THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
General Sessions

R. Knox McMahon, Presiding Judge

Case No. 2010-GS-32-00752

The State of South Carolina.....Plaintiff/Respondent,

v.

Sidney A. Hursey, Jr.,.....Defendant/Appellant.

NOTICE OF APPEAL

Appellant Sidney A. Hursey, Jr., appeals the order denying reconsideration of the Honorable R. Knox McMahon dated October 1, 2012, a copy of which is attached as Exhibit 1. Appellant also appeals the order denying his motion to dismiss dated March 6, 2012, a copy of which is attached as Exhibit 2. Appellant received written notice of entry of this order denying reconsideration on October 10, 2012.

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COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON	)	
STATE OF SOUTH CAROLINA,	)	ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER
-vs-	)	
SIDNEY A. HURSEY, JR.,	)	2010-GS-32-00752

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LEXINGTON SC

The Court issued an Order on March 6, 2012 denying the Defendant's motion to dismiss the prosecution of this case pursuant to S.C. Code Section 16-11-410, et seq., denying the Defendant's motion to dismiss on the grounds that the State cannot disprove the elements of self-defense beyond a reasonable doubt as required by *State v. Dickey*, 394 S.C. 491, 719 S.E.2d 97 (2011), and denying the Defendant's motion to suppress the evidence gathered pursuant to S.C. Code Sections 17-13-140 and 17-13-150. Defendant timely filed a Motion for Reconsideration of the March 6, 2012 Order on March 16, 2012. The Court heard argument on the motion August 21, 2012. Present at the hearing were Defendant's Counsel, S. Jahue Moore, Esquire and M. Brooks Biediger, Esquire, and representing the State were Samuel R. Hubbard, III, Esquire and David Shawn Graham, Esquire, both of the Eleventh Circuit Solicitor's Office.

Defense counsel's argument on the Motion to Reconsider was based essentially on two grounds: (1) The Court's March 6th Order primarily focused on subsections (A) and (B) of S.C. Code Section 16-11-440 and subsection (C) of the statute does apply and if met, the defendant should be immune from prosecution; and (2) S.C. Code Section 16-11-450(A) allows for the use of deadly force as permitted by the Persons and Property

DEFENDANT'S EXHIBIT 1
Blumberg No. 5114

Act codified in S.C. Code Sections 16-11-410, et seq., or another applicable provision of law so that immunity from prosecution is warranted through the law of self-defense.

S.C. Code Section 16-11-440(C) states:

> 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 or to prevent the commission of a violent crime as defined in Section 16-1-60.

After quoting the above statute provision, the Court in it's March 6th Order, provided the factual findings it relied on in analyzing the applicability of the statute to the case at hand (See pgs. 14-23 of March 6th Order). Specifically, the testimony provided showed a telephone conversation between the Defendant and the victim wherein the Defendant asked the victim to meet him (the Defendant) under the light. The Defendant then took affirmative steps to get dressed, arm himself with a deadly weapon, and solicit other males to accompany him (the Defendant) to the meeting that the Defendant had requested. The Defendant alleged he had reason to know or believe that he was preventing the unlawful and forcible acts of murder and assault and battery of a high and aggravated nature from occurring. The Court found based on the totality of the circumstances in this case that this was not credible:

> Although the Defendant can act on appearances, the facts in this case are that Butch invited Michael to meet him under the light. Butch armed himself and it was not unlawful for him to do so. Butch had two back up males with him. The question of whether or not Michael was armed is clearly disputed by the testimony of Butch, Robert Hursey, Aaron Bishop, the number and locations of the wounds, and the timing and recovery of the .22 caliber derringer. (pgs. 22-23, March 6th Order)

Based on the previous findings of fact, the Court finds that S.C. Code Section 16-11-440(C) does not act to protect the Defendant from prosecution under a theory of reasonableness. Subsection (C) allows for meeting force with force, even deadly force, if reasonably believed to be necessary. Although there was testimony of the victim's boisterousness, there is no evidence to support a finding that the victim was engaging in forceful behavior such that it would necessitate a response of deadly force to protect the Defendant or any other bystanders. Despite testimony as to the physical condition of the Defendant and testimony alleging the victim had on occasion threatened the Defendant that could potentially indicate some basis for the reasonable belief that the Defendant's actions were necessary to prevent death or great bodily injury, the Court found the Defendant formed no such reasonable belief. Testimony that Defendant requested the meeting, that the Defendant had never been worried about his safety at the hands of the victim, and the Defendant's own in-court demonstration of the manner in which he fired his gun at the victim all suggest that the Defendant not only held no such reasonable belief that bodily injury or death may be imminent, but also that the only person met with force that night was the un-armed, unaware victim.

Defense counsel asserts that Defendant is entitled to immunity under this provision of the Person and Property act through a theory of self-defense. S.C. Code Section 16-11-50(A) states:

> (A) 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 and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with the applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

Defendant argues that the words "another applicable provision of law" would allow Defendant to successfully argue self-defense. The Court would note, however, that a theory of immunity under self-defense is troubling at this pre-trial stage. The law of self-defense requires that the State disprove the elements of that affirmative defense beyond a reasonable doubt, thus shifting (and increasing) the burden of proof to the State. In a pre-trial Castle Doctrine hearing, the burden of proof is on the Defendant to prove those facts necessary to be granted immunity from prosecution by a preponderance of the evidence. Therefore, to shift the burden of proof to the State in this pre-trial hearing seems procedurally flawed. The common law Castle Doctrine provided immunity as to the duty to retreat, an element necessary to the affirmative defense of self-defense. Nonetheless, it appears that despite this shift in the burden of proof, the burden of persuasion presumably still lies with the defendant in these hearings, and as a result, the evidence of self-defense (or lack of evidence) is to be considered as just one factor in a full determination of whether the Defendant has met the preponderance of the evidence standard.[1]

Based on the facts the Court found credible, the Defendant would not be afforded immunity from prosecution under the Persons and Property act because of the totality of the circumstances. The Defendant may have been armed lawfully, but was not attacked or did not meet the burden of proof to support a finding that Defendant was attacked. The Defendant is not entitled to immunity under the Persons and Property Act as codified in S.C. Code Sections 16-11-410, et seq.

