

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chester County
Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No. 2015-000721

RECEIVED
AUG 24 2016
SC Court of Appeals

THE STATE,

Respondent,

vs.

BOBBY RANDOLPH SIMS,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit

Post Office Box 607
Lancaster, SC 29721
(803) 416-9367

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS3

ARGUMENT10

Appellant waived any issue he may have had with the circuit court judge’s ruling on his pre-trial immunity claim by subsequently entering an unconditional guilty plea and readily admitting he was criminally responsible for shooting his victim. However, even assuming Appellant’s challenge to the immunity ruling could somehow properly be considered on appeal despite the fact Appellant entered a guilty plea to the crime, the circuit court judge did not abuse his discretion in determining Appellant failed to meet his burden of establishing by a preponderance of the evidence he was entitled to immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act because the circuit court judge considered the evidence and testimony presented during the pre-trial immunity hearing, expressly determined Appellant’s testimony was not credible, and made a factually-supported determination the most credible version of events was Appellant shot his unarmed victim at a time when the victim was not threatening or provoking Appellant in any manner, which was a version of events that did not entitle Appellant to immunity from prosecution under any provision of the legislation.10

CONCLUSION.....21

TABLE OF AUTHORITIES

South Carolina Cases:

Dalton v. State, 376 S.C. 130, 654 S.E.2d 870 (Ct. App. 2007).16

Easter v. State, 355 S.C. 79, 584 S.E.2d 117 (2003).12

Ex parte Cannon, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009).13

Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999).11

In re Tracy B., 391 S.C. 51, 704 S.E.2d 71 (Ct. App. 2010).17

Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999).15, 16

Sanders v. Leake, 254 S.C. 444, 175 S.E.2d 796 (1970).11

State v. Asbury, 328 S.C. 187, 493 S.E.2d 349 (1997).19

State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013).15, 19

State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2015).15

State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004).12

State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).14, 15, 19

State v. Elders, 386 S.C. 474, 688 S.E.2d 857 (Ct. App. 2010).15

State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).13

State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013).13

State v. Johnson, 413 S.C. 458, 776 S.E.2d 367 (2015).17, 19

State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016).15

State v. Lee, 274 S.C. 372, 264 S.E.2d 418 (1980).20

State v. O’Leary, 302 S.C. 17, 393 S.E.2d 186 (1990).12

State v. Rice, 401 S.C. 330, 737 S.E.2d 485 (2013).13

State v. Rosier, 312 S.C. 145, 439 S.E.2d 307 (Ct. App. 1993).16

State v. Snowdon, 371 S.C. 331, 638 S.E.2d 91 (Ct. App. 2006).11

State v. Thomason, 341 S.C. 524, 534 S.E.2d 708 (Ct. App. 2000).11, 13

Vogel v. City of Myrtle Beach, 291 S.C. 229, 353 S.E.2d 137 (1987).12

United States Supreme Court Cases:

Boykin v. Alabama, 395 U.S. 238 (1969).11

Other State and Federal Cases:

Burns v. United States, 323 F.2d 269 (5th Cir. 1963).13

Dawkins v. State, 252 P.3d 214 (Okla. Crim. App. 2011).17

United States v. Adkins, 466 F. App'x 855 (11th Cir. 2012).12

Other Authorities:

S.C. Code Ann. § 16-11-420.14

S.C. Code Ann. § 16-11-440.14, 17, 18

S.C. Code Ann. § 16-11-450.13

S.C. Code Ann. § 16-23-230.17

S.C. Code Ann. § 44-53-375.17

STATEMENT OF ISSUE ON APPEAL

Appellant waived any issue he may have had with the circuit court judge's ruling on his pre-trial immunity claim by subsequently entering an unconditional guilty plea and readily admitting he was criminally responsible for shooting his victim. However, even assuming Appellant's challenge to the immunity ruling could somehow properly be considered on appeal despite the fact Appellant entered a guilty plea to the crime, the circuit court judge did not abuse his discretion in determining Appellant failed to meet his burden of establishing by a preponderance of the evidence he was entitled to immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act because the circuit court judge considered the evidence and testimony presented during the pre-trial immunity hearing, expressly determined Appellant's testimony was not credible, and made a factually-supported determination the most credible version of events was Appellant shot his unarmed victim at a time when the victim was not threatening or provoking Appellant in any manner, which was a version of events that did not entitle Appellant to immunity from prosecution under any provision of the legislation.

