ORIGINAL

RECEIVED

SEP 18 2019

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

Opinion No. 2019-UP-169 (S.C. Ct. App. Filed May 8, 2019)

15-GS-43-00710

THE STATE,

RESPONDENT,

V.

JERMAINE ANTONIO HODGE,

PETITIONER

APPELLATE CASE NO 2016-001175

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

CERTIFICATE OF COUNSEL 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

ARGUMENT

1. The Court of Appeals erred upholding the trial judge's denial of petitioner's motion to dismiss the charges against him despite the fact that he established immunity under the Castle Doctrine by a preponderance of the evidence in the case. 4

2. The Court of Appeals erred in finding that no error occurred when the solicitor urged the jury to return a symbolic verdict because this violated petitioner's right to due process. 10

CONCLUSION 12

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that pursuant to the South Carolina Court of Appeals' Opinion issued in this case on May 8, 2019, a Petition for Rehearing was filed on May 23, 2019, which was denied by the South Carolina Court of Appeals on August 22, 2019.

QUESTIONS PRESENTED

1.

The Court of Appeals erred upholding the trial judge's denial of petitioner's motion to dismiss the charges against him despite the fact that he established immunity under the Castle Doctrine by a preponderance of the evidence in the case.

2.

The Court of Appeals erred in finding that no error occurred when the solicitor urged the jury to return a symbolic verdict because this violated petitioner's right to due process.

STATEMENT OF THE CASE

Petitioner Jermaine Hodge was convicted of assault and battery of a high and aggravated nature during a jury trial held at the May 2016 term of the Sumter County General Sessions Court before Judge R. Ferrell Cothran. Jacob McFadden represented petitioner at trial and Assistant Solicitor John Meadors appeared on behalf of the state. Petitioner was sentenced to imprisonment for an aggregate term of fifteen years.

Petitioner appealed his conviction and sentence. On May 8, 2019, the South Carolina Court of Appeals affirmed petitioner's conviction and sentence. See State v. Jermaine Antonio Hodge, Unpublished Opinion No. 2019-UP-169 (S.C. Ct. App. filed on May 8, 2019). App.1-3. On May 23, 2019, petitioner filed a Petition for Rehearing in the case. App.4-13. On August 22, 2019, the South Carolina Court of Appeals denied the Petition for Rehearing. App. 14. This petition requesting a review of the Court of Appeals' decision in this appeal follows.

QUESTION I

The Court of Appeals erred upholding the trial judge's denial of petitioner's motion to dismiss the charges against him despite the fact that he established immunity under the Castle Doctrine by a preponderance of the evidence in the case.

The facts of the case were such that petitioner established by a preponderance of the evidence proof for immunity under the Castle Doctrine. Petitioner's case follows. At trial, Lyvonnia Copeland testified that she and petitioner, who was her live-in boyfriend, were arguing into the early morning hours of April 21, 2015, and that she called her cousin Lawrence Cooley to come over to her residence and talk to petitioner. Copeland stated that when Cooley pulled into the driveway and got out of his vehicle, he (Cooley) began walking towards her, and that as soon as she approached and began her greetings, she realized that Cooley had been stabbed just that quickly. R. 107, l. 1 – R. 116, l. 16. Copeland stated that she did not witness the stabbing, but that Cooley didn't stab himself. R. 119, lines 1-3; R. 123, l. 25 – R. 124, l. 1.

Lawrence Cooley testified at trial and stated that when he stepped out of his vehicle and walked up to Lyvonnia Copeland, he noticed petitioner walking from the back to the side of the house, and then he saw petitioner just came up to him and stab him with a knife. R. 72, l. 23 – R. 88, l. 11.

Petitioner testified at trial and explained that while he and Copeland argued on that night, she told him that she was calling Cooley to come over to beat him up. Petitioner stated that Cooley came over to their house immediately thereafter looking angry. Petitioner explained that Cooley pushed him twice and that after he stumbled per Cooley's second push, he responded by stabbing Cooley. R. 196, l. 8 – R. 211, l. 18.