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[1] The Court notes that even assuming it were to base its decision solely on the success or failure of the Defendant's self-defense argument, the Court does not find that the elements of that defense have been proven in the instant case.

THEREFORE, IT IS ORDERED that the Defendant's Motion for Reconsideration of the Court's Order dated March 6, 2012 is DENIED.

AND IT IS SO ORDERED.

The Honorable R. Knox McMahon
Presiding Judge, 11th Judicial Circuit

This 1ST day of October, 2012.
Lexington, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON	)	
STATE OF SOUTH CAROLINA,	)	
	)	
-vs-	)	ORDER
	)	
SIDNEY A. HURSEY, JR.,	)	
	)	2010-GS-32-00752
Defendant,	)	
	)	

The defendant moved prior to trial to dismiss this case under the immunity provided in S.C. Code Ann. Sect. 16-11-410, et seq., the Protection of Persons and Property Act (the Act), which is South Carolina's codification of the common law Castle Doctrine. The Defendant was represented by S. Jahue Moore, Sr., Esquire and M. Brooks Biediger, Esquire, and the State was represented by Deputy Solicitors Shawn Graham and Rick Hubbard. Pursuant to the holding in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011), the court conducted a hearing beginning December 5, 2011 and concluding December 12, 2011 and received testimony from nine witnesses for the defense and ten witnesses for the state. The Motion to Dismiss pursuant to S.C. Code Section 16-11-410, et seq., is denied. Defendant's Motion to Dismiss on the grounds that the State cannot disprove the elements of self-defense beyond a reasonable doubt as required by *State v. Dickey*, 394 S.C. 491, 719 S.E.2d 97 (2011), is denied. During the course of Defendant's Motion to Dismiss, the Defendant also moved to suppress evidence gathered pursuant to a search warrant, an unsigned copy of which was left on the Hursey premises after the investigation conducted November 25, 2009. The Defendant's Motion to Suppress is denied.

Findings of Fact

Sidney A. "Butch" Hursey, Jr. (hereinafter "Butch"), the defendant, is the owner and resident of 1509 Busbee Road Gaston, Lexington County, South Carolina. He is also the owner of the adjoining property of 1505 Busbee Road on which is located Cowboy's Auction (hereinafter "Cowboy's"). All of the events the night of November 24, 2009 occurred on property owned by Butch either as his residence or his business. There is no dispute that he was the owner of the Cowboy's property where the fatal incident occurred.

Approximately 30 days prior to the fatal encounter, Butch was asked by his long-time employee Faye Williams (hereinafter "Aunt Faye"), who worked at the snack bar at Cowboy's, if her nephew, Michael Reese, the victim (hereinafter "Michael"), might be employed by Butch at Cowboy's. Butch talked to Michael and allowed him to work in the snack bar at Cowboy's with his Aunt Faye. According to Aunt Faye, Butch gave Michael an apartment that was on the Cowboy's property as a free place to stay with a bath, bed, cell phone, and television. There is testimony that in the past Butch had allowed others (Stumpy and Chop) to stay at this apartment rent free. Michael became involved in a boyfriend-girlfriend relationship with Tammy Phillips who lived with Michael in an apartment on the Cowboy's property. Testimony was presented that Butch allowed Michael to stay at this apartment, but because of Michael's behavior he wanted Michael out of the apartment and off of his property. The testimony is that Michael was a chronic abuser of alcohol and drugs and became loud, belligerent, and threatening during these frequent episodes of excessive drug and alcohol use and abuse. There is conflicting testimony as to whether or not Michael was an invitee, a renter, a trespasser, or a squatter. Some testimony is that Butch allowed Michael to stay rent free. Other testimony is that Michael paid rent and was

paid up through the end of November 2009, and yet other testimony was that Michael just moved in without permission.

On November 23, 2009, the day before the fatal incident, Butch drove Michael along with his girlfriend Tammy Phillips to Michael's mother's place of business in West Columbia. Michael's mother gave Butch fifty dollars to buy Michael some food and pay for some medicine. Butch, along with Tammy Phillips and Michael, had made arrangements for Tammy and Michael to move from Cowboy's on November 25, 2009 to a location in Swansea near a barbecue restaurant where Tammy was going to be employed. Michael and Tammy's move was scheduled for eight o'clock on the morning of November 25, 2009. This time frame was agreed to by Butch and Butch was assisting in moving the parties.

