STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Chester County
Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RECEIVED

OCT 03 2016

SC Court of Appeals

BOBBY RANDOLPH SIMS,

APPELLANT.

APPELLATE CASE NO. 2015-000721

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial court's denial of immunity in a hearing pursuant to the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, *et seq.*, is appealable after a defendant pleads guilty to a lesser-included offense?

2.

Whether the trial court erred in denying appellant immunity under the Protection of Persons and Property Act because appellant fired his weapon at his attacker from inside his house and through his screen door?

STATEMENT OF THE CASE

On July 8, 2014, a Chester County grand jury indicted appellant for attempted murder. R. 146. On December 22, 2014, appellant filed a motion to dismiss pursuant to the Protection of Persons and Property Act. R. 147. On January 5, 2015, the State filed a reply to the motion. R. 152. On January 15, 2015, an immunity hearing was held before the Honorable Brian M. Gibbons. R. 1. Karen Friar represented the State. R. 1. Devon Nielson represented appellant. R. 1. On January 16, 2015, Judge Gibbons denied appellant's motion to dismiss. R. 115, ll. 1 – 7. On March 19, 2015, appellant pled guilty before Judge Gibbons to ABHAN. R. 118, l. 1 – 3, l. 23. Judge Gibbons sentenced appellant to sixteen years' imprisonment. R. 143, ll. 11 – 14.

Appellant timely filed a Notice of Appeal. R. 176. Appellant filed the explanation for an appeal from a guilty plea required by Rule 203(d)(1)(B)(iv). R. 173. On June 22, 2015, this Court issued a letter allowing the appeal to proceed and directing appellant to order the transcript. R. 178. This appeal follows.

ARGUMENT

1.

The trial court's denial of immunity in a hearing pursuant to the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, *et seq.*, is appealable after a defendant pleads guilty to a lesser-included offense.

Appellant was indicted for attempted murder. R. 146. After an adverse ruling that he was not entitled to immunity under the Protection of Persons and Property Act (the "PPPA" or the "Act"), appellant pled guilty to the lesser-included offense of ABHAN. R. 118, l. 1 – 3, l. 23. In this appeal, appellant raises the novel issue in South Carolina whether a defendant who pleads guilty to a lesser-included offense may appeal the trial court's denial of immunity.

Appellant recognizes that South Carolina has not yet recognized conditional guilty pleas. See State v. Rice, 401 S.C. 330, 331, 737 S.E.2d 485, 485 (2013); State v. Truesdale, 278 S.C. 368, 296 S.C. 528 (1982). In Rice, the Supreme Court stated, "South Carolina does not recognize conditional guilty pleas." Rice at 331, 737 S.E.2d at 485. The Rice Court stated the rule that "a guilty plea constitutes a waiver of nonjurisdictional defects and claims of violations of constitutional rights." Id. at 331-32, 737 S.E.2d at 485-86. However, the Court recognized that "most states, all federal courts, military courts, and the District of Columbia permit conditional guilty pleas in some manner." Id. at 332, 737 S.E.2d at 486. The Court also recognized that in many of these states, conditional guilty pleas were allowed through statutes and court rules. Id.

The PPPA presents a different question than South Carolina's previous rejection of conditional guilty pleas. The Legislature found "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. S.C. Code Ann. § 16-11-420(B). A citizen who uses deadly force and falls under the protection of the PPPA "is immune from criminal prosecution." S.C. Code Ann. § 16-11-450(A).

It is this statutory immunity conferred by the Legislature that distinguishes post-plea appeals under the PPPA from conditional guilty pleas that have been consistently rejected by our appellate courts. Unlike judicial errors which are not appealable after a guilty plea, an adverse ruling at an immunity hearing is akin to a jurisdictional error, from which appeals are allowed. If a person is entitled to immunity, then the entire prosecution—beginning with the indictment—is *void ab initio*. "[W]e find that, by using the words 'immune from criminal prosecution,' the legislature intended to create a true immunity, and not simply an affirmative defense." State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). "We agree with the circuit court that the legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act." Id.

The Supreme Court's decision denying the right to an interlocutory appeal from a decision denying immunity does not bar this appeal. See State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013). In Isaac, the Court stressed that an order denying immunity was not appealable because it was not "a final order in the case." Isaac at 182, 747 S.E.2d at 679. The Court cited many examples denying a defendant the right to an interlocutory appeal for the general principle that "a criminal defendant may not appeal until sentence is imposed." Id. at 183-84, 747 S.E.2d at 680.

