act. Instead, any right to a jury charge on a common law defense must be determined under common law principles, and application of those principles to the facts of Petitioner’s case did not support the requested charge. Furthermore, because Petitioner actually exited the car and confronted the victim outside the vehicle, the facts do not support the requested jury charge even under what Petitioner

⁴ State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013).

argues is an “extension of the common law Castle Doctrine” as a substantive provision of the Act.

ARGUMENT

I.

The Court of Appeals properly affirmed the trial court’s decision to deny Petitioner’s request to give the jury a charge under the Protection of Persons and Property Act where Petitioner never sought a pretrial determination from the trial court regarding immunity under the Act.

On appeal to the Court of Appeals, Petitioner argued the trial judge erred by refusing to charge the jury on the Act because his request to charge was a correct statement of law and was supported by facts in evidence. He maintains the Act was intended to extend the common law Castle Doctrine to occupied vehicles and thus provide citizens with the ability to protect themselves with deadly force and avoid the need for retreat when attacked in their vehicles. Petitioner argued that since he was attacked inside his vehicle and confronted the threat “in a protectable area outside his vehicle” he was entitled to the presumption of reasonable fear of imminent danger absolving him of the duty to retreat and therefore was entitled to the requested jury charge.

Petitioner continues to promote this argument in his petition for a writ of certiorari and argues the cases cited by the Court of Appeals do not support its conclusion that Petitioner’s failure to seek a pretrial finding of immunity operated as a waiver of his right to a jury charge on the Act. His argument centers on a distinction between what he calls the procedural immunity provisions of the Act and substantive provisions of law. Petitioner submits this Court misapprehends the reach of Curry and Marin as covering

both the procedural and substantive provisions of the Act, and he argues there is “no indication that the General Assembly intended the Act’s substantive provisions to apply only in the context of a request for immunity, and never to apply at trial.” However, the Act itself is not so limited and when considered as a whole, clearly does indicate that all of its provisions relate back to a defendant’s newly created right to seek pretrial immunity from prosecution. It provides: “A person who uses deadly force **as permitted by the provisions of this article** or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution” S.C. Code Ann. § 26-11-450(A) (2007) (emphasis added). The broad reach of this language was specifically recognized by this Court. Curry, 406 S.C. at 371, 752 S.E.2d at 266 (“Section 16-11-450 provides immunity from prosecution *if* a person is found to be justified in using deadly force under the Act.”). Thus, the conclusions reached in Curry and Marin in regard to immunity seem to apply equally to any and all provisions of the Act, procedural or substantive, by virtue of section 16-11-450. The Court of Appeals properly concluded the trial judge committed no error in refusing to charge the jury on provisions of the Act. Petitioner did not claim immunity under the Act and did not seek a pretrial determination from the trial court regarding immunity; thus, he waived immunity under any and all provisions of the Act. Curry, 406 S.C. at 373, 752 S.E.2d at 267. This did not prevent him from pursuing traditional common law defenses at trial and the jury charges appropriate to those defenses, but it does not mean he was entitled to a jury charge on a matter that must, by statute, be decided not by the jury, but by the trial court prior to trial. The Court of Appeals properly affirmed Petitioner’s convictions and sentence.

II.

The Court of Appeals properly affirmed the trial court's decision to deny Petitioner's request to give the jury a charge under the Protection of Persons and Property Act where the evidence presented at trial could not, as a matter of law, establish immunity under any specific terms of the Act.

In his argument to the Court of Appeals, Petitioner argued he was entitled to a jury charge under the Act based entirely on the General Assembly's stated intent to extend the Castle Doctrine to "include an occupied vehicle." S.C. Code Ann. § 16-11-420(A) (2007). Although Petitioner argued there was evidence he was attacked inside his vehicle and used force in self-defense in a "protectable area" immediately outside the vehicle after he exited, there was simply no evidence he shot the victim from an occupied vehicle. In the context of a vehicle, subsection 16-11-440(A) narrowly limits using force against a person who either: (1) unlawfully and forcibly entered an occupied vehicle, (2) is unlawfully and forcibly entering an occupied vehicle, or (3) is attempting to remove a person against his will from the occupied vehicle. S.C. Code Ann. § 16-11-440(A)(1) (2007). A plain reading of the statute establishes that by using the words "entered" and "entering," the Legislature intended for an unlawful and forcible entry to be a requirement of subsection 16-11-440(A), unless a person is being forcibly removed against his will from his occupied vehicle. Even though Petitioner testified he was scared of Nichols and got out of the car only because he wanted to talk to Nichols, these facts do not concern whether Nichols had unlawfully and forcibly entered or was in the process of unlawfully and forcibly entering Petitioner's occupied vehicle. Absent evidence Nichols himself unlawfully and forcibly entered Petitioner's vehicle or Nichols was attempting to remove Petitioner from his vehicle, Petitioner's argument that he acted within the scope

of the law is without merit for purposes of determining immunity under subsection 16-11-440(A). As a matter of law, the evidence presented at trial simply could not have established immunity under the Act. As a consequence, it would have been inappropriate to charge the Act to the jury regardless of whether this Court accepts the underlying distinction proposed by Appellant between procedural and substantive provisions of the Act. State v. Gibson, 390 S.C. 347, 355-56, 701 S.E.2d 766, 770 (Ct. App. 2010) (“The evidence presented at trial determines the law to be charged, and a trial court commits reversible error in failing to give a requested charge on an issue raised by the evidence.”). The trial court properly denied Petitioner’s request to instruct the jury on the particular provisions of the Act, and properly declined to give a modified charge on any common law defenses arguably expanded by the Act. Thus, the Court of Appeals properly affirmed Petitioner’s convictions and sentence.

CONCLUSION


Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court. If the Court grants the petition for a writ of certiorari, Respondent would request permission to fully brief the issues contained herein.

Respectfully submitted,

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Columbia, South Carolina
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v.

Jabari Linnen, Petitioner.


PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated August 17, 2015, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

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I further certified that all parties required by Rule to be served have been served.
This 17th day of August, 2015.



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