ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Marion County

D. Craig Brown, Circuit Court Judge

Opinion No. 2015-UP-280 (S.C. Ct. App. filed 6/10/2015)

12-GS-33-00301

THE STATE,

PETITIONER,

V.

CALVIN JERMAINE POMPEY,

RESPONDENT

APPELLATE CASE NO. 2015-001992

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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1.

There was evidence to support the Court of Appeals holding which found no abuse of discretion in the trial court's granting respondent Pompey immunity from prosecution pursuant to S.C. Code Ann. §16-11-440 and §16-11-450 where the evidence showed the irate decedent quickly approached the automobile respondent was inside, with a hand under his shirt seemingly hiding a weapon, and he was reaching inside the automobile for respondent when he was shot a single time. 5

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 8/20/2015.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the circuit court's grant of immunity under the Protection of Persons and Property Act, when, as a matter of law, there was no evidence to support a finding that the victim was unlawfully and for and forcefully entering, or had unlawfully and forcible entered the Respondent's vehicle when Respondent shot him?

COUNTER STATEMENT OF ISSUE ON APPEAL

Whether there was evidence to support the Court of Appeals finding no abuse of discretion in the trial court's granting respondent Pompey immunity from prosecution pursuant to S.C. Code Ann. §16-11-440 and §16-11-450 where the evidence showed the irate decedent quickly approached the automobile respondent was inside, with a hand under his shirt seemingly hiding a weapon, and he was reaching inside the automobile for respondent when he was shot a single time?

STATEMENT OF THE CASE

Respondent's agrees with petitioner's procedural history of the case. A factual summary of the relevant evidence follows in the argument below.

ARGUMENT

There was evidence to support the Court of Appeals holding which found no abuse of discretion in the trial court's granting respondent Pompey immunity from prosecution pursuant to S.C. Code Ann. §16-11-440 and §16-11-450 where the evidence showed the irate decedent quickly approached the automobile respondent was inside, with a hand under his shirt seemingly hiding a weapon, and he was reaching inside the automobile for respondent when he was shot a single time.

Relevant Facts

Kadeem Kelley testified that on March 18, 2012 he went to the Club Fusion in Marion County with his respondent brother-in-law, and Josh. R. p. 4, l. 23 – 6, l. 3. It was after midnight, and an altercation occurred inside the club. Kelley did not see what happened during the altercation but he learned that respondent had been "thrown out of the club." R. p. 5, ll. 5–23. As will be seen infra, respondent later testified that he tried to break up the fight inside the club but left as requested without incident when security intervened.

Kelley headed to the car with respondent and their friend Josh fully intending to leave. R. p. 6, ll. 7-10. Josh unlocked the door and "everybody proceeded to get in the car." R. p. 7, ll. 4-10. Respondent was in the passenger seat, and Kelley was in the backseat behind the driver's seat. Kelley testified: "I saw people coming to the car that wasn't with us, didn't know them, never seen them before. One guy was running up with his hand under his shirt as if he had something." R. p. 7, ll. 15-22.

Respondent testified that the decedent came running towards him with his hand under his shirt, and he told the trial court the decedent was "on top of me" when he shot him inside the automobile. R. p. 53, l. 16 – 55, l. 3.

Kelley also remembered that respondent was sitting in the passenger seat when the decedent came running up with his hand under his shirt, and he reached inside the automobile. R. p. 7, l. 15 – 9, l. 4. Kelley said he did not see the respondent involved in a fight inside the club, and it was not clear why the decedent was directing his anger at them. R. p. 11, ll. 16-17.

Kelley further testified that respondent left his gun inside the car when they went into the club. Kelley explained that respondent kept a gun in the car because of "prior things that happened to him." R. p. 20, ll. 9-10. Respondent would elaborate that about five years prior to this incident: "I had got jumped by nine people, had surgery. I had plates in my face all in the right side. They knocked two teeth out, jaw broke." This was something that was impossible for respondent to forget. R. p. 57, ll. 6-11.

Kelley confirmed that respondent was inside the car when he shot the decedent. The decedent was "on top of him." R. p. 18, ll. 17-24.