Here, unlike in Isaac, a sentence has been imposed. This appeal is not interlocutory. Furthermore, appellant did not waive the immunity issue at the plea hearing. When asked at

the plea hearing about guilt, appellant referenced the evidence and arguments made at the immunity hearing. He pled guilty to a lesser included offense—ABHAN—and admitted that he did intend to shoot his attacker through his screen door. R. 123, l. 4 – 9, l. 2. Judge Gibbons, who presided over the immunity hearing, accepted appellant's plea. R. 125, ll. 7 – 11. This Court should allow this appeal and determine whether appellant was wrongfully denied immunity.

2.

The trial court erred in denying appellant immunity under the Protection of Persons and Property Act because appellant fired his weapon at his attacker from inside his house and through his screen door.

Appellant testified that he shot Nantonio Byrd ("Byrd") through the screen door of appellant's front porch to prevent Byrd from attacking him in his own home. R. 72, l. 7 – 74, l. 22. Appellant knew that Byrd had a prior history of violence. R. 69, ll. 6 – 24. Appellant had seen Byrd pull a gun on people in appellant's yard before. Tr. 69, l. 23 – 70, l. 3. Appellant had seen Byrd kick in people's doors. R. 69, ll. 16 – 24.

Appellant had known Byrd since Byrd was fifteen years old. R. 69, ll. 11 – 12. Appellant owed Byrd $28.00 and Byrd came to appellant's house to visit and collect his money. R. 64, l. 23 – 65, l. 14. The two men quarreled because Byrd demanded $5.00 in interest. R. 66, ll. 4 – 18. They also argued over fertilizer that appellant had for sale. R. 67, l. 7 – 68, l. 5.

The argument became physical on appellant's front porch. R. 68, l. 3 – 69, l. 10. Appellant paid Byrd the money and told him to leave. R. 68, l. 3 – 69, l. 10. As Appellant put it, "the more I told him to leave the more angry he got." R. 68, ll. 16 – 18. Byrd refused

to leave. R. 68, ll. 14 – 18. The two men bumped chests. R. 68, ll. 21 – 25. Appellant could tell Byrd had been drinking. R. 68, ll. 21 – 25. Appellant again told Byrd to leave and that he would call 911 if he continued to refuse. R. 68, l. 21 – 69, l. 5.

The two men continued to tussle. R. 70, l. 3 – 71, l. 19. Byrd acted "like a wild man," and shouted expletives at appellant. R. 70, l. 3 – 71, l. 19. Appellant eventually pinned Byrd on the ground and again told him to leave. R. 70, l. 3 – 71, l. 19. Appellant went inside his house and Byrd went toward his truck. R. 71, ll. 13 – 21.

As Appellant was "half on the porch," Appellant saw Byrd walk back toward his house. R. 72, ll. 7 – 17. Byrd had his hands in his pocket where appellant knew Byrd kept a "chrome plated nine millimeter." R. 72, ll. 7 – 17. Appellant went back in the house and latched the screen door. R. 72, l. 7 – 73, l. 12.

Byrd stepped on appellant's front porch. R. 73, l. 13 – 74, l. 24. Byrd reached for the door and appellant thought he saw Byrd pull something chrome out of his pocket. R. 73, l. 13 – 74, l. 24. Appellant told him to "get the fuck away from here now," and Byrd ripped the door. R. 73, l. 13 – 74, l. 24.

Appellant fired three shots. R. 74, ll. 19 – 22. The police corroborated appellant's testimony on this point. R. 46, l. 12 – 47, l. 20. They found three holes in appellant's screen door. R. 46, l. 12 – 47, l. 20. The investigators determined from the direction of the fibers in the screen that the bullets were fired "from the inside outward." R. 46, l. 12 – 47, l. 20.

Byrd did not testify at the immunity hearing, but the parties stipulated to hearsay. R. 5, ll. 10 – 14. Officer Christopher Reynolds relayed Byrd's version. R. 17, l. 9 - 9, l. 17. In Byrd's version, Sims was irate, went into the house and came out with a gun and started

shooting. R. 17, l. 9 - 9, l. 17. Byrd claimed his two children were with him and he was shot protecting them. R. 17, l. 9 - 9, l. 17.

Appellant admitted he was scared after the shooting and that he was not immediately truthful with the police. R. 75, ll. 10 – 23. R. 77, ll. 19 – 21. Appellant had no criminal record and had never been to jail. R. 75, ll. 17 – 25. Appellant originally told the police that two men robbed him. R. 97, ll. 17 – 25. He also admitted that he put knives in the yard to bolster his original story. R. 98, ll. 1 – 9. However, appellant ultimately told the truth to the police about the encounter and led them to the gun. R. 76, l. 13 – 78, l. 11. Officer Reynolds admitted that in every one of appellant's statements, he insisted that he told Byrd to leave. R. 20, l. 23 – 21, l. 11. Officer Reynolds also testified that that holes inside the screen door corroborated appellant's testimony that he shot from inside the house. R. 24, l. 13 – 25, l. 15.

