THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2018-000136

THE STATE,

Appellant,

vs.

ADAM KEITH LUNSFORD,

Respondent.

FINAL BRIEF OF THE RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

Did the Circuit Court Judge properly grant the Respondent immunity from prosecution pursuant to the South Carolina Protection of Persons and Property Act?

STATEMENT OF THE CASE

In September of 2016, the Respondent, Adam Keith Lunsford shot another motorist multiple times during an incident near his home. In October of 2016, the Spartanburg County Grand Jury indicted Mr. Lunsford for one count of attempted murder and one count of assault and battery of a high and aggravated nature. Mr. Lunsford, by and through his attorneys, sought immunity from criminal and civil prosecution pursuant to the South Carolina Protection of Persons and Property Act, and a hearing was held by the Honorable J. Mark Hayes, II on July 17, 2017. The matter was taken under advisement. On July 21, 2018, four days after the hearing, the Solicitor's Office sought and received an indictment against Mr. Lunsford for one count of pointing or presenting a firearm. On September 28, 2017, Judge Hayes issued an order granting the Respondent's request for immunity on the attempted murder and assault and battery of a high and aggravated nature charges. Upon receipt of the Order, the State filed a motion to reconsider and Mr. Lunsford filed another motion for immunity on the pointing or presenting a firearm charge. On November 19, 2017, a second hearing was held before the Honorable J. Mark Hayes, II, and again the Court took the matter under advisement. On January 16, 2018, Judge Hayes issued orders denying the State's motion to reconsider and granting Lunsford's requests for criminal and civil immunity on the pointing or presenting a firearm charge. The State then filed a notice of appeal.

SUMMARY OF THE FACTS

Around dusk on September 22, 2016, the alleged victim Daniel Hull ("Victim") was driving home in Spartanburg, South Carolina after leaving his job. (R., p. 17, lines 19-25, p. 18, lines 13-24). Adam Lunsford ("Respondent") was driving himself home from taking a test at U.S.C. Upstate's The George. (R., p. 73, lines 2-9, p. 74, lines 1-9). The Victim and Respondent

did not know each other and had never met one another. (R., p. 75, lines 23-25). Both the Victim and Respondent lived in close proximity to one another, one hundred yards to a quarter mile more specifically, although neither of the men knew it. (R., p. 35, lines 15-25, p. 36, lines 1-4).

The Respondent first encountered the Victim on Union Street at the traffic light two lights before the men would have made a right-hand turn on Lucerne Drive. (R., p. 78, lines 1-25, p. 79, lines 1-6). The Respondent was driving slowly, and the Victim was tailgating the Respondent and flashing his lights at him while the Respondent was in the left hand lane; the Respondent moved into the right-hand lane and the Victim moved into the right-hand lane behind him. (R., p. 78, lines 1-25, p. 79, lines 1-6). The Victim was visibly irritated and was motioning; the Victim accelerated to the point of almost colliding with the Respondent and then illegally crossed the double yellow line on the left of the vehicle to pass the Respondent, swerve in front of him and force him to stop his car. (R., p. 78, lines 1-25, p. 79, lines 1-12). The Respondent was able to avoid the Victim the first two times. (R., 79, lines 7-12). On the third attempt, the Victim came up beside the Respondent and the Respondent was under the strong impression that the Victim intended to him harm, and the Respondent, who carries a valid Concealed Weapons Permit, showed the Victim that he was armed while in fear for his safety and in an attempt to ward off the Victim. (R., p. 79, lines 13-25, p. 80, lines 1-25, p. 81, lines 1-16). The Respondent was not pointing the weapon at the Victim when the Victim came up beside the vehicle. R., p. 79, lines 13-25, p. 80, lines 1-25, p. 81, lines 1-16). The Victim then pulled in front of the Respondent again and stopped, and the Respondent would have collided with him if he did not "slam on brakes." (R., p. 79, lines 13-25).

