

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

AUG 16 2018

Appeal from Sumter County
Honorable W. Jeffrey Young, Circuit Court Judge
Appellate Case No. 2015-001679

SC Court of Appeals

The State,

Respondent,

vs.

Jeffrey Dana Andrews,

Appellant.

RETURN TO PETITION FOR REHEARING

On July 18, 2018, this Court published an opinion which affirmed the first two issues raised on appeal by Appellant, but reversed Appellant's convictions as to the third issue. The State respectfully submits this Court incorrectly reversed Appellant's convictions based on the third issue raised on appeal. The State petitioned this Court for rehearing in regard to the third issue on July 23, 2018. Appellant submitted a Petition for Rehearing on August 2, 2018 which only challenged this Court's holding on the first issue raised on appeal. Specifically, Appellant asks this Court to reconsider its holding that the trial court did not abuse its discretion in denying Appellant's request for immunity under the Protection of Person's and Property Act (the Act). The State respectfully asks this Court to deny Appellant's Petition for Rehearing regarding the trial court's decision in the immunity hearing pursuant to Rule 221(a), SCACR, because this Court did not overlook or misapprehend any findings of fact or conclusions of law that would warrant further consideration of this matter. This Court's findings of fact and conclusions of law regarding the first issue are entirely supported by the Record and the case law cited in the

Court's opinion. Indeed, in regard to the first issue, this Court employed a straightforward application of existing precedent to the facts and circumstances of Appellant's case in finding the trial judge did not abuse his discretion by denying Appellant immunity under the Act. Accordingly, this Court should deny Appellant's Petition for Rehearing on the first issue raised on appeal.

Appellant asks this Court to reconsider its holding that the trial court did not abuse its discretion in denying Appellant immunity under the Act. In support of his petition, Appellant maintains that the trial judge somehow disregarded the burden of proof that Appellant was required to meet to be entitled to immunity under the Act. Specifically, Appellant complains the trial court disregarded the burden of proof by noting that Appellant's testimony conflicted with Erika Andrew's testimony. Furthermore, Appellant contends the trial judge did not evaluate the credibility of the witnesses presented during the immunity hearing. On the contrary, the trial judge correctly held that Appellant had not met his burden of proof by a preponderance of the evidence. Additionally, the trial judge specifically noted that he considered witness credibility in his findings.

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "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." State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016). The Court will "not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." State v. Mitchell, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009). "Consistent

with the Castle Doctrine and the test 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. This includes all elements of self-defense, save the duty to retreat." Curry, 406 S.C. at 371, 752 S.E.2d at 266.

Here, the trial judge considered the testimony and credibility of each witness in reaching his conclusion that Appellant had not proven he was entitled to immunity under the Act. The trial judge demonstrated that he was well aware of the correct burden of proof when he ruled on Appellant's motion for immunity:

The Court: The burden clearly is by just the preponderance of the evidence. Not the normal criminal case law beyond a reasonable doubt. But in order to receive the immunity that is established under these acts, it's clear there must be a case, a strong case for self-defense. And in this situation from the testimony, there's a lot of questions that are unanswered thus making a clear case for self-defense a question for a jury to decide. The testimony in this case from the witnesses and from [Appellant] have been at least very inconsistent. The testimony has been conflicting as to what the different witnesses saw and what happened on the night in question. And therefore, I find that [Appellant] has not met [his] burden of proving to me by a preponderance of the evidence, and therefore a request for immunity is hereby denied.

(R. 204, lines 4-21). The trial judge also explicitly noted that he considered witness credibility in his findings. The trial judge noted: "We don't count witnesses to determine whether or not I'll believe somebody. I listen to the testimony. And make it more credibility (sic)" (R. 201, lines 20-22). Thus, the trial judge appropriately weighed the evidence and ultimately determined Appellant did not prove that he was entitled to immunity by a preponderance of the evidence.

This Court correctly recognized that this case is similar to State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), but distinguishable from State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). In Curry, our Supreme Court considered a trial court's denial of immunity under the Act where Curry's testimony differed substantially from the State's eyewitnesses as to whether Curry

had acted in self-defense. Curry, 406 S.C. at 369, 752 S.E.2d at 265. Because the testimony of the State's witnesses differed considerably from Curry's, the court was presented with "a quintessential jury question, which, most assuredly is not a situation warranting immunity from prosecution." Curry, 406 S.C. at 372, 752 S.E.2d at 267.

In contrast, in Duncan the Supreme Court considered a trial court's grant of immunity under the Act where witness testimony was consistent. Duncan testified that he acted in self-defense and his testimony was corroborated by his girlfriend. Duncan, 392 S.C. at 407, 709 S.E.2d at 663. Not only was Duncan's testimony corroborated by his girlfriend, but it was uncontradicted by any other witnesses because Duncan's girlfriend was the only witness to the shooting other than Duncan. Id.

Here, this Court correctly held that the trial judge acted within his discretion in denying Appellant immunity under the Act. Like the facts in Curry, Appellant's version of events was directly contradicted by an eyewitness to the shooting. Appellant maintains this case is identical to the factual scenario in Duncan, but in making his claim, Appellant ignores the contradictory testimony of Erika Andrews. Erika testified that Victim was in fact leaving Appellant's residence when Appellant shot him without provocation. (R. 165).

Appellant suggests the trial judge abused his discretion simply because he didn't find Appellant's version of events to be more credible than Erika's. Indeed, Appellant also argues the trial judge abused his discretion because Appellant and his father, Robert Andrews, told similar stories and therefore must have been more credible than Erika Andrews. Appellant misapprehends the role of the trial court and the burden of proof under the Act. Indeed as the trial judge correctly noted, a trial court does not count the witnesses from either side to determine which side has met their burden of proof. A trial judge sits as a finder of fact to balance the

weight of the evidence presented by both sides. If a defendant produces enough evidence to tip the metaphorical scale in his favor, he would be entitled to immunity under the act. If the scale is equally weighed or tips in favor of the State, a defendant is not entitled to immunity under the Act. Here, Appellant did not produce enough evidence to entitle himself to immunity under the Act by a preponderance of the evidence. The trial judge reached this conclusion based on evidence presented in the record. Accordingly, the trial judge did not abuse his discretion in denying Appellant's motion for immunity under the Act. This Court should deny Appellant's petition for rehearing on issue one.

Conclusion

Based on the foregoing arguments and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court deny Appellant's Petition for Rehearing on issue one.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
August 16, 2018

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Return to Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, 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 16th day of August, 2018.


SALLY ELLISON
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

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VIA HAND DELIVERY

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Jeffrey Dana Andrews,
Appellate Case No. 2015-001679

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of the Return to Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

Scott Matthews
Assistant Attorney General
S.C. Bar No. 101464

Enclosures

cc: Robert M. Dudek, Esquire (2 copies enclosed)
Victim's Services (enclosure)