STATEMENT OF THE CASE

In April of 2014, Appellant Bobby Randolph Sims was arrested after he shot a man multiple times outside his home. In July of 2014, the Chester County Grand Jury indicted Appellant for one count of attempted murder. In December of 2014, Appellant filed a motion seeking immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act. On January 15, 2015, a pre-trial hearing was conducted on the motion in the Chester County Court of General Sessions with the Honorable Brian M. Gibbons, circuit court judge, presiding. Subsequent to the hearing, Judge Gibbons denied Appellant's request for immunity from prosecution and issued an order dated January 28, 2015, confirming that ruling. Thereafter, on March 19, 2015, Appellant appeared in the Chester County Court of General Sessions and entered a guilty plea to the lesser-included offense of assault and battery of a high and aggravated nature before Judge Gibbons. At the conclusion of the plea hearing, Judge Gibbons accepted Appellant's guilty plea and sentenced him to a sixteen-year term of imprisonment. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On the evening of April 11, 2014, officers with the Chester County Sheriff's Office were alerted of an injured person in need of aid near a feed-and-seed store located in Lowrys, South Carolina, and quickly responded to that location. (Immunity Tr. p. 6; p. 18; p. 26). Upon their arrival, the officers found a man ("Victim") suffering from multiple gunshot wounds to his chest and arm, and both the injured man, who was identified as Nantonio Byrd ("Victim"), and his five-year-old son, who was also present at the scene, indicated the shooter was Appellant Bobby Randolph Sims.¹ (Immunity Tr. p. 6; p. 16; p. 27). In response, the officers headed to Appellant's nearby home, which was located behind the feed-and-seed store, while Victim was rapidly transported to a hospital.² (Immunity Tr. p. 7).

Upon arriving at Appellant's home, the officers found Appellant, who was highly emotional and bleeding from a cut to his hand, walking around outside the residence in a ripped shirt. (Immunity Tr. pp. 7-8; pp. 27-28). When he initially encountered the officers, Appellant advised them someone else had done "it" and denied shooting anyone. (Immunity Tr. p. 30). He was then quickly detained and provided the officers with several different accounts of what had occurred. (Immunity Tr. p. 7). Specifically, after being informed of his rights, Appellant alternately claimed an unknown individual had fired shots, he personally shot someone because the person was trying to rob him, and two unidentified black males attacked him and cut his hand. (Immunity Tr. pp. 7-8; pp. 34-35). Meanwhile, officers investigated the scene and found a knife, gloves, Victim's phone, and an unopened beer can on Appellant's porch and another knife

¹ Specifically, Victim reported to the officers he was shot by "Bobby McGee," which was a name Appellant was known by "on the street." (Immunity Tr. pp. 6-7; p. 65).

² Due to the severity of his injuries, Victim had to be airlifted to the hospital. (Immunity Tr. p. 29).

on the ground near Victim's truck, which was parked in Appellant's yard.³ (Immunity Tr. p. 16; pp. 35-37). Based on the officers' investigation, Appellant was taken into custody that night. (Immunity Tr. p. 38).

On the following day, Detective Christopher Reynolds of the Chester County Sheriff's Officer conducted an interview of Appellant in regard to the shooting. (Immunity Tr. p. 9; pp. 38-39). During that interview, Appellant claimed Victim, whom he acknowledged was a friend and regular visitor to his residence, and another man came to his home on the night of the incident, and Appellant stated he got into a "tussle" with Victim on his porch over interest Victim claimed was owed on a debt.⁴ (Immunity Tr. p. 9; p. 11; pp. 39-40). Following the "tussle," Appellant alleged Victim grabbed a knife from a nearby fish cleaning station and threatened him, and he asserted he responded by retreating into his house and getting into his "ambush spot." (Immunity Tr. pp. 9-11; pp. 40-43). After that, Appellant claimed Victim ripped the door to his home open and he shot Victim when Victim came inside. (Immunity Tr. pp. 9-11; pp. 40-41; pp. 43-44). Appellant stated he then ran outside, broke his gun in half, and threw the pieces down a well. (Immunity Tr. p. 14).

Following the interview, Detective Reynolds travelled to Appellant's home and discovered the well Appellant claimed to have used to dispose of his rifle was inaccessible. (Immunity Tr. p. 14; pp. 44-45). The detective further discovered there was no damage of any kind to the latch or hook of Appellant's door but noticed the door's screen had three bullet holes in it. (Immunity Tr. pp. 41-42; pp. 46-47). Detective Reynolds then returned and confronted Appellant about those inconsistencies, and Appellant responded by admitting he hid the rifle in a

³ The officers also found Victim's other son, who was three years old, asleep in Victim's truck. (Immunity Tr. p. 29; Plea Tr. p. 13).

⁴ Regarding the debt, Appellant initially claimed he owed Victim twenty dollars before increasing the sum owed to twenty-eight dollars. (Immunity Tr. p. 9; p. 39).

brush pile instead of in the well, he shot Victim through the door while Victim was outside of the house as opposed to inside, Victim never possessed a knife during the incident despite his earlier claims, he planted the knives and gloves found at the scene, and he cut his own shirt and hand following the shooting. (Immunity Tr. pp. 48-51; pp. 56-57).