On the night of November 24, 2009, Butch was at his residence preparing for bed. His son Robert Hursey, age nineteen at the time, and Robert's friend Aaron Bishop, age twenty-four at the time, were present in the residence. Also present was Butch's ex-wife, Mary "Sissy" Cooper, who had already retired for the night. A call was received by Butch at his residence at 10:36 PM from Michael. This call originated from cell number (803) 747-6832 to phone number (803) 755-0902, the residence of Butch Hursey. The phone call lasted for 731 seconds (12 minutes and 11 seconds). *See* Court's Exhibit 3.[1] Butch testified that Michael called and he (Butch) assumed Michael was "hell-bent" on doing him (Butch) physical damage, that Michael was angry because Tammy was upset. Butch told Michael that was not his (Butch's) concern. Michael told Butch he needed some weed and for Butch to ask his (Butch's) son. Butch told Michael to leave his (Butch's) son out of it. Butch could hear Tammy in the background in a tirade. Butch testified that Michael was fussing with him (Butch) while Michael and Tammy

[1] The Court Exhibits were numbered sequentially 1 through 63. An "S" on the exhibit tag indicates the exhibit was introduced by the State. No "S" on the exhibit tag indicates the exhibit was introduced by the defense.

were fussing with each other. Butch couldn't understand what Michael was saying and he (Butch) told Michael to meet him (Butch) at the fence under the light. The telephone call ended at 10:48 PM. Butch testified that he put on his pants and loafers and got his gun. Butch armed himself with a .38 caliber Smith and Wesson six shot revolver pistol. Butch carried the pistol in the small of his back between his body and his pants. Butch testified that he always carries a gun when he is on his own property, that his former wife was murdered on the property, that Sheriff Metts told him he could lawfully carry a gun on his own property, and that he carries money from Cowboy's on the property. As Butch was leaving his residence to meet Michael he told his son Robert and his son's friend Aaron Bishop to come with him and see if everything would be okay. Butch testified he would have these two people to back him up if there were any problems. Butch testified that as he, Robert, and Aaron were approaching the middle building of Cowboy's he heard Michael before he saw Michael. Butch testified that when he saw Michael, he appeared to be under the influence and Michael was coming toward Butch, Robert, and Aaron. Butch testified that when Michael was approximately twenty-three (23) feet away from Butch that he (Butch) pulled his pistol and told Michael to stop.

Butch testified at various times that he saw Michael fumbling with something in his pocket, that he thought Michael had a pistol in his hand. Butch testified that he thought Michael had his (Butch's) .22 caliber derringer pistol in his (Michael's) hand that had been missing for approximately two weeks from Butch's van where it was kept normally. Butch testified that when he discovered the .22 derringer pistol missing that he discovered a cell phone in the van near where the derringer was kept normally. Butch testified that this was Michael's cell phone and that he confronted Michael about finding his (Michael's) cell phone in his (Butch's) van. Butch testified that when he confronted Michael about his cell phone that Michael stated he

(Michael) did not think Butch would mind if he (Michael) charged his cell phone. Butch did not report the derringer as missing or stolen to the police. This .22 caliber derringer weapon was recovered by the Lexington County Sheriff's Department pursuant to a search warrant issued and executed on March 4, 2010. The weapon was found between the driver's seat and the console in Butch's van covered by a napkin.

Butch testified that after he pulled and pointed his pistol at Michael and told Michael to stop the first time that Michael continued to advance toward him and that he told Michael to stop a second time. Butch testified that as Michael was approximately twenty (20) feet away from Butch that he (Butch) pushed his son, Robert, and told him to get back and that he (Butch) fired his weapon striking Michael four times before Michael fell to the ground. Butch testified that after Michael fell to the ground that he (Butch) approached Michael and that Michael was holding his (Butch's) .22 caliber derringer and pointing the weapon at Butch and that Butch then fired a fifth shot striking Michael. Butch testified that he told his son Robert to go tell Sissy to call the police. Butch then placed the .38 caliber Smith and Wesson six shot revolver pistol in the passenger seat of the same van where the .22 caliber derringer pistol was located three months and eleven days later. After the shooting and before the arrival of the police, Butch returned to his residence while Mary "Sissy" Cooper was on the phone with 911 dispatch. The 911 call from Sissy was received by dispatch at 10:52 PM. From the time of the termination of the phone call between Butch and Michael until the Sissy 911 call, three minutes and forty-nine seconds passed. Butch called Kay or Faye and told her he shot Michael, he was going to jail, and he called 911.

Upon arrival of Deputy Kevin Howard, first officer on the scene, Hursey was taken into custody and the crime scene was secured. The first CSI (Crime Scene Investigation) Officer on

the scene was Shelby Derrick who called for assistance from Officer David Day. After a search warrant was secured the scene was processed. The following is observed upon the examinations Court's Exhibits 12, 13, 18, 22 S, 24 S, 26 S, 32 S, and 60 and the testimony of the crime scene officers. There was a Ford Bronco vehicle parked in the Cowboy's lot facing Busbee Road. The front of the Bronco was approximately thirty-three (33) feet from the building. Next to the front passenger side of the Bronco was the victim's body lying on its right side with the top of the head towards Busbee Road and the feet toward the rear of the Bronco. The body is dressed in a plaid long sleeve shirt, undershirt, dark pants and tennis shoes. Looking at the body on the ground from the back there is a large stain on the back of the plaid shirt about midway down the back appearing to be blood. Upon examination from the front the plaid shirt is unbuttoned partially revealing the undershirt. Blood is observed on the undershirt of the victim that appears to be consistent in location on the front with the blood stain observed on the rear of the victim's plaid shirt. The left ear is observed revealing a large pool of blood that has flowed from the ear to the forehead and matted into the hair line. The nose and face are bloody with a large pool of blood about the body and head of the victim. There is a cell phone lying partially under the head of the victim. There was a trail of blood originating in the paved parking lot near the rear passenger side of the Ford Bronco ending at the body of the victim. No weapon was located on or around the victim or his body. A GSR (Gun Shot Residue) test was performed on the victim with negative results. The officers also located a .38 caliber S&W revolver in the front passenger seat of the green van belonging to Defendant. Upon examination of the .38 caliber pistol it was determined that six rounds were in the cylinder and five of those six had been fired, that is five spent rounds and one unspent live round. All of these rounds were Winchester 38 SPL.

