STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Spartanburg County
Hon. Robin H. Stilwell, Circuit Court Judge
Appellate Case Tracking No. 2018-001531

Antwon M. Baker, Jr., Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

I. This Court should affirm the PCR court's ruling that trial counsel was not deficient for not presenting Baker as a witness in his pretrial immunity hearing because the decision was based on reasonable trial strategy. Furthermore, Baker was not entitled to relief because he was not in a "place he had a right to be" within the meaning of the immunity statute.

II. Trial counsel was not deficient for not objecting to the court's self-defense charge because the charge was substantially correct and adequately covered the law.

STATEMENT OF THE CASE

In July 2012, the Spartanburg County Grand Jury indicted Antwon Baker for murder (2012-GS-42-3668). In July 2013, Baker was indicted for unlawful carrying of a pistol (2013-GS-42-2013) based on the same incident. Robert E. Ianuario, Esquire, and Matt Canady, Esquire, represented Baker at trial. Assistant Solicitors Derrick B. Bulsa and Lindsey Overby prosecuted the case on behalf of the Seventh Circuit Solicitor's Office. On June 3-6, 2013, Baker proceeded to trial before the Honorable J. Derham Cole. A jury found Baker guilty of the lesser included offense of voluntary manslaughter and as indicted for the unlawful carrying of a pistol. Judge Cole sentenced Baker to eighteen years for voluntary manslaughter and one year for unlawful carrying of a pistol. The terms were ordered to run concurrently.

Baker filed a timely notice of appeal. Wanda H. Carter, Appellate Defendant of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Baker on appeal. The South Carolina Court of Appeals affirmed Baker's conviction. State v. Baker, Op. No. 2015-UP-178 (S.C. Ct. App. filed April 8, 2015). Baker filed a Petition for Rehearing, which was denied by the South Carolina Court of Appeals on May 21, 2015. On June 22, 2015, Baker filed a Petition for Writ of Certiorari to review the Court of Appeals' opinion. The South Carolina Supreme Court denied the petition in an order dated October 8, 2015. The Remittitur was returned on November 20, 2015.

Baker filed a PCR application on December 21, 2015. Respondent made its Return on July 12, 2016, moving for a more definite statement by Baker and requesting an evidentiary hearing. On December 30, 2016, Baker submitted an Application Addendum to add additional allegations. An evidentiary hearing was convened on March 21, 2017, at the Spartanburg County Courthouse in Spartanburg, South Carolina. Baker was present and represented by Susannah C.

Ross, Esquire. Respondent was represented by Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office. At the evidentiary hearing, Baker testified on his own behalf. Respondent called Robert Ianuario, Esquire, and Derrick Bulsa, Esquire, as witnesses. The PCR court found Baker failed to meet his burden of proof and denied his application in a written order dated July 8, 2018. Baker now appeals this order.

STATEMENT OF FACTS

Baker was convicted of murder and unlawful carrying of a pistol, arising out of the shooting death of Anthony Young (Victim) in Spartanburg County, June 3, 2012. Victim and Baker were both present at a Waffle House, located on Highway 29 in Spartanburg, SC. (App. p. 93). There was a history of prior physical altercations between the Baker and Victim. (App. p. 98). On the night of the shooting, Baker drove into the parking lot of Waffle House at the same time as Victim was standing outside the restaurant. (App. p. 98). Baker witnessed Victim and a group of friends standing, and before exiting his vehicle, Baker placed a loaded pistol in his waistband. (App. p. 98). After exiting the restaurant, Baker encountered Victim and a group of friends and an argument began. (App. p. 98). Baker turned to walk back inside the Waffle House and was struck in the back of his head. (App. p. 99). Evidence presented at trial indicated it was not the Victim who struck the Baker in the head. Baker removed the loaded pistol from his waistband and began firing into the group of people outside of Waffle House. (App. p. 99). As Victim was running away, Baker shot Victim in the back five times. (App. p. 94). Baker fled the scene, changed clothes, and placed the pistol in the trunk of his girlfriend's vehicle. (App. p. 229-246). Law enforcement officers located Baker and his vehicle at an apartment complex and Baker was then placed under arrest. (App. p. 229-242).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed de novo, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

I. Trial counsel was not deficient for not presenting Baker as a witness in his pretrial immunity hearing because the decision was based on reasonable trial strategy. Furthermore, Baker was not entitled to relief as a matter of law because he was not in a "place he had a right to be" within the meaning of the immunity statute.