After the close of testimony at the immunity hearing, appellant cited Duncan and argued that appellant was entitled to immunity because he told Byrd to leave, he was afraid of Byrd, and appellant had no duty to retreat while in his own home. R. 105, l. 9 – 108, l. 24. Appellant argued that the different versions of events that appellant gave the police did not matter on the essential facts that entitled appellant to immunity. R. 105, l. 9 – 108, l. 24. The State argued that because appellant admitted smoking crack earlier in the day and that the rifle he used was sawed off, appellant was "engaging in two unlawful activities" that deprived him of immunity. R. 110, ll. 5 – 21. Appellant countered that neither of these facts applied and deprived appellant of the right to defend himself in his own home. R. 110, l. 22 – 113, l. 11. Judge Gibbons took the matter under advisement overnight. R. 113, ll. 12 – 18. The next day, the court ruled, "Based upon the evidence presented the Court denies the

defense's motion for immunity from prosecution pursuant to the Stand Your Ground Statute." R. 115, ll. 1 – 7.

The trial judge erred in denying appellant immunity. The PPPA creates a presumption that a person has "a reasonable fear of imminent peril of death or great bodily injury . . . when using deadly force . . ." against a person "in the process of unlawfully and forcefully entering . . . a dwelling." S.C. Code Ann. § 16-11-440(A)(1). Appellant testified that he knew Byrd sometimes carried a gun and that Byrd was attempting to forcefully enter his house after being told multiple times to leave. Critically, appellant's testimony that he fired at Byrd from inside his house was corroborated by the police.

The State's argument that appellant was not entitled to immunity because he had smoked crack earlier in the day and that his rifle had been sawed off was incorrect. The State urged the trial court to find that the exception in S.C. Code Ann. § 16-11-440(B)(3) applied. This exception does not apply because its use of the present tense "**is** engaged in an unlawful activity" or "**is using** the dwelling . . . to further an unlawful activity" means that the unlawful activity must be ongoing or have some connection to the incident. S.C. Code Ann. § 16-11-440(B)(3). Appellant had smoked crack earlier in the day, not during the incident. The rifle being sawed off had no connection to the incident other than being used as a defensive weapon. Therefore, to the extent the trial judge relied on the State's argument, the court erred.

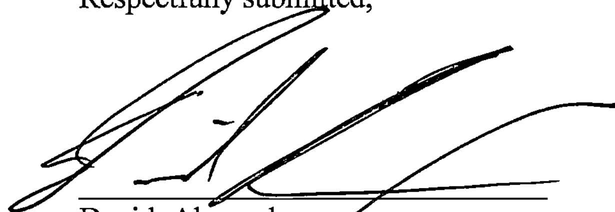
The trial court also erred in not finding Duncan controlling. Just as in the present case, the homeowner in Duncan told a guest to leave. Duncan at 406-07, 709 S.E.2d at 663. The victim in Duncan left, but returned and was opening the screened porch door. Id. The homeowner tried to get the victim to leave the steps, but the victim "continued to force his

way on the porch." Id. The defendant shot him. Id. The Supreme Court found "respondent showed by a preponderance of the evidence that the victim was in the process of unlawfully and forcefully entering respondent's home in accordance with § 16-44-440." Id. at 411, 709 S.E.2d at 665. The facts here are the same. Byrd was attempting to forcefully enter appellant's home when appellant shot him through the screen door. Just like the defendant in Duncan, appellant was entitled to immunity.

CONCLUSION

For the foregoing reasons, this Court should entertain appellant's appeal from the adverse decision at the immunity hearing, find that appellant was entitled to immunity, and reverse appellant's conviction.

Respectfully submitted,



David Alexander
Appellate Defender

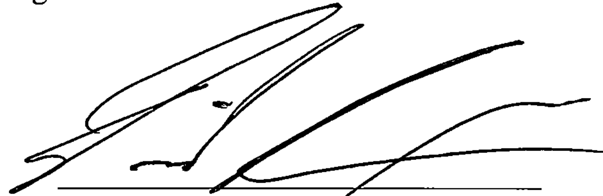
ATTORNEY FOR APPELLANT

This 3rd day of October, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 3, 2016



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