Officers also processed the apartment of Michael Reese and Tammy Phillips located on the Cowboy's lot. Observed were items of clothing for both male and female belonging to Michael and Tammy respectively. No drugs or alcohol were observed in Michael and Tammy's apartment.

Robert Hursey, Butch's son, had known Michael for about one month. Robert testified that during that time he had seen Michael under the influence of alcohol or drugs on numerous occasions. Robert identified the drugs Michael used as marijuana and pain pills. Robert testified that when Michael was under the influence Michael would talk "smack" or "trash". Robert testified that Michael had an aggressive manner but that he (Robert) had never heard Michael threaten Butch. Robert testified that he (Robert) and Aaron Bishop were in the Hursey residence drinking beers and playing video games. Robert testified that he and Aaron had divided an eighteen pack of beer between the two of them and that he and Aaron had a buzz. Robert said that Butch was in his (Butch's) bedroom and that Robert did not hear the phone ring or any conversation Butch had on the phone that night. Robert testified that Butch came out of his bedroom and asked him (Robert) and Aaron to walk outside with him. Robert testified that Butch did not say why he wanted them to walk outside. Robert testified that he heard Michael in the middle building cussing and that Michael came out of the building and was walking at an "aggressive pace." Robert testified that Butch told Michael to stop twice. Robert testified that it appeared Michael had a gun which he (Robert) described as shiny with the appearance of a derringer similar to the missing .22 caliber derringer. Robert testified that Butch motioned for him (Robert) to get back, pulled the pistol, and fired striking Michael in the chest. Robert testified that Michael fell towards Butch. Robert testified that Butch normally carried a pistol while on the property. Robert testified that Butch told him to tell his mother Sissy to call the

police. Robert testified that he told Sissy to call the police and that Daddy had shot someone. Robert testified that he and Aaron left and went to Robert's brother Stephen's house but that they returned after the police arrived at the scene. Robert gave oral and written statements on the night or early morning hours after the fatal encounter. Robert told a responding officer that Michael did not have a weapon, that he did not hear Michael make any threats and he did not know why his dad (Butch) shot Michael. Robert told Lt. J. J. Jones of the Lexington County Sheriff's Department that his dad (Butch) pulled his .38 caliber pistol on Michael and said something to the effect of "What do you have to say?" Before Michael could respond, Butch shot Michael at least three times. Robert said Michael did not have any weapons and was not threatening his father (Butch) in any way. Robert gave the following written statement to the police on the night of November 24, 2009:

> My dad Sidney Hursey told me to come outside. Me and my buddy Aaron went out following my dad and we stopped because we heard yelling from across from the apartment Michael came out and talked for a second and my dad told me to back up and he shot him and I freaked out. (*See* Court's Exhibit 17.)

Robert never told the police that he (Robert) thought Michael had a gun nor is it in his statement given on the night of the incident.

Aaron Bishop, Robert Hursey's friend, testified that he drank between three and ten beers on the night of November 24, 2009. Bishop testified that Butch asked him (Bishop) and Robert to go outside with him (Butch). Bishop testified that he (Bishop) had no idea why they were going outside. Bishop testified that he (Bishop) heard a man screaming and that the man came out of the middle building. Bishop did not know the man. Bishop testified that the man had a cell phone up next to his (the man's) head. Bishop further testified that the object he (Bishop) saw up next to the man's head he (Bishop) thought it was a phone, that he (Bishop) was close

enough to think it was a phone. Bishop testified the man put the phone back in his pocket. Bishop testified the man appeared grossly intoxicated, agitated and moving needlessly. Bishop testified that Butch told the man to stop or back off. Bishop testified that the man did not stop and that Butch pulled a pistol from the back of his (Butch's) pants and assumed a "firing stance." Bishop testified that he (Bishop) and Robert stepped back and that he (Bishop) yelled or was in the process of yelling "Don't shoot him" at the time of the first shot. Bishop testified that the shot hit the man at the bottom of the rib cage. Bishop stated that he turned and moved away and heard more shots. Bishop testified that he and Robert left and went to Robert's brother's Stephen's house and that Stephen talked them into returning.

Bishop gave an oral and written statement to the police. Bishop told Lt. J. J. Jones that Michael was holding a phone when Butch shot him and that right as Butch started shooting, he (Butch) said something to the effect of "What do you have to say for yourself?" Bishop said that Butch shot Michael at least three times and that Michael did not threaten Butch in any manner. Bishop gave the following written statement to the police on the night of November 24, 2009:

> I was sitting in Robert's room drinking and Butch came and got Robert and I. The three of us went outside and a man came out of the middle building holding a phone. He and Butch started talking back and forth. Butch yelled at him; pulled a pulled a [sic] pistol. Robert and I stepped back saying "don't shoot him." Then Mr. Butch shot him in what looked to be the bottom of the rib cage. I turned and moved away. I heard more shots as I went back to the house. Robert and I were scared and left to get away from there. We went to his brother, Stephen's house. Stephen logically pointed out that we had to go back. Stephen drove us back and we met with Lt. J.J. Jones. (*See* Court's Exhibit 21.)

Doctor Janice Ross, forensic pathologist testified that she performed the autopsy upon the body of Michael Reese, a male Caucasian approximately 5'4" tall, weighing approximately 145 pounds. Dr. Ross testified that she observed multiple gunshot wounds (five) to the body of

Michael Reese. The gunshot wounds were described as follows (these are not in the order of the entry wounds, but merely a list of entry wounds and their exits as described by Dr. Ross):

1) Entered head at left cheek and exited right side of forehead;
2) Entered left side of head exited top right side of head;
3) Entered right side of chest exited right side of back;
4) Entered left side of back exited right side of chest;
5) Entered left lower side of back exited right side of chest.