Prior to trial, defense counsel moved to have the case dismissed on the ground that petitioner was immune from prosecution under the Castle Doctrine. R. 4, lines 18-25. An in camera pretrial hearing followed. Lyvonnia Copeland testified during the pre-trial hearing and admitted that petitioner was living with her as a boyfriend then, and that they had been dating since 2013 (two years). Copeland testified that she did not witness the stabbing or any altercation between Cooley and petitioner. R. 5, l. 14 – R. 17, l. 24.

Petitioner testified at the pretrial hearing and stated that he had been living with Lyvonnia Copeland every night at Copeland's house as her boyfriend since 2013, and that they both paid bills at that residence. Petitioner explained that as they argued during the early morning hours in question, Copeland hollered that she was calling Cooley to come over and "beat [his] ass." Therefore, when Cooley, who was bigger and taller (6'2" and 300 lbs), arrived looking unhappy and pushed him and said "what the f___ is going on," and then pushed him again (harder the second time) even after petitioner asked that the pushing stop, then fear begin to set in. Petitioner claimed that as he stumbled from the second hard shove from Cooley, he "fear[ed] for his life" and responded with the stabbing. R. 19, l. 5 – R. 38, l. 25. Petitioner stated that he did not push or attack Cooley and was attempting to walk away. R. 19, l. 5 – R. 38, l. 25.

Lawrence Cooley did not testify during this pre-trial hearing.

The trial judge denied petitioner's motion for immunity under the Protection of Persons and Property Act. R. 46, l. 8- R. 48, l. 14. The trial judge's findings follow:

> 1.) That petitioner and Cooley were both guests on Copeland's property;
> 2.) That petitioner in effect was not acting in self-defense; and
> 3.) That petitioner in effect had a duty to retreat in this instance.
> R. 46, l.8- R. 48, l. 5.

On appeal, the following question presented was the first issue raised in the case:

> I. The trial judge erred in denying petitioner's pre-trial motion for a dismissal of the case via immunity under [the Castle Doctrine] because ... [petitioner] established by a preponderance of the evidence that he was entitled to this immunity from prosecution.

The Court of Appeals ruled on the Castle Doctrine issue as follows:

> As to whether the trial court erred in denying Hodge's motion for immunity under the Act: State v. Manning, 418 S.C. 38,45, 791 S.E.2d 148, 151 (2016) ("[Appellate courts] review immunity determinations under an abuse of discretion standard."); State v. Mitchell, 382 S.C. 1, 4, 675 S.E.2d 435,437 (2009) (providing appellate courts "do [] not re-evaluate the facts based on [their] own view of the preponderance of the evidence but simply determine [] whether the trial court's ruling is supported by any evidence"); S.C. Code Ann. § 16-11-440(C) (2015) ("A person who...is attacked in another place where he has a right to be...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..."); State v. Jones, 416 S.C. 283, 301, 786 S.E.2d 132, 142 (2016) (providing a defendant's claim of immunity under the Act based upon a belief of fear of death or great bodily injury requires that "a reasonably prudent man of ordinary firmness and courage would have entertained the same belief" (quoting State v. Curry, 406 S.C. 364, 371 n.4, 752 S.E.2d 263, 266 n.4 (2013))).

A.) Petitioner and Cooley were not guests in Copeland's home.

Section (A) of the Protection of Persons and Property Act reads as follows:

> (A) A person is presumed to have a reasonable dear of imminent peril of death or great bodily injury to himself or another person using deadly force that is intending 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 of has unlawfully and forcibly entered a dwelling, residence...or if he removes or is attempting to remove another person against his will from the dwelling/residence and
>
> (2.) Who uses deadly force knows or has reason to believe that an unlawful and forcibly entry or unlawful and forcible act is occurring or has occurred.

