

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Honorable Maité Murphy, Circuit Court Judge

Opinion No. 2020-UP-031

RECEIVED
Jun 25 2020
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CHRISTIAN ANTHONY HIMES,

APPELLANT.

APPELLATE CASE NO. 2017-000870

PETITION FOR REHEARING

On June 10, 2020, this Court affirmed Appellant’s conviction in an unpublished opinion. *State v. Himes*, 2020-UP-178 (S.C. Ct. App. filed June 10, 2020). Pursuant to Rule 221(a), SCACR, counsel for Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court.

On appeal, Appellant argued in his first issue that the trial court erred in finding that he was not eligible for or entitled to immunity from prosecution under the Protection of Persons and Property Act, because Appellant was eligible for immunity under the Act and proved the elements required under subsection (C), and Appellant established a valid case of self-defense. In

his second issue, Appellant argued that, pursuant to S.C. Code Ann. § 16-23-490, this Court should vacate the five-year sentence imposed for possession of a firearm during the commission of a violent crime since Appellant was sentenced to life without parole for the murder case. This Court affirmed Appellant's murder conviction and sentence but vacated the conviction and five-year sentence for possession of a weapon during the commission of a violent crime. Appellant requests rehearing on the first issue.

Counsel respectfully asserts that this Court overlooked or misapprehended several critical facts in issuing its decision affirming his murder conviction and sentence. Appellant did not bring about the difficulty, and he was in a place where he had a right to be. Appellant was also in reasonable fear of imminent serious bodily injury or death given his knowledge of the decedent's history of violence and the decedent's threatening text message two days prior. Appellant was also in reasonable fear because the decedent began reaching in his pocket, ignored multiple pleas from Appellant to back up, and lunged at Appellant. Finally, Appellant had no duty to retreat, although he tried to do so.

On April 3, 2017, an immunity hearing was held pursuant to the Protection of Persons and Property Act (the Act), and the following facts were established.

Heather Ham (Heather) had been separated from her abusive husband David Ham (Decedent) for approximately eighteen months before Heather became romantically involved with Appellant, Christian Himes. R. 41, l. 20 – 42, l. 24. Heather and Decedent separated after an argument became physical when Decedent dragged her from the house in front of their young children. R. 121, l. 2-15; R. 44, ll. 16-24. At that point, Heather already had a scarred face from earlier in the relationship when Decedent punched her in the face. R. 120, l. 14 – 121, l. 1; R. 45,

ll. 15-16. However, they remained cordial after separating and they shared custody of their children pursuant to an informal agreement.

Heather had been Appellant's counselor when he was a juvenile living in a group home, and after he was released from prison, she assisted him in the process of getting back on his feet and the two fell in love. R. 115, ll. 9-20; R. 116, l. 23 – 117, l. 10. It was undisputed that Appellant began staying at Heather's apartment three weeks before the fatal altercation that would kill Decedent. R. 11, ll. 14-24; R. 117, l. 24 – 119, l. 9. Appellant's clothes and toothbrush were at Heather's apartment. R. 119, ll. 10-13. Appellant had the use of Heather's apartment key and she occasionally allowed him to drive her car. R. 119, ll. 14-22. It is notable that the apartment was not Decedent's—he never lived there. Instead, Heather had moved there about three months prior to the shooting. R. 58, ll. 3-5.

Decedent was not aware of the budding romance between Heather and Appellant. Heather feared an altercation would occur if the two men met. R. 122, ll. 1-8. On occasions when Decedent came by to pick up the children, Appellant remained hidden in the back of the Heather's apartment. R. 129, l. 23 – 130, l. 6. Usually, such exchanges took only five or ten minutes. R. 129, l. 20 – 130, l. 25. However, a few days before the shooting, Decedent learned that Heather was in a romantic relationship with Appellant. On October 30, 2015, Decedent sent Heather a text message that read, "tell your bf don't let me catch him slippin." R. 589; R. 125, ll. 7-21.

Appellant saw the text message and he found it threatening. "I thought that meant—to me it meant if he sees me, he's gonna come at me and he's gonna attack me." R. 125, ll. 22-24.

On November 1, 2015, Decedent came by to drop off the children but his stay was “a lot longer” than the usual five or ten minutes. R. 54, ll. 4-8. Decedent had been drinking heavily—it would later be determined that he had a 0.19 blood alcohol content. R. 25, ll. 5-8.