Dr. Ross testified that each wound individually was fatal and that the victim bled out as a result of these multiple gunshot wounds. Dr. Ross testified that with either of the gunshot wounds to the head the victim would not be able to make any threatening gestures and would not be able to move. Dr. Ross testified that the gunshot wounds to the head were consistent with the bullets entering the victim's head at the same angle. Dr. Ross testified that the gunshot wounds were distant shots and that there was no stippling or tattooing on the body as a result of any of the wounds.

Testimony was presented that Michel had threatened Butch within a week of November 24, 2009. John O'Neale testified that on November 18, 2009, he was at Cowboy's to talk with Butch about renting some storage property and that he saw and talked with Michael and asked Michael how he and Butch were getting along. According to O'Neale, Michael said Butch was trying to put him (Michael) out, that he (Michael) had paid through the first of the month and he was staying at least that long, and that "first chance I get I'm going to kill that mother fucker." O'Neale said Butch pulled up in his car about that time, and O'Neale let Butch know what Michael had said. Despite the alleged threat, he said Butch did not appear to be afraid of Michael, that nothing happened, and that Butch and Michael went about their business as usual. O'Neale testified that on November 21, 2009, he (O'Neale) and his wife were at Cowboy's and observed Michael intoxicated and yelling at Butch and that Butch patted Michael on the back and told him (Michael) to go back inside and sleep it off. O'Neale's wife testified that Butch

said "He's (Michael) not going to hurt me." O'Neale and his wife testified that Butch did not appear to be afraid of Michael.

Testimony was presented that Butch had threatened Michael within a week of November 24, 2009. Becky Lynn Phillips, Tammy's daughter, testified that four or five days before the shooting incident that Butch came to Michael and Tammy's apartment and that Michael told Butch to leave Tammy alone and to leave the apartment. Michael told Butch that if he (Butch) did not leave that he (Michael) was going to turn Butch in for the illegal video poker machines that were in Cowboy's. The Sheriff seized six illegal video poker machines from Cowboy's on November 25, 2009. Phillips testified that Butch pointed his finger at Michael and told Michael "I'm going to blow your fucking head off." Phillips testified that Butch also stated to Michael, "you do what you got to do and I'll do what I got to do."

Dustin Smith, Forensic Toxicologist with the State Law Enforcement Division (SLED) was offered as an expert by the defendant and was accepted as such by the Court. Agent Smith testified that he tested a blood sample submitted to him from the body of the victim labeled Christopher Reese FA09-756. Agent Smith reported the following relevant findings: Ethanol 0.214; Benzodiazepines Positive 0.05 mg/L; Cannabinoids Positive 0.03 mg/L. The witness opined that the Victim would have been grossly intoxicated and the combination of ethanol and benzodiazepines would have had a synergistic[2] effect depressing the central nervous system. The amount of cannabinoids was a non-factor in the toxicological analysis. The Agent testified that the victim would have displayed unsteadiness on his feet, slurred speech, decreased inhibitions, decreased reaction time, staggering gait and confusion. The agent opined that a

[2] Merriam Webster's Dictionary defines "synergism" as the interaction of discrete agencies (as industrial firms), agents (as drugs), or conditions such that the total effect is greater than the sum of the individual effects. Webster's defines "synergistic" as having the capacity to act in synergism.

person with these characteristics would be less likely to carry out a threat due to the synergistic effect of the drugs.

Dr. Nelson Stuckey testified as the Defendant's treating physician and was offered as an expert in the field of medicine and was so accepted by the Court. Dr. Stuckey testified that on November of 2009 the Defendant was diabetic, had heart troubles and cataracts. Dr. Stuckey testified that the Defendant was on hypertensive medicine, high cholesterol medicine, insulin and whatever medicine the heart doctor gave him. Dr. Stuckey testified that the Defendant was in fair health and that the defendant managed his health condition well. Dr. Stuckey testified that the Defendant did not have the physical stamina to fight, had shortness of breath and poor eyesight .

After being taken into custody by officers, the Defendant was complaining of shortness of breath and was transported to the Lexington Medical Center Emergency Room. At the ER he was interviewed by Detective Eddie Prestigiacomo of the Lexington County Sheriff's Department. After being advised of his rights and waiving same freely and voluntarily the Defendant make the following statements:

1. That he allowed Reese to live on his property in an apartment at "Cowboy's Auction".
2. That he went outside to talk to Reese and as he went outside he observed Reese "thrown his hands up in the air" as he (Hursey) thought Reese had a gun in his hands.
3. Hursey said "so I shot Reese in the chest and several more times."
4. Hursey said "I shot him until he stopped" after being asked why he shot Reese so many times.
5. Hursey said "I thought he had a gun in his hand" after being asked again why he shot Reese.
6. Hursey said a week or two ago he had a .22 caliber handgun missing from one of his vehicles-he said he did not report the gun stolen with the Sheriff's Office nor could he provide any more detailed information about the handgun- he alluded to the fact that he thought Reese had the gun.
7. Hursey asked about the self defense law in South Carolina and at this point said he was going to call Sheriff Metts and his attorney Jake Moore and explain to them that he shot in self defense.
8. Hursey said "after the shooting I put the gun in the front passenger seat of the green van."

Statements 1 through 8 are recorded in the typed notes of Detective Prestigiacomo introduced as Court's Exhibit 30 and the handwritten notes of Detective Prestigiacomo introduced as Court's Exhibit 31.