According to the Victim, he became irritated when he saw the gun and pulled over to ask the Respondent to fight in the road. (R., p. 19, lines 6-25, p. 20, lines 9-13, p. 21, lines 9-24). The

Respondent remained in his vehicle with the door closed and the window down. (R., p. 82, lines 18-24). The Victim admits to stopping the car abruptly and knew the Respondent had a firearm. (R., p. 47, lines 1-25, p. 48 line 1). The Victim exited his vehicle angrily advancing on the Respondent and was obscured by his vehicle as it was stopped at an angle in front of the Respondent; once he turned the edge of his vehicle, still advancing on the Respondent, the Respondent fired three shots at the Victim fearing his life was in serious and imminent danger. (R., p. 47, lines 1-19, p. 82, lines 2-25, p. 83, lines 1-25, p. 84, lines 1-25, p. 85, lines 1-10). Investigator Chris Taylor testified that the Victim continued to approach the Respondent's vehicle until he was shot. (R., p. 50, lines 17-25, p. 51, lines 1-5). During a later interview with the police, the Victim stated that he wouldn't have been mad about the first shot. (R., p. 36, lines 22-25, p. 37, lines 1-8). Investigator Nelson testified that at the instant the two cars stopped, the Respondent was legally in his vehicle and had committed no crime. (R., p. 60, lines 3-25, p. 61, lines 1-21). The Investigator also testified that Officer Jerry Jones, upon hearing the shots, ran to the scene with his service weapon and confronted the Respondent. (R., p. 69, lines 22-25).

Jennifer Sevick was between seventy-five (75) and one hundred (100) yards away when she saw the two vehicles stopped in the road. (R., p. 98, lines 19-22). She saw two individuals in the road way and one go to the ground, but she never identified the individuals in her testimony. (R., p. 99, lines 20-22). Ms. Sevick was unaware that an off duty officer was on the scene until being informed at a later time. (R., p. 101, lines 25, p. 102, lines 1-19).

STANDARD OF REVIEW

"A claim for immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate] court reviews under an abuse of discretion standard." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "An abuse

of discretion occurs when the [circuit] 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, 570, 647 S.E.2d 144, 166-167 (2007). "The abuse of discretion standard of review does not allow [the appellate] court to reweigh the evidence or second guess the [circuit] court's assessment of witness credibility." State v. Douglas, 411 S.C. 307, 316, 768 S.E.2d 232, 238 (Ct. App. 2014).

ARGUMENT

I. The Circuit Court did not err in granting the Defendant immunity from prosecution pursuant to the South Carolina Protection of Persons and Property.

After the immunity hearing, the Honorable J. Mark Hayes, II ruled that the Respondent was entitled to immunity on all three (3) indicted charges pursuant to the South Carolina Protection of Person and Property Act ("the Act") after concluding Lunsford was acting lawfully at the time of the incident, was under attack by the Victim at the time of the incident and that he reasonably believed deadly force was necessary at the time he shot the Victim during the course of the incident. As was testified by the Respondent and Investigator Nelson, the Respondent was not cited for any traffic or moving violation, he had a valid Concealed Weapons Permit, and he was legally permitted to be where he was physically located. The State argues that the Respondent brandishing his vehicle in an attempt to ward off the attack of the Victim was in violation of South Carolina Law and contributed to the series of events that lead to the shooting of the Victim. Accordingly, the State argues that the Respondent cannot claim self-defense. Finally, the State also argues that the Respondent was not under attack at the time of incident.

S.C. Code Ann. §16-11-440(A) states the following:

> A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended 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, or has unlawfully or forcibly entered a dwelling, residence or occupied vehicle, or if removes or is attempting to remove another person against his will from the dwelling, residence or occupied vehicle; and

(2) Who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful or forcible act is occurring or has occurred.

Further codified is S.C. Code Ann. § 16-11-440(C) which states:

> 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.

In this case, the Respondent and Victim at one point testified that the Respondent was in the vehicle when he fired at the Victim. However, what is undisputed is that the Respondent was lawfully in the roadway on Lucerne Dr. when the shooting occurred regardless if he was in his vehicle or not. *See* Order Granting Criminal and Civil Immunity on 2017-GS-42-03432 and Order Granting Criminal and Civil Immunity on 2016-GS-42-05238 and 2016-GS-42-05239. The State wishes to allege that the Defendant showing the Victim his firearm put him in a position that he was engaged in an unlawful activity. The Respondent testified that the Victim had attempted to run him off the road and pulled in front of him and stopped twice before going around him. On the third attempt, in fear for his safety, the Respondent showed his firearm to attempt to have the Victim drive away. Nonetheless, the Victim, by his own admission, sped up, pulled in front of the Respondent causing him to stop. He left his vehicle on while he exited the vehicle and approached the Respondent to fight while the Respondent was yelling at him to get back in his vehicle. S.C. Code Ann. §16-23-410 states the following:

> It is unlawful for a person to present or point at another person a loaded or unloaded firearm. A person who violates the provisions of this section is guilty of a felony and,

> upon conviction, must be fined in the discretion of the court or imprisoned not more than five years. This section must not be construed to abridge the right of self-defense or to apply to theatricals or like performances.