Roderick McCrae was the owner of the Fusion Sports Bar. R. p. 30, l. 11 – 31, l. 4. McCrae thought the altercation inside the club occurred about 3:00 to 3:30 in the morning. McCrae described the decedent as "*kind of erratic, kind of riled up a little bit.*" McCrae said he talked to the decedent and the man with him, and told them: "It's not worth it . . . just go home, it's not worth it. McCrae thought the situation had calmed down with them. R. p. 32, ll. 8-21. (emphasis added).

McCrae was told the decedent had been involved in the altercation inside his bar. McCrae maintained he thought the decedent and the other man were going to go home. However, McCrae recalled: [I] took my eyes off Mr. Rondell [the decedent]; and before I knew it he hopped a pillar about as high as the middle of my leg, and he fell face first so I knew he was intoxicated. He popped up. And when he popped up off the ground, the car was in my sight and I saw him. I said, man, I still – I put my hand on the pillar. I was like, don't go over there, don't go over there. He

went straight to the car . . . not so much running but in a hurried motion . . . straight towards the car." R. p. 34, l. 13 – 35, l. 7.

Mr. McCrae said that the car door was open, and the respondent was "sitting with his feet on the ground and he saw the decedent leaning into the car when a single gunshot went off." R. p. 36, ll. 14-22; 37, ll. 1-3. On cross-examination McCrae confirmed that the decedent approached respondent's car at a fast pace. McCrae lamented: "[B]efore I could hop across that pillar and grab him it was too late." R. p. 45, ll. 16-20.

Respondent testified that the club was crowded that night, and the altercation occurred near him. Respondent tried to break up the fight but the security men grabbed him and took him outside the club. Respondent went peacefully and he waited outside for Kelley and Josh. R. p. 50, l. 14 – 52, l. 24.

Respondent testified that when they were getting in the car he saw the decedent running to the car "with his hand under his shirt." Respondent recalled: "[A]s I started to get in the car, it took him [Josh] a while to unlock the door. So when I got in the car I was sitting down, I seen him coming. And when he started coming he started to reach in. It really looked like he was running -- everything was happening so fast -- with his hand under his shirt." R. p. 54, ll. 6-15. Respondent testified he grabbed the gun, and that the decedent was "on top of me close enough for blood in the car and on my clothes" when he shot him. R. p. 54, l. 6 – 55, l. 3.

On cross-examination respondent stated that he left the club when requested to do so. "If they tell you to leave the best thing for you to do is leave so I left." R. p. 59, l. 25 – 60, l. 2. Respondent confirmed that he was inside the automobile when he saw the decedent running towards the car. R. p. 60, l. 5 – 61, l. 10. Respondent said he shot the decedent because he felt threatened and "I felt my life was in danger." R. p. 65, ll. 18-25.

The state called Milton Wheeler as a witness. Wheeler said he was with the decedent the entire day of the incident. R. p. 68, l. 14 – 69, l. 12. *Wheeler confirmed that respondent was inside the car when the shot was fired.* R. p. 74, l. 2-11. Wheeler said the entire incident "happened so fast," but he maintained he did not see the decedent do anything with his hands. R. p. 74, ll. 9-20.

However, on cross-examination Wheeler acknowledged in his statement to the police he told them that the decedent had "reached out" with his hands at the time of the shooting. R. p. 76, ll. 4-11. Wheeler further admitted that in his statement he told the police that the decedent raised his hand at respondent. R. p. 77, l. 14 – 78, l. 6.

Defense counsel argued that "none of the evidence here is in dispute as to what happened. We feel like the facts fit this statute." R. p. 82, ll. 9-11. The judge took the matter under advisement.

Order

After the break of a day to consider his ruling, the trial judge reconvened court, and he issued his order. He ruled that S.C. Code Ann. §16-11-420 stated the intent of the General Assembly was that no person or victim of a crime was required to surrender his personal safety. A person was presumed to have a reasonable fear of imminent peril death or great bodily injury and could use deadly force if another person was unlawfully and forcefully entering a dwelling, residence or occupied vehicle. S.C. Code Ann. §16-11-440(A)(1)-(2); R. p. 85, l. 9 – 87, l. 9.

