THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

John C. Hayes, III, Circuit Court Judge



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Unpublished Opinion No. 2018-UP-169 - Filed April 25, 2018

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Appellate Case No. 2015-001810

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THE STATE, .....RESPONDENT

v.

MARQUEZ DEVON GLENN, .....APPELLANT.

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**RETURN TO MOTION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC***

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On April 25, 2018, this Court issued an unpublished opinion that affirmed Appellant Marquez Devon Glenn's convictions for assault and battery of a high and aggravated nature (ABHAN) and possession of a weapon during the commission of a violent crime. *State v. Glenn*, Op. No. 2018-UP-169 (S.C. Ct. App. filed April 25, 2018). On May 8, 2018, Appellant submitted a motion for rehearing or rehearing *en banc* pursuant to Rules 219 & 221(a), SCACR. By letter dated May 24, 2018, this Court asked Respondent (the State) to file a return to the motion. This return to motion for rehearing and suggestion for rehearing *en banc* now follows.

## Procedural History

Appellant was indicted at the July 2014 term of the grand jury for Greenville County for attempted murder (count 1) and possession of a weapon during the commission of a violent crime (count 2) (2013-GS-23-006789). He was represented by Christopher Brumback, Esquire, and Spencer Langley, Esquire, and the State was represented by assistant solicitor Ryan Holloway of the Thirteenth Circuit Solicitor's Office. On August 3, 2015, the case was called for trial at the Greenville County Courthouse before the Honorable John C. Hayes, III. (R.p.19). In regard to the specific testimony, evidence, and arguments presented to the lower court, the State hereby incorporates by reference the statement of facts set forth in the Final Brief of Respondent.

At the call of the case, Appellant made a motion to be granted immunity from prosecution pursuant to the Protection of Persons and Property Act (S.C. Code Ann. §§ 16-11-410 to -450) (Supp. 2012) (the Act). After the parties argued their respective positions, the jury was qualified and selected. Prior to the jury being sworn, the trial court conducted a pretrial immunity hearing pursuant to the procedures set forth in *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). At the close of that hearing, after taking testimony, observing evidence, and hearing additional arguments from both sides, the trial court found that Appellant had failed to establish he was entitled to immunity under the Act because, at the time of the shooting, he was not in a place he had a right to be. The trial court denied Appellant's motion to dismiss the charges and the case proceeded to trial. (R.p.22-p.231).

After hearing the evidence and the trial court's charge on the law—which included a charge on self-defense—the jury found Appellant guilty beyond a reasonable doubt of ABHAN and possession of a weapon during the commission of a violent crime. Citing mitigating

circumstances, the trial court sentenced Appellant to twelve (12) years' imprisonment for ABHAN and five (5) years' concurrent imprisonment for possession of a weapon during a violent crime. (R.p.246-p.250; p.279-p.280; 281-282). Appellant filed a notice of intent to appeal the denial of his motion for immunity and his conviction, and the parties filed briefs in support of their respective positions. This Court heard oral arguments on February 6, 2018, and on April 25, 2018, filed the unpublished opinion affirming Appellant's convictions and sentence.

**Motion for Rehearing**

Appellant now seeks rehearing on the ground that this Court overlooked several of his main arguments, resolution of which he claims would result in a decision in his favor. First, Appellant contends this Court failed to address his argument that to strip victims of their right to defend themselves and to statutory immunity where their unlawful presence was not the **proximate cause** of the incident would be unreasonable, illogical, inconsistent with the intent of the Act, and contrary to the interests of justice and existing case law concerning individuals' rights to defend themselves. He argues that even if this Court concluded he was a trespasser, it "should nonetheless have moved to the second step of the analysis . . . to determine whether [his] "unlawful act" . . . was the proximate cause of the [incident]. Second, he contends the Court overlooked his argument that he was **not a trespasser** because the owner of the apartment complex who placed him on trespass notice had sold the property and he was never placed on trespass notice by the subsequent owner. The State submits these arguments are without merit and do not support his request for rehearing. This Court applied the proper standard of review in considering the issues raised by Appellant, affirming the trial court's denial of immunity, and affirming Appellant's convictions and sentence.