Analysis

I. Protection of Person and Property Act

In a hearing requested by Hursey under the Act, Hursey has the burden to prove by the preponderance of the evidence that he is statutorily immune from prosecution. *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011) (holding that "the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence."). The Act is stated as an attempt to codify the common law Castle Doctrine. The statement of legislative intent is found in §16-11-420, which reads:

> (A) It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes 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.
> (B) The General Assembly finds that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.
> (C) The General Assembly finds that Section 20, Article I of the South Carolina Constitution guarantees the right of the people to bear arms, and this right shall not be infringed.
> (D) The General Assembly finds that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles.
> (E) The General Assembly finds that 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.

The Act reads, in pertinent part, as follows:

> (A) 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 a dwelling ... 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.

(B) The presumption in subsection (A) does not apply if the person:

(1) Against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling . . .; or

(2) Who uses deadly force is engaged in an unlawful activity or is using the dwelling . . . to further an unlawful activity; . . .

(C) A person who is not engaged in an unlawful activity and who is attacked in an 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 violent crime as defined in Section 16-1-60.

Section 16-11-440 (A) - (C) (S.C. Code of Laws, 1976 as amended).

Section 16-11-440(B) disallows the presumption of subsection (A), where the person [subsection (1)] against whom the deadly force is used has the right to be in the dwelling. Michael was not a trespasser. Butch testified that he was going to assist in moving Michael and Tammy off of the Cowboy's property on the morning of November 25, 2009 at eight AM. There is no testimony that Butch ever withdrew his permission for Michael to remain on the property until the time and date scheduled for the move. Since the fatal encounter occurred at approximately 10:52 PM on the night of November 24, 2009 and Butch had not withdrawn his consent allowing Michael to remain, Michael was not a trespasser on the night of November 24, 2009. Hursey had granted Michael permission to stay on the premises until eight AM the morning of November 25, 2009. So, the subsection would not provide a presumption related to immunity from

prosecution, in the court's determination. The failure of evidence regarding Michael's presence on Butch's property as being unlawful is fatal to the defendant's argument concerning subsection (B).

A person is entitled to the reasonable fear presumption if the person against whom the deadly force is used *is in the process of unlawfully and forcefully entering or has unlawfully and forcefully entered a dwelling* ... AND *who used deadly force knows or has reason to know that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.* S.C. Code Section 16-11-440(A)(1)-(2) (emphasis added). In this case the testimony is that Butch asked Michael to meet him (Butch) under the light. Butch then took affirmative steps to get dressed, arm himself with a deadly weapon, and solicit other males to accompany him (Butch) to the meeting that Butch requested with Michael.

The Court finds that there is no credible testimony that Michael was in the process of unlawfully and forcefully entering a dwelling or that he had unlawfully and forcefully entered a dwelling.[3]

Further, Butch, the person who used deadly force, did not know and had no reason to believe that unlawful and forcible entry or an unlawful and forcible act was occurring or about to occur. Butch had spoken with Michael over the phone and had arranged for the meeting under the light. The defendant alleges that he (Butch) had reason to know or believe that he (Butch) was preventing the unlawful and forcible acts of murder and assault and battery of a high and aggravated nature from occurring. The Court finds that based on the totality of the circumstances in this case that is not credible.

[3] Although the Court only addresses the dwelling, the finding would be the same as to Defendant's place of business.

Although the Defendant can act on appearances, the facts in this case are that Butch invited Michael to meet him under the light. Butch armed himself and it was not unlawful for him to do so. Butch had two back up males with him. The question of whether or not Michael was armed is clearly disputed by the testimony of Butch, Robert Hursey, Aaron Bishop, the number and locations of the wounds, and the timing and recovery of the .22 caliber derringer.

The Defendant submits that he is entitled to immunity under the law of self-defense and the law of habitation under the Act. Defendant asserts he is ummune under the Protection of Person and Property Act under those affirmative defenses by virtue of S.C. Code Section 16-11-450 which reads as follows:

> (1) 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 and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer acting in the performance of his official duties and he identifies himself in accordance with applicable law or the person using deadly force knows or reasonably should have known that the person is a law enforcement officer.

The inclusion of the words "another applicable provision of law" is troubling because it can be read as requiring judges to have separate pretrial hearings in every case where it is asserted that there was a justifiable use of deadly force. The legislature could not have intended such a broad reading of the statute. Further there is no other applicable provision of the law that grants a pretrial hearing and immunity from prosecution in the case of a homicide. Self-defense is an affirmative defense that requires the State to disprove the elements: "when a defendant claims self-defense, the State is required to disprove the elements of self-defense beyond a reasonable doubt." *State v. Dickey*, 394

S.C. 491, 719 S.E.2d 97 (2011) (citing *State v. Wiggins*, 330 S.C. at 544-545, 500 S.E.2d 492-93).

II. Search Warrant

Defendant argues the warrant used to search the location of the incident was facially defective and any evidence gathered from this warrant must be excluded pursuant to S.C. Code Sections 17-13-140 and 17-13-150. The pertinent portions of these sections are as follows:

> SECTION 17-13-140. Issuance, execution and return of search warrants for property connected with the commission of crime; inventory of property seized.
>
> Any magistrate ... may issue a search warrant to search for and seize ... (4) property constituting evidence of crime or tending to show that a particular person committed a criminal offense...
> A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate...establishing the grounds for the warrant. If the magistrate...is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant...
> Any warrant issued hereunder shall be executed and return made only within ten days after it is dated. The officer executing the warrant shall make and deliver a signed inventory of any articles seized by virtue of the warrant, which shall be delivered to the judicial officer to whom the return is to be made, and if a copy of the inventory is demanded by the person from whose person or premises the property is taken, a copy of the inventory shall be delivered to him.