At that point, Detective Reynolds brought Appellant back to the scene of the shooting, and Appellant showed him where he had actually hidden the rifle, which had a sawed-off barrel. (Immunity Tr. pp. 51-52; p. 54). The detective then spoke with Appellant again, and Appellant acknowledged he was under the influence of crack cocaine at the time of the incident while claiming he shot Victim after Victim approached the door to his home upon ignoring a command to leave the premises.⁵ (Immunity Tr. pp. 54-55). However, Appellant did not state Victim was acting threateningly or aggressively before he shot him. (Immunity Tr. p. 55).

Thereafter, several days later, Detective Reynolds conducted an interview of Victim after Victim was moved out of the intensive care unit at the hospital. (Immunity Tr. p. 17). During the interview, Victim stated he and his children regularly visited Appellant's home several days a week and had done so on the night of the incident. (Immunity Tr. pp. 17-18). While at Appellant's home that night, Victim indicated he got into an argument with Appellant's brother and Appellant came out of the home in response in an angry fashion. (Immunity Tr. pp. 17-18). Victim stated the two then argued, Appellant asked him to wait because he had something for his "shit," and Appellant went back into his home. (Immunity Tr. pp. 18-19). Moments later, Victim indicated he saw Appellant returning with a gun and quickly got his son out of the way just before Appellant fired shots that struck him in his chest and wrist. (Immunity Tr. p. 19).

⁵ Subsequently, during the immunity hearing, Appellant claimed he smoked "a little piece" of crack cocaine he had been storing in his home for the past two months approximately two hours before the incident while insisting he was sober at the time of the shooting. (Immunity Tr. pp. 85-86).

After that, Victim stated he rapidly grabbed his son and ran for help while Appellant chased behind them shouting threats. (Immunity Tr. p. 19).

Subsequently, Appellant was indicted for attempted murder. (Plea Tr. p. 2; Indictment). Prior to trial, Appellant filed a motion seeking immunity from prosecution, and a pre-trial hearing was conducted on the matter. (Immunity Tr. p. 4; Defendant's Motion to Dismiss, dated Dec. 22, 2014, pp. 1-4). During the hearing, Detective Reynolds testified about the investigation into the shooting and discussed all the statements made in regard to the incident, including Appellant's numerous shifting statements about what had occurred. (Immunity Tr. pp. 6-62). Additionally, Appellant elected to testify in his own defense and presented yet another version of events in regard to the night of incident. (Immunity Tr. pp. 63-103). Specifically, in his latest version of events, Appellant asserted Victim, a friend and regular visitor to his home, came by on the night of the incident while "already mad about something" and demanded money Appellant owed him along with interest on the debt.⁶ (Immunity Tr. pp. 63-66; pp. 78-79). Appellant stated he then paid Victim the money he owed, refused to pay the interest, and instructed Victim to leave. (Immunity Tr. p. 66). After that, Appellant claimed he got into an argument with Victim over fertilizer, ordered Victim to leave again, threatened to call the authorities, and got into a "tussle" with Victim that ended with him pinning Victim to the ground. (Immunity Tr. pp. 66-71). Once the "tussle" was over, Appellant stated he yet again ordered Victim to leave and went into his house while Victim got into his truck. (Immunity Tr. pp. 71-72). Appellant claimed he was then preparing to leave to go buy beer when he saw Victim coming back towards his home with his hand in his pocket on a gun. (Immunity Tr. pp. 72-73). After that, Appellant claimed Victim ripped his door off and broke it before pulling something chrome out of a pocket,

⁶ In regard to Victim, Appellant alleged during his testimony he knew Victim had been drinking alcohol and taking pills on the night of the shooting, and he claimed to have witnessed Victim engage in acts of violence in the past. (Immunity Tr. pp. 68-70).

and Appellant indicated he responded by shooting Victim three times as he attempted to enter the home.⁷ (Immunity Tr. pp. 73-75; p. 94). Appellant stated Victim then fled the area while he began getting himself ready to go to jail. (Immunity Tr. pp. 74-75). Thereafter, Appellant acknowledged he hid his rifle, lied to the officers, fabricated evidence, cut himself, and told a variety of stories to the officers about what had occurred. (Immunity Tr. pp. 76-77; 97-100; p. 103). However, he insisted his latest version of events was the truthful one. (Immunity Tr. pp. 77-78).