## Standard of Review

The appellate court reviews the trial court's pretrial determination of immunity for an abuse of discretion. *State v. Curry*, 406 S.C. 364, 370,752 S.E.2d 263, 266 (2013). In criminal cases, the appellate court sits to review errors of law only. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by *any evidence*. *Wilson*, 345 S.C. at 6, 545 S.E.2d at 829 (emphasis added); *see also State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." *State v. Sheldon*, 344 S.C. 340, 342, 543 S.E.2d 585, 585-86 (Ct. App. 2001). An abuse of discretion occurs only when the trial court's conclusions lack evidentiary support or are controlled by an error of law. *State v. Scott*, 414 S.C. 482, 486, 779 S.E.2d 529, 531 (2015) (quoting *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)); *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.'" (quoting *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)).

**The Protection of Persons and Property Act**

The subsection of the Act which creates immunity provides:

> A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force, unless the person against whom deadly force was used is a law enforcement officer . . . .

S.C. Code Ann. § 16-11-450 (Supp. 2012). A claim of immunity under the Act must be determined pretrial and the defendant has the burden of proving entitlement to immunity by a preponderance of the evidence. *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity. *Curry*, 406 S.C. at 371, 752 S.E.2d at 266. This includes each element of self-defense, save the duty to retreat. *Id.* at 372, 752 S.E.2d at 266-67 ("[I]mmunity is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.")

Section 16-11-440 sets forth the circumstances under which the Act allows the use of deadly force. It creates a presumption of reasonable fear of imminent peril of death or great bodily injury when a person is subject to an unlawful or forceful entry of his or her dwelling, residence, or occupied vehicle, or when a person is subject to removal or attempted removal against his or her will from a dwelling, residence, or occupied vehicle, and it establishes certain exceptions to this presumption. S.C. Code § 16-11-440(A) & (B) (Supp. 2012). The Act then provides:

> (C) 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) (Supp. 2012) (emphasis added). Appellant's overarching contention in this appeal was that he was attacked in a place where he had a right to be, and that the trial court erred in finding he was not. As noted above, he now argues this Court overlooked several of his main arguments in this appeal, resolution of which he claims would result in a decision in his favor. The State disagrees.

**Analysis / Discussion**

In regard to Appellant's first argument, he appears to mischaracterize the basis upon which the trial court denied immunity and upon which this Court determined immunity was properly denied. He suggests the request for immunity was denied solely because his act of trespassing was an "unlawful act." This is not the case. While being "engaged in an unlawful activity" can be a reason to exclude a person from a grant of immunity under the Act, and would have been a valid basis for doing so here, failing to be "in another place where [the person] has a right to be" is a separate and independent bar to immunity.

Here, the trial court specifically denied immunity because, as a trespasser, Appellant was not in a place he had a right to be. Immunity was not expressly denied because, as a trespasser, Appellant was also engaged in unlawful activity. Appellant's proximate cause argument is based on case law in South Carolina recognizing that, in the context of self-defense, a person may be acting lawfully in self-defense even where engaging in an unlawful activity, such as unlawfully possessing a weapon. Because the trial court's decision was based not on Appellant's unlawful activity, but on the fact that his particular unlawful activity happened to put him in a place he had no right to be, no discussion of proximate cause was relevant or required. In any event, the Act itself makes clear it is intended only to provide immunity to "law-abiding citizens." This intent

informs the breadth of the Act's language barring immunity for someone "engaged in an unlawful activity." Thus, even if Appellant's unlawful activity was the basis of the trial court's ruling, it nevertheless was properly affirmed. The rules of self-defense in the context of a jury determining whether the state has proven guilt beyond a reasonable doubt are inapplicable in the context of a judicial grant of immunity from prosecution under the Act.

In regard to Appellant's second argument, rather than overlooking the argument that Appellant was not a trespasser, this Court instead addressed it head-on, finding "Glenn was not in a place where he had a right to be **because his status at all times was that of a trespasser**, regardless of Shericka Duncan's invitation to Glenn to come to Spring Grove." The Court noted the existence of evidence in the record reflecting that a sheriff's deputy issued a verbal trespass notice and placed Appellant on Spring Grove's no trespass list after the deputy found Glenn loitering. The Court concluded this demonstrated Appellant knew he was prohibited from being on the grounds and, as a result, could not claim to believe he had a right to be at Spring Grove. Finally, this Court found Appellant was not reasonably egressing Shericka's residence at the time of the incident. For all of these reasons, the timing of Appellant's original placement on a no trespass list by Spring Grove apartments, and whether that notice carried over to a subsequent owner of Spring Grove after the alleged sale of the apartment complex is of no moment. By finding Appellant was in fact a trespasser at the time of the incident, this Court did not overlook any of Appellant's claims that he was not a trespasser.