The judge ruled that the evidence showed that the decedent was attempting by force to enter the vehicle occupied by respondent, and that he intended to commit an unlawful act. The law presumed respondent had a reasonable fear of great bodily injury or death given the decedent's actions. R. p. 86, l. 9 – 89, l. 2.

The judge found that the respondent had proven by a preponderance of the evidence that he was entitled to immunity. The judge observed: "There was some contradictory testimony as to whether his feet were in the car or out of the car. But it is uncontradicted that he was seated in the car. This court determines that whether his feet were in or out of the car is irrelevant." R. p. 89, l. 23 – 90, l. 1.

The judge further found that the decedent went hurriedly to the automobile where respondent was after the decedent had fallen to the ground. The decedent approached the car with his hand under his shirt and he leaned into the car. The respondent leaned back and shot the decedent one time resulting in his death. R. p. 90, l. 2 – 91, l. 25. The judge ruled respondent was entitled to immunity.

Court of Appeals

The Court of Appeals affirmed in per curiam opinion in State v. Calvin Jermaine Pompey, 2015-UP-280 (2015)(Few, C.J., and Huff and Williams, JJ.) dated June 10, 2015. The Court of Appeals wrote:

> The circuit court granted the motion to dismiss, finding Pompey showed by a preponderance of the evidence that the victim was attempting to forcefully enter the vehicle occupied by Pompey when Pompey shot him. *See* S.C. Code Ann. §16-11-440(A)(1) (Supp. 2014) (providing a defendant is entitled to a presumption of reasonable fear of imminent peril of death or great bodily injury if the defendant uses deadly force against a person who "is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a[n]...occupied vehicle"); § 16-11-440(D) (stating an aggressor "who unlawfully and by force enters or attempts to enter a person's ...occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or a violent crime as defined in Section 16-1-60"). Accordingly, the circuit court ruled Pompey was entitled to the legal presumptions in section 16-11-440, and thus was immune from criminal prosecution under the Act. *See* § 16-11-450 (A) (stating "[a] person who uses deadly force as permitted by the provisions of this article...is justified in using

> deadly force and is immune from criminal prosecution"). We find the circuit court did not abuse its discretion in determining by a preponderance of the evidence that the victim was in the process of forcefully entering Pompey's vehicle in accordance with section 16-11-440. *See State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013).
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> * * *
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> The evidence supports the circuit court's finding that the victim was forcing his way into the vehicle when Pompey shot him. *See generally State v. Douglas*, Op. No. 5286 (S.C. Ct. App. filed Dec. 23, 2014) (Shearhouse Adv. Sh. No. 51 at 60)[1] (affirming the circuit court's grant of immunity and recognizing "the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the [circuit] court's ruling is supported by any evidence" (internal quotation marks and citation omitted)). We therefore affirm the circuit court's ruling granting Pompey immunity from prosecution.

App. p. 40-41.

Discussion

Standard of Review

In criminal cases, the appellant court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citing State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. Review is limited to determining whether the trial judge abused his discretion. Id. The appellate court may not re-evaluate the facts based on its own view of the preponderance of the evidence, but must determine whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; see generally Felts v. Richland County,

[1] 411 S.C. 307, 768 S.E.2d 232 (Ct.App. 2014), *cert. granted* (November 5, 2015).

303 S.C. 354, 356. 400 S.E.2d 781, 782 (1991) ("In law actions, the lower court must be affirmed where there is "any evidence" to support its findings.")

Petitioner argues that the actions taken by the decedent "prior to the shooting could not constitute a forcible entry." Certiorari petition at 12. Petitioner urges that because the decedent "here neither attempted to open the car door nor took any actions to force respondent to open the door," respondent was not protected by the Act. Certiorari petition at 15.

The evidence in this case shows that respondent was in the front passenger seat of the car. He left the club as requested even though he was not at fault because he correctly reasoned when asked to leave, the correct thing to do was leave. Respondent had been very badly injured in the past, and that is why he had a gun in the car.