Following the presentation of that testimony, defense counsel asserted the facts in Appellant's case were "almost" undisputed while alleging Appellant's testimony regarding his mental state at the time of the shooting was not contradicted. (Immunity Tr. pp. 105-106). Based on Appellant's testimony, defense counsel alleged Appellant should be found to be immune from prosecution since that testimony established Appellant was simply defending himself in his home from an attacker who would not leave.⁸ (Immunity Tr. pp. 106-108). In rebuttal, the solicitor asserted Appellant had the burden of proving he was entitled to immunity while noting he had no credibility whatsoever in light of the fact he had repeatedly lied about what occurred and had attempted to fabricate exculpatory evidence. (Immunity Tr. p. 109). Furthermore, the solicitor contended Appellant was additionally not entitled to immunity from prosecution because he was engaged in unlawful conduct by smoking crack cocaine and possessing a sawed-off rifle at the time he shot Victim, an invited guest to the home. (Immunity Tr. pp. 109-110).

⁷ Later on during cross-examination by the solicitor, Appellant indicated Victim simply tried to open the door but was unable to do so because he was blocking it with his own foot. (Immunity Tr. p. 90).

⁸ In arguing Appellant should be found to be immune from prosecution, defense counsel acknowledged Appellant had provided a variety of different accounts of the incident while insisting Appellant only changed "small minute thing[s]" in those varying accounts. (Immunity Tr. pp. 107-108). Furthermore, defense counsel postulated Appellant's false statements to the officers did not lead their investigation "that badly" astray. (Immunity Tr. p. 108).

Thereafter, upon considering the matter overnight, the circuit court judge denied Appellant's motion seeking immunity from prosecution.⁹ (Immunity Tr. p. 113; Immunity Ruling Tr. p. 2; Order, dated Jan. 28, 2015, pp. 1-4). In denying the motion, the circuit court judge expressly determined Appellant's testimony from the immunity hearing was not credible, rejected Appellant's numerous inconsistent and fabricated versions of events as to what occurred on the night of the incident, and made a factual finding Victim, an unarmed invited guest, was shot three times by Appellant after Appellant retrieved a sawed-off rifle from inside his home following a verbal altercation between the two and fired at Victim through the home's screen door without being threatened or provoked by Victim in any manner. (Order, pp. 1-2). Based on those determinations and findings, the circuit court judge concluded Appellant failed to meet his burden of establishing he was entitled to immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act as Victim never entered Appellant's home and was posing no threat to Appellant before he was shot. (Order, pp. 2-3). Furthermore, the circuit court judge concluded Appellant was similarly not entitled to immunity from prosecution because he was engaging in two unlawful acts – possession of crack cocaine and possession of a sawed-off rifle – at or near the time of the shooting. (Order, pp. 3-4).

Following the circuit court judge's ruling, Appellant decided to enter a guilty plea to the lesser-included offense of assault and battery of a high and aggravated nature and appeared before the circuit court judge at a plea hearing. (Plea Tr. pp. 2-4). During the plea hearing, Appellant indicated he understood what he was charged with, understood what he was pleading guilty to, was aware of the elements of the offense he was pleading guilty to, and understood he was facing a potential term of imprisonment of up to twenty years. (Plea Tr. pp. 3-4). Appellant

⁹ Upon orally ruling on the motion, the circuit court judge directed the solicitor to prepare a written order for him. (Immunity Ruling Tr. p. 2).

then pled guilty to assault and battery of a high and aggravated nature while affirming he was doing so on his own free will and wished to waive his rights, including his right to trial. (Plea Tr. pp. 4-5). Thereafter, the solicitor recounted the facts related to the shooting, and, following that recitation, defense counsel indicated Appellant disagreed with some of the facts recounted by the solicitor but was willing to admit he intentionally shot and assaulted Victim in a manner sufficient to satisfy the required elements of assault and battery of a high and aggravated nature. (Plea Tr. pp. 7-8). Appellant then confirmed to the circuit court judge he agreed with defense counsel's remarks, and the circuit court judge accepted Appellant's guilty plea. (Plea Tr. p. 9). After that, the circuit court judge proceeded forward with sentencing, and Appellant expressed regret for what happened while indicating the incident was "totally out of character" for him.¹⁰ (Plea Tr. p. 25). The circuit court judge then sentenced Appellant to a sixteen-year term of imprisonment. (Plea Tr. p. 27).

¹⁰ During the sentencing proceedings, the solicitor noted Victim was still experiencing lasting medical issues as a result of the shooting, and Victim personally explained the bullets from the shooting were still lodged inside of his body and continuing to cause him pain. (Plea Tr. pp. 9-10; pp. 13-14).

ARGUMENT

Appellant waived any issue he may have had with the circuit court judge's ruling on his pre-trial immunity claim by subsequently entering an unconditional guilty plea and readily admitting he was criminally responsible for shooting his victim. However, even assuming Appellant's challenge to the immunity ruling could somehow properly be considered on appeal despite the fact Appellant entered a guilty plea to the crime, the circuit court judge did not abuse his discretion in determining Appellant failed to meet his burden of establishing by a preponderance of the evidence he was entitled to immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act because the circuit court judge considered the evidence and testimony presented during the pre-trial immunity hearing, expressly determined Appellant's testimony was not credible, and made a factually-supported determination the most credible version of events was Appellant shot his unarmed victim at a time when the victim was not threatening or provoking Appellant in any manner, which was a version of events that did not entitle Appellant to immunity from prosecution under any provision of the legislation.