A. The issue is not preserved for review.

This issue is not preserved for review. Baker did not raise the issue in his application or his amended application. (App. 589–604; 612). Although Baker did testify at the PCR hearing that he wanted to testify at the immunity hearing, App. 620, PCR counsel did not clearly argue this ground in her summation to the PCR court. (App. 670–71). She vaguely mentioned the pretrial hearing at the beginning of her summation, but quickly moved on to trial counsel's failure to file an interlocutory appeal, referring to this as her "first issue." (App. 671). In his ruling from the bench, the PCR court did not explicitly rule on trial counsel's decision not to present Baker as a witness at the hearing, but ruled generally that this "was not a stand your ground case." (App. 675, line 23). He went on to address trial counsel's decision not to present Baker as a witness at trial, but did not address counsel decision not to present Baker's testimony at the pretrial hearing. (App. 677–78). This was not a specific ruling on the issue as presented on appeal. The judge did not address the issue in his written order. Because Baker did not raise this issue in his application, PCR counsel did not argue this as an independent ground at the PCR hearing, and the judge did not rule on the issue, it is not preserved for review. See Mangal v. State, 421 S.C. 85, 95, 805 S.E.2d 568, 573 (2017) (finding PCR court did not its abuse its discretion by refusing to address an issue in a 59(e) motion because it was not raised in the PCR application and not argued with specificity at hearing).

B. Trial counsel's decision not to present Baker as a witness was based on reasonable trial strategy.

Trial counsel testified that he decided not to present Baker as a witness at the immunity hearing because he "did not want to subject him to cross-examination" because he believed his sense of "bravado" would come off as disrespectful, and the solicitor would be able to use Baker's testimony and insights about his demeanor to prepare for trial. (App. 645–46; 656). Trial counsel believed he could elicit sufficient evidence from the State's investigator to make a valid self-defense case. (App. 645). Trial counsel further stated Baker preferred not to testify. (App. 647, lines 21–25). Thus, counsel's decision not to present Baker as a witness at the immunity hearing was reasonable trial strategy. Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (explaining "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel").

C. Baker was not entitled to immunity as a matter of law because he was not in a place where he had a right to be.

The Protection of Persons and Privacy Act begins with an unequivocal statement of legislative intent: "It is the intent of the General Assembly to codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code §16-11-420(A). Baker claims the act applies to his actions at a Waffle House restaurant. His argument fails because the common law castle doctrine only applies to homes and businesses, and the PPPA only extended the doctrine to occupied vehicles. Accordingly, the act does not apply to the facts of this case and Baker was not entitled to immunity as a matter of law.

§16-11-440(A) establishes a presumption of reasonable fear of death or serious bodily harm when a person is attacked in his residence,[1] dwelling,[2] or occupied vehicle[3] by an intruder.[4] Alternatively, §440(C) provides that a person who is not engaged in an unlawful activity and is attacked while in his business or "another place where he had a right to be" is not required to retreat from such an assault. §440(C) differs in three respects: 1) it does not require an intrusion, but only an attack, and 2) it is not limited to residences, dwellings, and occupied vehicles, but includes businesses and other places where the defendant "has a right to be"; and 3) it leaves the burden of proving reasonable fear with the defendant. §440(C) is broader than (A), and (consistently with the common law) includes scenarios where one is attacked on his property by an invitee or cohabitant.[5] Under subsection (C), Defendant must prove to the court by a

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[1] §16-11-430(2): "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.

[2] §16-11-430(1): "Dwelling" means a building or conveyance of any kind, including an attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging there at night.