As set forth in his brief on appeal, Appellant argued the trial court erred in denying immunity on grounds that he did not have the right to be at Spring Grove because S.C. Code section 16-11-410's "invocation of location rights refers to relative

rights versus an attacker and does not contemplate an individual's forfeiture of protections during lawful egress from a posted property." He contended the trial court's reasoning for denying immunity would wreak havoc on the rights of people to stand their ground and would run counter to the General Assembly's intent to "loose an innocent person's right to defend themselves from the archaic and technical limitations previously placed on the right to self-defense." (Brief of Appellant, p.32-p.34). While this argument is not preserved for appellate review because it was not specifically raised to and ruled upon by the trial court. *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94, it also is without merit. The only person who wreaked havoc during the incident in question was Appellant, when he pulled out his unlawfully concealed pistol and started shooting instead of attempting to retreat, which resulted in his paralyzing an unarmed man who was with the person who allegedly punched Appellant in the head. Contrary to Appellant's assertion, the "archaic and technical" limitation previously placed on the right to self-defense, i.e., the duty to retreat, has not been eliminated by our Legislature in every situation. Instead, the Legislature deliberately restricted the circumstances in which a person does not have a duty to retreat. One of those restrictions was to only make immunity possible for someone "in another place where he has a right to be." As found by this Court, Appellant was not egressing Shelricka's apartment and was not in a place where he had a right to be. The trial court properly denied immunity on this ground. This Court properly affirmed, and rehearing should be denied.

**Suggestion for Rehearing *En Banc***

Appellant further suggests rehearing *en banc* on grounds that this case involves a question of exceptional importance. He claims there are several questions of first impression

raised by this appeal and that "the outcome of this appeal will directly and materially impact every South Carolinians' right and ability to defend themselves and their property." Appellant argues that as it stands, this Court's opinion will "undoubtedly have a chilling effect" on these rights and abilities under the Act. He states: "Determining whether the General Assembly's expansion and codification of the doctrine of self-defense was intended to loose an innocent person's right to defend themselves from the archaic and technical geographic limitations previously placed on the right to self-defense is certainly a question deserving of *en banc* consideration." The State respectfully submits the reasons given by Appellant do not render this proceeding exceptionally important or particularly compelling for *en banc* review. Indeed, as noted in the heading of the opinion itself, as an unpublished opinion it has no precedential value and should not be cited or relied upon as precedent. Therefore, it neither directly nor materially impacts the rights or abilities of any South Carolinians to defend themselves under the plain and ordinary meaning of the language of the Act. This Court examined the Act in light of this language and agreed with the circuit court's logical interpretation to find Appellant did not have a right to be at Spring Grove at the time of the incident. The opinion was based on the specific facts and circumstances of Appellant's case and will not prohibit or prevent South Carolinians from seeking immunity under the Act or pursuing self-defense at trial, even if they are attempting to raise the same legal arguments put forth by Appellant in this appeal.

**Conclusion**

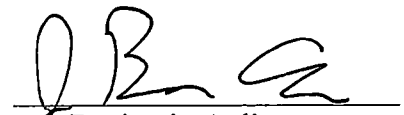
WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court deny Appellant's motion for rehearing, deny Appellant's suggestion for rehearing *en banc*, and let stand the unpublished opinion affirming Appellant's convictions and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit

BY: 

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Columbia, South Carolina
June 1, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
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**PROOF OF SERVICE**

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I, Angela Bennett, Legal Coordinator, hereby certify that I have served the within *Return to Motion for Rehearing and Suggestion for Rehearing En Banc*, dated June 1, 2018, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

Christopher T. Brumback, Esquire
Spencer D. Langley, Esquire
1 Augusta Street, Suite 301
Greenville, SC 29601

I further certified that all parties required by Rule to be served have been served. This 1st day of June, 2018.

Angela Bennett
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ALAN WILSON
ATTORNEY GENERAL

June 1, 2018



Christopher T. Brumback, Esquire
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State v. Marquez Devon Glenn
Appellate Case No. 2015-001810

Dear Mr. Brumback and Mr. Langley:

I am enclosing one (1) copy of the Return to Motion for Rehearing and Suggestion for Rehearing *En Banc* in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

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