South Carolina Code Sections 17-13-140 (as amended, 1976).

The analysis of the search warrants in this case necessarily requires the examination of each search warrant document. There is an objection by the defense as to any items of evidence seized as a result of the search warrant marked as Court's Exhibit 49. The defendant's position is that the document left at the place of the search is not signed by a judge and therefore does not comply with Sections 17-13-140 and 17-13-150. The State introduced Court's Exhibit 61 S, the search warrant issued by Judge Scott Whittle on November 25, 2009 and executed by officers on

November 25, 2009. A review of Court's Exhibit 61 S and Court's Exhibit 49 reveals the following:

1. Court's Exhibit 61 S on the page entitled "Search Warrant" includes the date November 25, 2009 and the signature of judge. Court's Exhibit 49 contains the exact information on Court's exhibit 61 S but does not include the date or signature of judge.
2. Court's Exhibit 61 S on the page entitled "Affidavit" contains the date and signature of judge. Court's Exhibit 49 contains the exact information on Court's Exhibit 61 S but does not include the date or the signature of judge.
3. Court's Exhibit 61 S on the page entitled "Return" contains the date of the return, November 30, 2009, and the signature of judge. The return was made within ten days of the date the search warrant was issued and executed. The inventory of the property taken pursuant to the warrant reads: photographs, jacket (clothing), S&W 6 shot revolver handgun, 5 Winchester 38 special casing and 1 Winchester 38 special bullet. Court's Exhibit 49 on the page entitled "Return" does not contain the date of the return or the signature of judge. Further, Court's Exhibit 49 lists the following inventory: photographs, jacket (clothing), S&W 6 shot revolver handgun, 5 Winchester shell casing (38 special), 1 Winchester bullet (38 special). Court's Exhibit 49 is a handwritten copy of Court's Exhibit 61 S, thus the minor inconsistency in verbiage used on the return.

Defendant cites to *State v. Covert* for its assertion that an unsigned search warrant is invalid and void. However, in *Covert*, the Court was dealing with a search warrant issued by a magistrate after the search had already taken place whereas in the present case, the search

⇒ not so sure that is the case

warrant was validly issued by a magistrate prior to service and execution. The applicable portion of *Covert* is as follows:

> The search warrant in this case is signed by the magistrate, and dated September 28, 2002; the accompanying two-page affidavit is signed by her on each page, and both these signatures are dated September 26, 2002. The return is signed and dated September 27, 2002. It is undisputed that the warrant was obtained and served on September 26, 2002.
>
> At trial, respondent contended that the warrant was unsigned when it was served, that it was therefore invalid, and that accordingly the evidence seized pursuant to the search should be suppressed. Respondent argued that, without the magistrate's signature, the warrant was not issued within the meaning of South Carolina's search warrant statute, S.C. Code Ann. § 17-13-140 (1985). The trial judge refused to suppress the evidence even though he found the warrant had not been signed before it was served, holding that the search warrant statute was subject to a "good faith" exception, and that such an exception was applicable here.
>
> On appeal, Judge Short held that the search warrant was not issued within the meaning of the statute because it lacked a timely signature. Judge Short also held there was a good faith exception to the statutory warrant procedures, but that it was inapplicable here. We agree that the absence of the magistrate's signature at the time the warrant was served invalidates it, but do not reach the issue whether there exists a "good faith" exception to the statutory warrant requirements since we find, as explained below, that no warrant was ever issued.
>
> We have held, in the context of an arrest warrant, that such a warrant is not lawful where the issuing judicial officer failed to sign the warrant on the space provided on the warrant form. *Davis v. Sanders*, 40 S.C. 507, 19 S.E 138 (1894). Although the State would characterize such an omission as merely procedural or ministerial, we disagree. The *Davis* Court gave a persuasive explanation of the signature requirement, albeit in the context of an arrest warrant:
>
> [W]hen it is remembered that a sheriff or other officer, who undertakes to arrest a citizen under a warrant, is bound to show his warrant, if demanded, to the person proposed to be arrested, and if he refuses to do so the arrest may be lawfully resisted [internal citation omitted], we think it would be very dangerous to the peace of society for the court to hold that a paper, which shows on its face that it is an unfinished paper...would be a sufficient justification for an arrest.
>
> The same policy considerations apply to a search warrant, [2] and thus the lack of the issuing officer's signature is not excusable as merely procedural or ministerial, but rather negates the existence of a warrant, creating instead "an unfinished paper." As the *Davis* Court went on to hold, the fact that the issuing officer intended to sign the warrant and had in fact signed the back was not sufficient to validate it, nor was the arrest legal despite the fact the officers who executed the arrest pursuant to the "warrant" were "entirely innocent of any intentional wrong."
>
> The *Davis* requirement that a warrant must be signed by the issuing judicial officer in order to be complete is a common law decision predicated on public policy considerations. The signature is the assurance that a judicial officer has found that law

enforcement has made the requisite probable cause showing, and serves as notice to the citizen upon whom the warrant is served that it is a validly issued warrant. Without the signature, it is merely an "unfinished paper." *Davis*, supra; see also *DuBose v. DuBose*, 90 S.C. 87, 72 S.E. 645 (1911) ("But it has been decided [in Davis] that, when an officer is performing the ministerial duty of issuing a paper on compliance with certain conditions prescribed by law, his signature at the foot of the paper he intended to sign is necessary to its validity").