[3] §16-11-430(4): "Vehicle" means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.

[4] §440(A) is more akin to common law defense of habitation than true self defense. See State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923) (explaining "in ancient days habitations were necessarily converted into strongholds of defense, and the dwelling became a castle. The law crystallized the familiar principles: 'While the man keeps the door of his house closed, no other may (unlawfully) break and enter it'; 'The persons within the house may exercise all needed force to keep aggressors out, even to the extent of taking life.'"); see also State v. Green, 118 S.C. 279, 110 S.E.145 (1921) (spring gun case) ("There it is not simply the damage to the property which may result from the burglary that is involved, but, in addition thereto, is the question of the risk to the lives of the inmates. It is common knowledge that burglaries under such circumstances often result in the death of some of the inmates of the dwelling upon which the burglary is committed, and for that reason it might well be held that a burglary of that kind could rightfully be prevented by such means as might result in death. The undisputed facts showed that there was no person in this cabin whose life could have been endangered by a burglary committed thereon; hence, if what we have said is correct, it might not be prevented by means which might be expected to destroy the life of a human being.").

[5] Such scenarios do not qualify for the presumption in subsection (A). *See* §440(B).

preponderance of the evidence that he: 1) was acting lawfully; 2) killed Victim in self defense; and 3) was in his business or "another place where he had a right to be."

The "right to be" language appears twice within the act. §440(B)(1) provides that the presumption of fear in §440(A) does not apply if the person "against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder." This passage qualifies the broad "right to be" language with specific examples of scenarios (tied to property rights) appropriately within the reach of the act. §440(C) also qualifies the phrase with "including, but not limited to, his place of business." This shows further intent to limit and contextualize the phrase.

The "place where he has a right to be" phrase has no settled meaning at common law. Variations of the phrase have been used by courts to connote property rights (such as those of an owner, lessor, or invitee). See State v. Cleland, 148 S.C. 86, 145 S.E. 628, 631 (1928) ("But, as to the house in which the deceased was living, the law is different. This house was the home of the deceased and his family; it was his castle, his place of refuge, where he had a right to go when seeking a place of safety . . . ."); State v. Kennedy, 143 S.C. 318, 141 S.E. 559, 561 (1928) (mill worker at his place of business was not required to retreat because he was "where he had a right to be"). But the phrase has also been used by defendants in arguments to refer to the right of law-abiding citizens to be present on public spaces, such as highways, where all have equal rights. But even in cases where the phrase refers to public places, the courts do not extend the castle doctrine to these areas. See State v. Rochester, 72 S.C. 194, 51 S.E. 685 (1905) ("Some courts have held that one assaulted in a public street is not bound to retreat before taking measures to defend himself, because he is where he has a lawful right to be. But this doctrine is not based upon sound principles, and it never has been recognized in this state.") (citation

omitted); State v. Davis, 214 S.C. 34, 38, 51 S.E.2d 86, 87 (1948)("In some jurisdictions the rule has been extended so as to relieve the defendant from the necessity of retreating if attacked in any place where he has a right to be, as when he is lawfully on a public street or highway. We have not gone that far."); State v. McGee, 185 S.C. 184, 193 S.E. 303 (1937) ("It is contended that the defendant, being on a public street, in his automobile, where he had a right to be, did not have to retreat . . . . The fact that the defendant was on a public highway, where all men have equal rights, and in his automobile, did not constitute any one of those special privileges obviating the necessity of retreating before killing."). Thus, Baker's argument is directly contrary to common law.

The terminology of the act provides further proof that the act was intended to codify existing law on the duty to retreat, except where it is explicitly changed. The act could not more explicitly state that its intent is to codify the "common law castle doctrine." Other terms of art featured prominently in the act, such as "stand your ground," and "meet force with force," have historically been associated with self defense which occurs on private property. Finally, the specific inclusion of the words "residence," "home," "dwelling," "business," and "vehicle" throughout the act shows that these enumerated areas and those recognized by the common law are the exclusive focus of the act. By contrast, the "Stand Your Ground" laws in Georgia, Florida, North Carolina, Alabama, and Tennessee do not purport to codify common law.