Appellant contends the circuit court judge erred in finding he was not entitled to immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act ("the Act"). In support of that contention, Appellant maintains he was entitled to immunity because his own testimony and statements established he shot Victim through his screen door while Victim was attempting to forcibly enter his home. Initially, Appellant waived any issue he may have had in regard to the circuit court judge's ruling on his immunity claim by subsequently entering an unconditional guilty plea and admitting he was criminally responsible for shooting Victim. However, notwithstanding Appellant's waiver of his pre-trial immunity claim by entering a guilty plea, Appellant's appellate challenge to the circuit court judge's immunity ruling is entirely without merit because the circuit court judge considered the testimony and evidence presented during the pre-trial hearing, which included Appellant's varying accounts of the shooting and efforts to fabricate exculpatory evidence, and made a factual determination Appellant shot Victim, who was unarmed, at a time when Victim was not threatening or provoking Appellant in any manner. Thereafter, upon making his factual findings regarding the incident, the circuit court judge properly applied those findings to the provisions of the Act

before concluding Appellant's actions did not entitle him to immunity from prosecution, and the circuit court judge's ruling was neither unsupported by any evidence nor controlled by an error of law. As a result, even assuming Appellant's appellate challenge to the circuit court judge's immunity ruling could somehow properly be considered on appeal, there are no proper grounds upon which to disturb the circuit court judge's ruling. Appellant's conviction should be affirmed.

A. Waiver of the Immunity Claim By Appellant's Subsequent Entry of a Guilty Plea

In South Carolina, a guilty plea has been recognized to be "a confession of guilt, made in a formal manner[,]" and such a plea "has the same effect in law as a verdict of guilty[.]" Sanders v. Leake, 254 S.C. 444, 447, 175 S.E.2d 796, 797 (1970). By entering a guilty plea, a criminal defendant admits all elements of the charged offense, waives all other non-jurisdictional defects and defenses, and leaves open for review only the sufficiency of the indictment. State v. Thomason, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (Ct. App. 2000); see State v. Snowdon, 371 S.C. 331, 333, 638 S.E.2d 91, 92 (Ct. App. 2006) ("Generally, a knowing and voluntary guilty plea waives all non-jurisdictional defects and defenses, including claims of constitutional violations."). As a result, "[a] defendant who pleads guilty usually may not later raise independent claims of constitutional violations." Gibson v. State, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999). In fact, once a guilty plea has been entered, nothing remains but for a circuit court judge to enter judgment against the defendant and determine the appropriate punishment for the admitted crime. See Boykin v. Alabama, 395 U.S. 238, 242 (1969) ("A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.").

In the case sub judice, Appellant sought immunity from prosecution prior to trial, and the circuit court judge rejected Appellant's claim of immunity. Thereafter, following the circuit court judge's ruling on Appellant's immunity claim, Appellant knowingly and voluntarily elected to enter a guilty plea to the lesser-included offenses of assault and battery of a high and aggravated nature. In entering that guilty plea, Appellant did **not** improperly condition his admission of guilt on an ability to appeal the circuit court judge's denial of his immunity claim or on any other ground. See Easter v. State, 355 S.C. 79, 81, 584 S.E.2d 117, 119 (2003) ("To be valid, a guilty plea must be unconditional."); see also State v. O'Leary, 302 S.C. 17, 18, 393 S.E.2d 186, 187 (1990) ("Guilty pleas are unconditional and, in an accused attempts to attach any condition, the trial Court must direct a plea of not guilty."); cf. State v. Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 379-380 (2004) (finding Downs's guilty plea was unconditional because Downs "never attempted to reserve the right to later deny his guilt"). Instead, Appellant solemnly admitted his actions were criminal in nature and sufficient to satisfy the elements of assault and battery of a high and aggravated nature. Thus, by unconditionally admitting he was criminally responsible for shooting Victim, Appellant waived any defects with his case and any defenses he may have had to his crime, including his claim of entitlement to immunity from prosecution. See Vogel v. City of Myrtle Beach, 291 S.C. 229, 231, 353 S.E.2d 137, 138 (1987) ("A plea of guilty constitutes a waiver of nonjurisdictional defects and defenses, including claims of violations of constitutional rights prior to the plea. **It conclusively disposes of all prior issues** including independent claims of deprivations of constitutional rights." (emphasis added and citations omitted)). Accordingly, Appellant's challenge to the circuit court judge's pre-trial denial of immunity is not properly preserved for appellate review and cannot appropriately be considered on appeal.¹¹ Cf. United States v. Adkins, 466 F. App'x 855, 857, n. 2 (11th Cir.