The Respondent was acting in self-defense from the behavior of the Victim, and as is specifically codified, S.C. Code Ann. §16-23-410 must not be construed to abridge the right of self-defense. It is also important to note that the charge of pointing or presenting a firearm was not originally charged against the Respondent but was indicted after the initial immunity hearing, and as such, the State never elicited any testimony from the witnesses about any alleged unlawfulness or illegality on the part of the Respondent. *See* Order Granting Criminal and Civil Immunity on 2017-GS-42-03432 and Order Granting Criminal and Civil Immunity on 2016-GS-42-05238 and 2016-GS-42-05239. There was no additional testimony taken from any witnesses after the initial immunity hearing and an indictment itself is not evidence of a crime. Therefore and in addition to the fact that the Defendant was attempting to thwart an attack, the Respondent asserts that there was no witness testimony that the Defendant was committing any unlawful behavior at the time of the shooting. It is also worth noting that once the Victim saw the firearm, he became more enraged and chose to act in the manner he did and get out of the car to fight the Respondent. It seems illogical to see a firearm, forcibly cause the Respondent's vehicle to stop, and get out to fight unless you intended to do harm to the Respondent.

There are four elements that must be established to justify the use of deadly force as self-defense. State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011). The Defendant bears the burden of proving these elements by the preponderance of the evidence. State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). The elements are,

> (1) The defendant was without fault in bringing on the difficulty; (2) The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) If the defense is based upon the

> defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and (4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Dickey, 394 S.C. at 499, 716 S.E.2d at 101 (quoting State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 (1998)). First, as has been discussed, the Respondent was without fault in bringing on the difficulty as the Victim's behavior lead to the incident beginning with tailgating the Respondent, passing him multiple times and trying to run him off the road, and finally stopping in the road to get out to fight the Respondent. Second, the Defendant, by and through his testimony, believed he was in imminent danger of losing his life or sustaining serious bodily injury based upon the Victim's persistent actions and the fact that he was actively approaching the Respondent who the Victim knew was armed, and by the Victim's own admission, to do him harm in a fight. Third, based upon the facts in this matter, a reasonable man of ordinary firmness and courage would have entertained the belief that he was in imminent danger. As Judge Hayes stated in his Order Granting Criminal and Civil Immunity in 2017-GS-42-03432,

> This Court finds that there is no fathomable reason for a person who knows another driver has a firearm to block the firearm carrier's vehicle other than to engage in an altercation with the firearm carrier. This Court finds that a person in possession of a firearm could only presume that the person stopping him wants to cause him harm by confrontation. Therefore, the Defendant was under attack at the time he used deadly force to defend himself...

Finally, the Respondent had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance and had no duty to retreat. Again, the Victim blocked in the Respondent's car and approached him with the intent to fight. The Victim is the one that admitted the intent fight, and even though he did not know that at the time, the circumstances were such that a reasonable person would fear for his or her safety.

The State argues that the Respondent was never under attack because the Victim never actually touched the Respondent or his vehicle. "A person has the right to act on appearances, even if the person's belief is ultimately mistaken." Dickey, 394 S.C. at 501, 716 S.E.2d at 102 (citing State v. Fuller, 297 S.C. 440, 443-44, 377 S.E.2d 328, 331 (1998)). There is no requirement for the Respondent to be physically engaged or physically harmed by the Victim for the Act to apply and for the Respondent to be able to defend himself. The actions of the Victim were a progression of an attack on the Respondent rather than a single event that the State argues is required. If the Respondent were to wait to be physically harmed to act, the damage could have already been done to him.

The Victim, by his own admission, acted the way he did because he was angry and wanted to fight the Respondent, and the Respondent had no reason to believe that there was any reason for the Victim to behave the way he was unless he intended to cause him great bodily harm. Here, the Circuit Court's finding that the Respondent acted in self-defense is supported by the testimony of the witnesses and this Court should therefore affirm the Circuit Court's granting of immunity. "It is clearly the Legislature's intent that if a person seeking immunity under subsection 16-11-450(A) could prove the elements of self-defense in an immunity proceeding, immunity must be granted." *See* State v. Scott, Opinion No. 27834.

CONCLUSION

For the reasons stated herein, the Respondent respectfully requests that the Court affirm the ruling of the Circuit Court.

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Respectfully submitted,

December 3, 2018

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents 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."

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