Baker's interpretation of the Act would elevate every public street, sidewalk and restaurant to the special status of a person's home, making each human being a castle unto himself. Such an interpretation would eviscerate the centuries-old and well-reasoned legal doctrine that a person must avoid deadly conflicts whenever possible. This extreme shift in public policy is not authorized by the Act, which states simply that its intent is to codify the

common law castle doctrine and extend it to a person's occupied vehicle and place of business. No case interpreting the act has held that it abrogates the duty to retreat in public places, or applied it to an area other than a home, business, or vehicle. Nor has any South Carolina case held that the castle doctrine's application is unconnected to property or possessory interests.

The true purpose of the Act is twofold: 1) to provide a pretrial procedure for worthy defendants to gain immunity from prosecution; and 2) to extend the castle doctrine to occupied vehicles. While these provisions do change the common law, they do so explicitly. If the legislature intended to abolish the law of retreat, it would have likewise done so explicitly. Defendant's interpretation of §440(C) ignores the remainder of the statute, particularly the declaration of intent. When read alongside §420, the only reasonable reading of the statute as a whole is that "another place where he has a right to be" refers to those places specifically enumerated in the act or recognized by common law as being immune from the duty to retreat.

D. Baker has not shown prejudice.

Because of the above, Baker has not shown prejudice from counsel's alleged deficiency in failing to call him as a witness at the immunity hearing. Even if the Act does apply to shootings at Waffle Houses, Baker testified he would have presented the same testimony at the pretrial hearing that he presented at the PCR hearing. App. 647, lines 17–18. This testimony showed he illegally armed himself with a handgun at 5:00 in the morning and walked into a fight. Instead of avoiding the conflict, he shot the victim five times in the back. He failed to prove he acted in self defense. Certiorari should be denied.

II. Trial counsel was not deficient for not objecting to the court's self-defense charge because the charge was substantially correct and adequately covered the law.

Baker's conclusory claim that the trial court's jury charge on self-defense was confusing gives new meaning to the expression "splitting hairs." There is no meaningful distinction between the charge as given and the statement of the law pronounced by this Court in State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492–93 (1998) (explaining "current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt."). The trial court instructed the jury:

> Now, although the defendant has raised the defense of self-defense, the burden of proof is not on the defendant to prove the existence of self-defense. As I have previously instructed you, the burden is always upon the state to prove the defendant's commission of the crime alleged against the defendant beyond a reasonable doubt, and **this would therefore necessarily require that the state prove beyond a reasonable doubt the absence of self-defense.**

This charge was substantially correct and adequately covered the law. A jury charge which is substantially correct and covers the law does not require reversal. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). "The substance of the law is what must be charged to the jury, not any particular verbiage." Id. There is no meaningful difference between "disproving" something and "proving the absence of" something.

Likewise, the court's "acting on appearances" instruction was a substantially correct statement of law. A person may act in self-defense when he reasonably believes he is in imminent danger of death or great bodily injury. The circumstances must be such that "a reasonably prudent man of ordinary firmness and courage would have entertained the same belief." State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 238–39 (Ct. App. 2014). Thus, the standard is one of "objective reasonableness," just as the trial court explained to the jury. App. 529. Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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ANTWON M. BAKER, JR., PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by sending two (2) copies via hand delivery addressed to:

Robert M. Dudek, Esquire
SC Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29211

This 18th day of June, 2019

CAROLINE COLLINS
Administrative Coordinator

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUN 18 2019
S.C. SUPREME COURT

June 18, 2019

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Antwon M. Baker, Jr. v. State of South Carolina**
Appellate Case No. 2018-001531
Lower Court Case No. 2015-CP-42-5198

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
SC Bar No. 101188

JAE/cc
Enclosures

cc: Robert M. Dudek, Esquire (2 copies)