Petitioner was not a guest in Copeland's home. Petitioner lived in the home with Copeland. In State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), the Court held that since the

defendant and Collins were both social guests in the defendant's mother's apartment when they fought, then Collins (deceased victim) had an equal right to be in the dwelling, and therefore the defendant could not use immunity under 16-11-440(A), **but** that he could default into using immunity under 16-11-440(C), which carries no presumption like section (A), but still offered immunity if the one who used force was attacked in a place where he had a right to be. Specifically, under 16-11-440 (C) the Act provides that one is justified in using deadly force if:

> 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...

Additionally, compare also the relevant case of State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), where the Court held that "another place" under § 16-14-440 (C) encompassed a residence and that there is immunity for use of deadly force by a person within the residence who is not engaged in an unlawful activity and who is attacked in this "another place," i.e., a residence where he or she has a right to be present. In Jones, there was a domestic dispute between a man and a woman (Jones) who lived together inside a particular residence. The woman, i.e., Jones, who killed the man, was acting in self-defense and rightfully in another place where she had a right to be, and as a result was granted immunity for her acts under the Castle Doctrine. In Jones, both Jones and her live-in male friend were lawful residents together, and therefore her claim under 16-11-440(A) was properly and successfully moved to a claim under 16-11-440(C).

This case is similar to Jones to the extent that Copeland and petitioner both lived together in the same residence, and both had a right to be there, and therefore petitioner was not a guest. Therefore, since petitioner lived at the residence with Copeland where Cooley arrived, and since

petitioner paid bills at that residence, and cohabitated with Copeland there, then petitioner was not a guest, but rather present in another place where he had a right to be under 16-11-440 (C), and thus had a right to claim immunity from his acts under the Castle Doctrine. Although 16-11-440 (C) does not contain the presumption of subsection (A), nonetheless it allows one the privilege of claiming the immunity from prosecution of using deadly force by a person who is not engaged in an unlawful activity and is attacked in another place where he has a right to be present. See also State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2015), where it was held that another place would include a place where attackers who are invited into one's home later place the homeowner in reasonable fear of death or great bodily harm.

B.) .Self Defense Was Supported By the Evidence and Given as a Jury Charge

Consistent with the Castle Doctrine and the text of the Act, "a valid case of self-defense must exist" in order to successfully claim the immunity. In Curry, the Court held that the self-defense elements were non-existent in the case. Petitioner acted in self-defense in this case. Note that the trial judge charged the jury on the law of self-defense. Tr. 334, l. 25 – p. 338, l. 2. In Jones, the Court held that one who uses deadly force in response to an attack in his or her own home by a cohabitant can seek immunity from prosecution under that provision under 16-11-440(C) as long as the person can establish his reasonable fear of the attacker and there is evidence supporting a self-defense claim. In Jones, the Court held as follows:

> "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." State v. Curry. 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). Therefore, the defendant must demonstrate the elements of self-defense, save the duty to retreat, by a preponderance of the evidence. Id. However, if section 16-11-440 (A) applies, there is not requirement that the

> defendant prove he believed he was in imminent danger of losing his life or sustaining serious bodily injury given the presumption of reasonable fear of imminent peril of death or great bodily injury is included in subsection (A).

In order to establish self-defense, the defendant must have been without fault in bringing on the difficulty and was or believed he was in actual imminent danger of losing his life or sustaining serious bodily injury, which a reasonably prudent person would have so believed, and he had no other means of avoiding the danger. State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). Also, depending on the circumstances, words accompanied by hostile acts may establish self-defense and one has a right to act on appearances. State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). Moreover, when a one claims self-defense, the state is required to disprove the elements of self-defense beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 4 89 (1998); State v. Williams, 400 S.C. 308, 733 S.E.2d 605 (2012).