¹¹ In arguing he did not waive his right to appeal by entering a guilty plea, Appellant maintains an erroneous ruling

2012) (“Adkins also fleetingly mentions that he was immune from prosecution, but he presents no specific arguments in this regard, thereby abandoning the issue. In any event, he has **waived any defense of immunity by pleading guilty.**” (emphasis added and citations omitted)); Burns v. United States, 323 F.2d 269, 272-273 (5th Cir. 1963) (“[T]he guilty pleas, in the absence of proof that they were coerced or made otherwise than freely, voluntarily and with a full understanding of the consequences as well as all constitutional rights involved, constitute a waiver of a previously attained immunity.”). Appellant’s conviction should be affirmed.

B. Propriety of the Trial Judge’s Ruling on the Immunity Issue

Under the mandates of the Act, any person who uses deadly force in a manner permitted by the provisions of the Act is immune from criminal prosecution for the use of deadly force.¹² S.C. Code Ann. § 16-11-450(A). The intent of the legislature in implementing the Act was to

on an immunity claim is “akin” to a jurisdictional error and, for that reason, appears to suggest such a ruling cannot be waived by the entry of a guilty plea. Importantly though, Appellant’s immunity claim did **not** impact the circuit court’s subject matter jurisdiction over Appellant’s case as Appellant was charged with the felony offense of attempted murder, which was an offense falling within the general class of cases over which the circuit court properly had subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005) (“Circuit courts obviously have subject matter jurisdiction to try criminal matters.”). Accordingly, as the immunity claim did not impact the circuit court’s general subject matter jurisdiction over Appellant’s case, Appellant was capable of waiving – and did waive – any issue he may have had with the circuit court judge’s immunity ruling by entering a guilty plea subsequent to the pre-trial immunity hearing. See State v. Rice, 401 S.C. 330, 331-332, 737 S.E.2d 485, 485 (2013) (“[I]n South Carolina, a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights.”); see also State v. Isaac, 405 S.C. 177, 185, n. 6, 747 S.E.2d 677, 681 (2013) (“We further note that, in South Carolina, a writ of prohibition is not an appropriate remedy for criminal defendants denied immunity under the Act. This is so because it has been settled in this state from an early period that . . . if the inferior court or tribunal has jurisdiction of the person and subject-matter of the controversy, the writ of prohibition will not lie to correct errors and irregularities in procedure, or to prevent an erroneous decision There is no dispute that the circuit court qualifies as a court of general criminal jurisdiction under the South Carolina Constitution.” (citations, brackets, and internal quotations omitted)); see generally Ex parte Cannon, 385 S.C. 643, 654, 685 S.E.2d 814, 820 (Ct. App. 2009) (“**Personal jurisdiction may be waived**, but subject matter jurisdiction may not be waived.” (emphasis added)); cf. Thomason, 341 S.C. at 527, 534 S.E.2d at 710 (“[B]y pleading guilty instead of proceeding to trial and attempting to show the existence of only one offense, Thomason waived his double jeopardy claim.”).

¹² Specifically, Section 16-11-450(A) reads: “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.” S.C. Code Ann. § 16-11-450(A).

“codify the common law Castle Doctrine” and “to extend the doctrine to include an occupied vehicle and the person’s place of business.” S.C. Code Ann. § 16-11-420(A). In carrying out that intention, the legislature instructed:

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 or forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

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

S.C. Code Ann. § 16-11-440(A). Additionally, the legislature further expressly instructed the presumption of reasonable fear established by the Act was **not** applicable if the person “who uses the deadly force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity.” S.C. Code Ann. § 16-11-440(B). Furthermore, the legislature instructed:

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.

S.C. Code Ann. § 16-11-440(C).

Importantly, the question of whether a defendant is entitled to immunity under the Act must be decided prior to trial if either party moves for a determination regarding the Act’s application to a particular defendant’s case. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). “[W]hen a party raises the question of statutory immunity prior to trial, the proper

standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence.” Id. at 411, 709 S.E.2d at 665.

In an appeal from a circuit court judge’s pre-trial determination regarding a claim of statutory immunity, the appellate court reviews the circuit court judge’s ruling for an abuse of discretion. State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2015); see State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (“[T]his court reviews [a claim of immunity under the Act] under an abuse of discretion standard of review.”). An abuse of discretion occurs when the circuit court judge’s conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010); see State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016) (“An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.”); see also Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) (“In appeals of pretrial rulings, this Court is ‘bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.’ ” (citation omitted)). If **any** evidence supports the circuit court judge’s immunity determination, an appellate court must affirm that determination. Curry, 406 S.C. at 372, 752 S.E.2d at 267; see also Douglas, 411 S.C. at 316, 768 S.E.2d at 237 (“[T]he abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court’s assessment of witness credibility.”).