We consider also whether the unsigned warrant can be upheld in the face of § 17-13-140, the general search warrant statute. The statute contains requirements different from those mandated by the Fourth Amendment, and is in some ways "more strict" than the federal constitution. *State v. McKnight*, 291 S.C. 110, 352 S.E.2d 471 (1987). While we have recognized a "good faith" exception to the statute's requirements where the officers make a good faith attempt to comply with the statute's affidavit procedures, McKnight, supra, explaining *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975), we have left open the question whether a good faith exception would be applied where "the officers reasonably believe the warrant is valid when the search is made, but is subsequently determined to be invalid." *McKnight*, supra. Here, we do not reach the question whether there exists a good faith exception to the statute where a defective warrant is issued, since under South Carolina law an unsigned warrant is not a warrant, and is not capable of being issued within the meaning of § 17-13-140. See also *Davis*, supra (officers good faith irrelevant where warrant is not signed).

The circuit court erred in refusing to suppress the evidence seized pursuant to the unsigned "warrant." Respondent is therefore entitled to a new trial.

State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009) (citing *Davis v. Sanders*, 40 S.C. 507, 19 S.E. 138 (1894).

The case before the Court is distinguishable from *Covert* and *Davis*. In this case there is credible testimony presented by the State that the search warrant was signed by the issuing Magistrate Judge Scott Whittle on November 25, 2009, and that the probable cause was presented to Judge Whittle prior to any search or seizure conducted by the officers pursuant to the validly issued search warrant. The search warrant, Court's Exhibit 61 S, complies with Section 17-13-140.

I find the testimony of Lt. Jeff Palkowski and Deputy Court Administrator, Janice Marshall, to be credible. Lieutenant Jeff Palkowski of the Lexington County Sheriff's Department (LCSD) testified that he was the affiant on the search warrant. As it was after hours

and there was no copier at the Judge's residence, Palkowski testified that he printed off two copies of the search warrant and drove to Magistrate Scott Whittle's house. Judge Whittle signed one Search Warrant page and one Affidavit page, hereinafter referred to as the "original" search warrant (Court's Exhibit no. 61 S). The other unsigned Search Warrant page and the unsigned Affidavit page are hereinafter referred to as the "copy." The Lexington County Sheriff's Department served the Search Warrant (Court's Exhibit 61 S), retained the original search warrant, and left the "copy" (Court's Exhibit 49) of the search warrant at the residence.

Ms. Marshall testified that she was employed as Deputy Court Administrator and was Custodian of Records for search warrants returned to Judge Jeffcoat. Ms. Marshall further testified that she was the custodian for Court's Exhibit 61 S, which was an original search warrant that was issued by Judge Whittle on November 25, 2009.

The question in this case, then, becomes: Should the items seized as a result of the validly issued search warrant (Court's Exhibit 61 S) be suppressed because an unsigned "copy" was left with the property searched. I find that the items should not be suppressed under these circumstances. The warrant was validly issued under Section 17-13-140. Section 17-13-150 is entitled "Person served search warrant shall also be furnished copy of warrant and supporting affidavit" and reads as follows:

> When any person is served with a search warrant, such person shall be furnished with a copy of the warrant along with the affidavit upon which such warrant was issued.

S.C. Code Section 17-13-150 (as amended, 1976). When the search warrant was served on November 25, 2009, Court's Exhibit 49 was furnished as a copy of the warrant along with the affidavit upon which the warrant was issued. I find that even though Court's Exhibit 49 was

unsigned by the issuing magistrate and the affidavit was signed by the affiant but not sworn that this did comply with Section 17-13-150 and as such would deny defendant's motion to suppress.

Court's Exhibit 61 S complies with Section 17-13-140. As to Section 17-13-150, I find that Court's Exhibit 49 complies with that section under the circumstances of this case. Further even if Court's Exhibit 49 does not qualify as a "copy," I find that it is not a constitutional violation and only a ministerial act and therefore the Defendant's motion to suppress is denied.

Even if the Court were to find that the copy of the search warrant left at the scene does not meet the requirements of Section 17-13-150, the Court believes that the Lexington County Sheriff's Department made a good faith effort to comply with the statute by leaving the copy, Court's Exhibit 49, at the residence; that Hursey has shown no prejudice and the exclusionary rule should not apply. See *State v. Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975) (holding that the officers made a good faith effort to comply with search warrant affidavit requirement, that defendant was not prejudiced, and that exclusionary rule did not apply).

THEREFORE, IT IS ORDERED that the motion to dismiss the prosecution of this case pursuant to S.C. Code Section 16-11-410, et seq., is denied.

IT IS FURTHER ORDERED that the motion to dismiss on the grounds that the State cannot disprove the elements of self-defense beyond a reasonable doubt as required by *State v. Dickey*, 394 S.C. 491, 719 S.E.2d 97 (2011), is denied.

IT IS FURTHER ORDERED that the defendant's motion to suppress the evidence gathered pursuant to S.C. Code Sections 17-13-140 and 17-13-150 is denied.

AND IT IS SO ORDERED.

March 6, 2012

R. Knox McMahon, Judge

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. Knox McMahon, Presiding Judge

Case No. 2010-GS-32-00752

State of South Carolina,

Respondent,

v.

Sidney A. Hursey, Jr., Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid, on October 11, 2012, to the following individuals:

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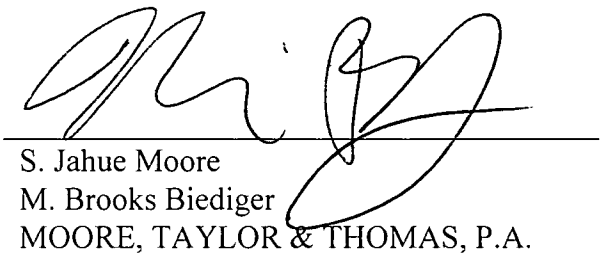

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