Clearly, petitioner acted in self-defense in the case. For example, Copeland asked Cooley to come to their residence for the express purpose of fighting petitioner; and true to his mission, Cooley came there and got out his truck with an angry demeanor and immediately pushed petitioner, who was near enough to do so, and asked petitioner what was going on. Petitioner was not the aggressor during this incident. To the contrary, Cooley was the aggressor. Then, despite petitioner's request that the shoving and pushing stop, Cooley shoved petitioner again, and this second act of aggression made petitioner stumble and almost fall. Keeping in mind that since Cooley was a big guy and petitioner was much smaller, and that Cooley was the aggressor and his (Cooley's) aggression was escalating, and also that petitioner had a reason to be fearful for his life against the attacker, then the knifing of Cooley was petitioner's act in self-defense. Hence the elements of self-defense were met here.

C.) No Duty to Retreat

Petitioner had no duty to retreat as he was at his home. The Castle Doctrine did not require petitioner to retreat in the case. State v. Curry, supra; State v. Jones, supra.

The Standard of Review for the Castle Doctrine follows:

"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); State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011) (recognizing that the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence). 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. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007).

A defendant claiming immunity under the Castle Doctrine must show by a preponderance of the evidence that he was not engaged in an unlawful activity, and was in a place where he had a right to be, and was attacked there, and used deadly force via self-defense to protect himself, and had no duty to retreat. Petitioner established this by a preponderance of the evidence. Thus, this Court overlooked the trial judge's error in denying petitioner's pretrial motion for immunity from prosecution in this case.

QUESTION II

The Court of Appeals erred in finding that no error occurred when the solicitor urged the jury to return a symbolic verdict because this violated petitioner's right to due process.

The last issue presented on direct appeal follows:

> The lower court erred in overruling an objection to the solicitor's closing argument imploring the jury to convict petitioner on the charge as a "symbolic verdict" because the jurors' oath required a verdict issued upon the evidence presented at trial only.

The Court of Appeals ruled as follows:

> As to whether the trial court erred in overruling Hodge's objection to the State's closing argument that the jury should render a "symbolic Verdict": State v. Harris, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009) ("This [c]ourt must review the argument in the context of the entire record."); Humphries v. State, 351 S.C. 362, 373, 570S.E.2d 160, 166 (2002) ("A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony."); Tappeiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (providing appellate courts must determine whether the solicitor's statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process" (quoting Vaughn v. State, 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004))).

However, to the contrary, the argument was unconstitutional and led to a conviction that was given in violation of due process.

Pertinent sections of the solicitor's closing remarks regarding this issue follow:

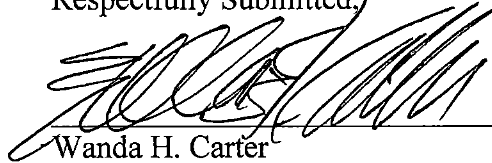
> Solicitor: When you come back in with that verdict, bring the shirt in symbolically. Bring it in symbolically because the only innocent person in this room is Lawrence Cooley. And with your verdict symbolically give him that shirt, that cloak and let it keep him warm. Thank you.
>
> Defense Counsel: Your Honor, I'm going to object that he asked the jury to decide this case on a basis other than the law and evidence provided.
>
> Solicitor: I certainly did not, Judge.
>
> Defense Counsel: As a symbolic gesture restore the victim, the alleged victim. R. 265, lines 12 – 22.

A true verdict is required by the jury according to the oath taken prior to trial as they fulfill their duty to carefully deliberate on the matters at issue. State v. Ballen, 333 S.C. 378, 510 S.E.2d 226 (1998). Any verdict issued symbolically cannot pass constitutional standards. This Court might have overlooked merit regarding the objection here by upholding the trial judge's ruling that no error occurred with respect to this issue.

CONCLUSION

Based on the foregoing arguments, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above raised points.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of September, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
Honorable R. Ferrell Cothran, Circuit Court Judge

Opinion No. 2019-UP-169 (S.C. Ct. App. filed May 8, 2019)
15-GS-43-00710

THE STATE,

RESPONDENT,

V.

JERMAINE ANTONIO HODGE,

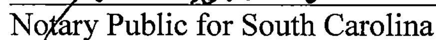
PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jermaine Antonio Hodge, #273774, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 18th day of September, 2019.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE ME this 18th day of September, 2019.



(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.