In the case at bar, notwithstanding the fact Appellant admitted the circuit court judge correctly found he was not entitled to immunity from prosecution by entering a guilty plea and openly acknowledging he shot Victim in an unlawful manner, the circuit court judge did not abuse his discretion in finding Appellant failed to establish he was entitled to immunity pursuant

to the Act by the required showing of a preponderance of the evidence, and the circuit court judge's factual determinations regarding the incident were fully supported by the evidence and testimony presented during the pre-trial hearing. See Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) ("A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed."). Accordingly, there is no legitimate basis to reverse the circuit court judge's decision to deny Appellant's request for immunity.

Critically, after hearing the testimony presented during the pre-trial hearing and considering the various statements made in regard to the shooting, the circuit court judge determined Appellant shot Victim, whom he concluded was unarmed, three times through a screen door following an argument between the two that was merely verbal at a time when the Victim was not threatening or provoking Appellant in any manner. Furthermore, based on the fact Appellant provided numerous inconsistent statements about the incident and admittedly attempted to fabricate exculpatory evidence to make it appear as if he was engaged in an act of self-defense at the time of the shooting, the circuit court judge expressly determined Appellant was not credible in regard to what had occurred. See State v. Rosier, 312 S.C. 145, 149, 439 S.E.2d 307, 310 (Ct. App. 1993) ("The determination of credibility must be left to the trial judge who saw and heard the witnesses and is therefore in a better position to evaluate their veracity.").

Importantly, those key findings and determination were fully supported by the evidence and testimony presented during the pre-trial hearing, including the testimony regarding Victim's statement about the shooting, Appellant's numerous shifting and inconsistent statements about the incident, and Appellant's attempt to fabricate exculpatory evidence, and, as a result, are binding on appeal. See Reed, 333 S.C. at 684, 511 S.E.2d at 400 ("In appeals of pretrial rulings,

this Court is ‘bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.’ ” (citation omitted)); see also State v. Johnson, 413 S.C. 458, 467, 776 S.E.2d 367, 371 (2015)

(“Credibility findings are treated as factual findings, and therefore, the appellate inquiry is limited to reviewing whether the trial court’s factual findings are supported by any evidence in the record.”). Moreover, in light of those factual findings and determination, the circuit court judge correctly concluded Appellant was **not** entitled to immunity from prosecution pursuant to the provisions of the Act.

Specifically, in regard to Section 16-11-440(A), the circuit court judge correctly determined Appellant was not entitled to immunity pursuant to that provision because the facts found to be most credible by the circuit court judge did not establish Victim was unlawfully or forcibly entering Appellant’s residence, had unlawfully or forcibly entered Appellant’s residence, or was attempting to remove another person against his will from the residence at the time Appellant shot him. Instead, at the time the shooting occurred, the circuit court judge concluded Appellant simply shot Victim, who was posing no threat to Appellant, after the two had engaged in a verbal argument. Under those circumstances, Appellant failed to establish he was entitled to immunity pursuant to Section 16-11-440(A).¹³ See S.C. Code Ann. § 16-11-

¹³ Moreover, Appellant could not avail himself of the presumptions of Section 16-11-440(A) because he was engaged in unlawful activity by possessing a sawed-off rifle and was using his residence to further unlawful activities by storing the sawed-off rifle and crack cocaine there. See S.C. Code Ann. § 16-11-440(B) (instructing the presumptions established by Section 16-11-440(A) do **not** apply if the person “who uses deadly force is engaged in an unlawful activity or is using the dwelling, residence, or occupied vehicle to further an unlawful activity”); see also S.C. Code Ann. § 16-23-230 (mandating it is unlawful “for a person to store, keep, possess, or have in possession or permit another to store, keep, possess, or have in possession a machine gun or firearm commonly known as a machine gun, military firearm, sawed-off shotgun, or sawed-off rifle” except in limited circumstances); S.C. Code Ann. § 44-53-375 (criminalizing, amongst various things, the possession of crack cocaine); see generally In re Tracy B., 391 S.C. 51, 71, 704 S.E.2d 71, 81 (Ct. App. 2010) (“Although [unlawful possession of a weapon] alone does not automatically bar a self-defense charge, it is evidence of an unlawful activity which can preclude the assertion of self-defense.”); cf. Dawkins v. State, 252 P.3d 214, 217-218 (Okla. Crim. App. 2011) (“Dawkins had an illegally modified weapon – his sawed-off shotgun – and used it to shoot Sanford. At the time he used deadly force, he was engaged in an unlawful act, and he does not get the benefit of the [“stand your ground”] statute. . . .

440(A) (establishing a presumption of reasonableness in the use of deadly force where the person against whom deadly force is used is in the process of unlawfully and forcefully entering or has unlawfully or forcibly entered a residence or is attempting to remove another person against his will from a residence).