Conversely, the decedent, who was apparently intoxicated and irate, fell on his face in the parking lot. He then got up and very quickly went to the automobile where respondent was sitting in the front passenger seat, and he reached into the automobile. He also had a hand under his shirt which indicated he may have been armed. Respondent testified he felt threatened and in fear for his life, and he shot the decedent while the decedent was "on top" of him.

The circuit court judge did not abuse his discretion by reasoning the fact the decedent did not force the car door open, or open the car door without permission, was a fact which disqualified respondent from immunity. Respondent was sitting in a car where he had a right to be -- minding his own business -- when the irate drunk decedent reached inside the car in a menacing manner and was shot while he was "on top" of respondent.

S.C. Code Ann. §16-11-440(A)(1) & (2) provide that: 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 forcefully entered ... an occupied vehicle or if he removes or in attempting to remove another person against his will from ... an occupied vehicle; and, (2) who uses deadly force, knows or has reason to believe that an unlawful and forceful entry or unlawful and forceful act is occurring or has occurred.

Reaching into an automobile, or, more accurately reaching for respondent inside of the automobile, and being on top of respondent was an unlawful and forceful act. The evidence in this case was also sufficient for the alternative application of the statute that the decedent was attempting to remove respondent against his will from the occupied vehicle.

A reasonable person would have been afraid if a "riled up" intoxicated person reached into his car to assault him, or worse. Further, the decedent in this case had a hand under his shirt which would lead a reasonable person to believe he was hiding a weapon.

Again, the state attempts to make much of the fact that the decedent did not attempt to open the car door nor force respondent to open the door. However, the undisputed evidence was that the car door was open when the decedent reached in and was "on top" of respondent. Whatever the state's definition of "force" might be -- it is too narrow -- particularly given the intent of the legislature when passing these statutes.

S.C. Code Ann. §16-11-420(A) provides that it was the intent of the General Assembly to codify the common law doctrine which recognized that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business.

S.C. Code Ann. §16-11-420(D) further provides that the General Assembly **finds that persons residing or visiting this State shall have the right to expect to remain unmolested and safe within their homes, businesses and vehicles.** Respectfully, the right to remain unmolested

and safe within their homes, businesses and vehicles does not only when the door is closed or locked. A person under the Act has the right to sit in his house, business or vehicle without the fear or being molested or attacked regardless of whether his or her door is locked or unlocked, or open or shut.

Finally, and extremely importantly, S.C. Code Ann. §16-11-420(E) provides that "the General Assembly *finds no person or victim of crime should be required to surrender his personal safety to a criminal*, **nor should a person or victim be required to needlessly retreat in the face of intrusion or attack.**" (emphasis added). Respectfully, the General Assembly did not intend the Act to be read narrow in protection of the attacker, and against the innocent citizen sitting in his house, business or car.

Simply put, respondent was not obligated to try and push the irate decedent away from the car, hope that he could close the door and lock it before the attacker overpowered him, and then pray that that drunk and angry attacker would simply go away. The trial court correctly found that respondent proved by a preponderance of the evidence that he was entitled to immunity pursuant to S.C. Code Ann. §16-11-440 and §16-11-450. See State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011); State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct.App. 2014). Because there was evidence supporting the trial court's ruling that respondent had proven his right to immunity by a preponderance of the evidence, certiorari should be denied.

CONCLUSION

By way of the foregoing argument, the state's petition for writ of certiorari should be denied.

Respectfully submitted,

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 2nd day of December, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marion County
D. Craig Brown, Circuit Court Judge

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12-GS-33-00301

THE STATE,

PETITONER,

V.

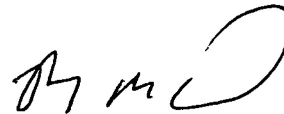
CALVIN JERMAINE POMPEY,

RESPONDENT

APPELLATE CASE NO. 2015-001992

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case has been served on Alphonso Simon, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and the S.C. Court of Appeals, this 2nd day of December, 2015.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 2nd day
of December, 2015.

_______________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.