Likewise, in regard to Section 16-11-440(C), the circuit court judge properly determined Appellant was not entitled to immunity pursuant to that provision because the circuit court judge concluded Victim was unarmed and was **not** provoking or threatening Appellant in any way at the time of the shooting. Under those circumstances, Appellant was not under attack and, as no force was being directed towards him, was not meeting force with force when he shot Victim. As a result, Appellant could not have reasonably believed the force he used against Victim was necessary to prevent death or the infliction of great bodily injury upon himself or to prevent the commission of any violent crime. Accordingly, Appellant failed to establish he was entitled to immunity pursuant to Section 16-11-440(C). See S.C. Code Ann. § 16-11-440(C) (permitting a person who is attacked in “another” place he has a right to be to stand his ground and meet force with force so long as he reasonably believed the use of deadly force was necessary to prevent death or great bodily injury or to prevent the commission of a violent crime).

In arguing the circuit court judge erred in denying his motion for immunity, Appellant entirely ignores the circuit court judge’s factual findings regarding what occurred and contends he was entitled to immunity pursuant to Section 16-11-440(A) because his own testimony allegedly established Victim was forcibly attempting to enter his home at the time of the

Dawkins asks this Court to read into the statute a nexus requirement between the unlawful act and the use of deadly force. He suggests that, under such a reading, the type of weapon he used had nothing to do with his use of deadly force and there is no nexus between his unlawful act (possession of an illegal weapon) and the crime. . . . The statute neither specifies a type of unlawful activity nor requires that it be connected to the use of defensive force. That is, the statute contains no nexus requirement. This Court should not interpret the statute to require a nexus where such a requirement is neither included nor necessary to effect the Legislature’s intent. . . . The Legislature has the power to do so. This Court should not attempt to create such distinctions.”).

shooting. Importantly though, the circuit court judge specifically rejected Appellant's contentions regarding the facts of what occurred, including his claim Victim was forcibly attempting to enter his home, and accepted the evidence and testimony establishing Appellant shot the unarmed victim at a time when he was posing no immediate threat to Appellant or Appellant's home. Critically, the circuit court judge's acceptance of that version of events as the most credible was fully supported by the evidence, and, under that version of events, Appellant was **not** entitled to immunity from prosecution. See State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997) ("In criminal cases, appellate courts are bound by fact findings in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law.").

Thus, even though several of the different versions of the shooting presented by Appellant could have potentially entitled him to immunity from prosecution if any of those versions had been found to be credible by the circuit court judge, the circuit court judge did not abuse his discretion in reaching a determination supported by the evidence but inconsistent with Appellant's preferred version of the facts. See Johnson, 413 S.C. at 468, 776 S.E.2d at 372 ("[T]here is no requirement under the law that the trial court must believe a criminal defendant's version of events."); cf. Curry, 406 S.C. at 371, 752 S.E.2d at 266 (finding the General Assembly did not intend for a circuit court judge considering an immunity issue to be limited to accepting the accused's version of the underlying facts). Because the factually-supported version of events accepted by the circuit court judge did not entitle Appellant to immunity from prosecution, the circuit court judge committed no error in denying Appellant's request for immunity after finding Appellant failed to meet his burden of establishing he was entitled to immunity from prosecution by a preponderance of the evidence. See Duncan, 392 S.C. at 411, 709 S.E.2d at 665 ("[W]hen a

party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence.”); see generally State v. Lee, 274 S.C. 372, 375, 264 S.E.2d 418, 419 (1980) (“We cannot say that [the trial judge’s] finding that the defendant was capable of standing trial was without evidentiary support or against the preponderance of the evidence and, accordingly, we find no error on the part of the judge in ordering the defendant to trial.”). Appellant’s conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit

BY: 

Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 24, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chester County
Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No. 2015-000721

RECEIVED
AUG 24 2016
SC Court of Appeals

THE STATE,

Respondent,

vs.

BOBBY RANDOLPH SIMS,

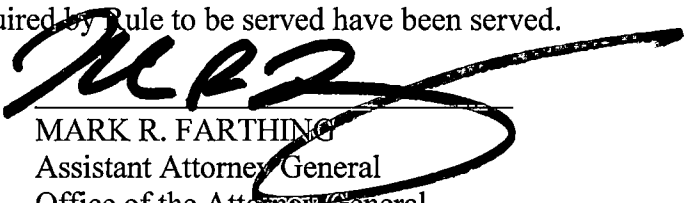
Appellant.

PROOF OF SERVICE

I, Mark R. Farthing, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 24th day of August, 2016.


MARK R. FARTHING
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211



ALAN WILSON
ATTORNEY GENERAL

August 24, 2016

RECEIVED

AUG 24 2016

SC Court of Appeals

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Bobby Randolph Sims – Appellate Case No. 2015-000721

Dear Mr. Alexander:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services