Appellant had borrowed Heather’s car and arrived home late with the car, which necessitated that Decedent bring the children to Heather’s apartment, rather than Heather bringing the children to Decedent’s apartment. R. 127, l. 18 – 128, l. 1; R. 77, l. 7 – 79, l. 23. When Appellant arrived home, Heather met him at the door and told him to leave because Decedent was still there. R. 128, ll. 10-14.

Appellant was aware of Heather’s physical abuse by Decedent in the past. R. 120, l. 4 – 121, l. 1. However, Appellant left and went to a gas station, and he remained there for thirty or forty-five minutes. R. 129, ll. 11-16. When he thought more than enough time had elapsed for Decedent to be gone, Appellant drove back to Heather’s apartment and again walked towards the door. R. 129, l. 17-24. However, Decedent was coming out of the apartment at that moment and waylaid Appellant, asking him, “You Chris?” R. 586. Appellant tried to walk past Decedent into the apartment but Decedent blocked his entry. R. 132, ll. 21-22. Appellant noticed that Decedent was taller than him. R. 132, l. 18.

A verbal altercation ensued.

When he came out, he asked me if I was crazy. And I told him, yeah. I told him that I didn’t want to do this here and now because his kids was in the house. And he was upset. He was throwing his arms. And he told me that I needed to leave. And he said he didn’t want me to be a father to his kids. He wasn’t going to allow his kids to call me daddy . . .

Initially, I told him I was going inside. And he blocked me off. And he started walking towards me. And at that time he was stating that he wasn’t going to allow me to be a father to his kids. And he kept coming towards me.

R. 132, ll. 3-24.

Appellant believed he backed up about fifty feet, and police officers would estimate the fatal encounter took place about thirty-three to thirty-nine feet from the breezeway that led to the apartment. R. 98, l. 19 – 99, l. 4; R. 133, ll. 13-19. At that point, Appellant pulled out a gun. R. 133, ll. 1-19. Appellant had bought the gun because Heather was raped by an acquaintance on October 26, 2015. R. 126, l. 5 – 127, l. 14.

Appellant tried to continue backing away towards Heather's car, but Decedent, "was yelling at me. He said I'm not scared of your punk ass gun." R. 134, ll. 6-12. Appellant told Decedent to leave, and said he was going into Heather's apartment but Decedent told Appellant he was not going in the apartment. R. 134, ll. 14-17. Decedent began reaching in his pocket. R. 156, ll. 4-5; R. 586; R. 135, ll. 6-8.

"When he told me that he wasn't going to let me in the apartment, he started walking towards me aggressively. And I told him to backup." R. 134, ll. 20-22. "I told him to back up a few times and he charged at me." R. 134, l. 24. Heather, who was listening at the door, confirmed that she heard Appellant tell Decedent to back up three times. R. 90, ll. 12-16. However, instead of backing up, Decedent lunged at Appellant. "He went to lung[e] at me, and I stumbled back. And I shot him." R. 135, ll. 1-2.

"I was trying to back up to my car and he started charging at me." R. 158, ll. 1-2. Appellant's testimony was uncontradicted in this regard. No eyewitness saw and heard the entirety of the confrontation, although various witnesses corroborated portion's of Appellant's account of events.

Appellant explained in his testimony at the immunity hearing that, from the time he saw Decedent at the door to the time he shot Decedent, after backing up a significant distance, “I was thinking he was going to hurt me.” R. 136, ll. 6-12.

Appellant gave a written statement to Detective Weaver, which was admitted at the immunity hearing. Appellant’s statement, which was written by Detective Weaver, stated that, “**I was just thinking how much he hurt Heather.** And I went back to thinking of how my dad treated my family.” R. 586 (emphasis added). Appellant’s statement also reflected that Appellant said, “I was scared, my father hurt me so much in the past mentally, physically, and emotionally. And I was going through it all over again.” R. 587.

Appellant explained that when Detective Weaver wrote that Appellant said he did not think Decedent had a gun, that was only after being at the police station and reflecting back on what happened. “In this statement, I had time to reflect back on everything that happened. And reflecting back, there was more than enough opportunity to pull a gun before I pulled mine if he had one.” R. 135, l. 15 – 136, l. 5. “I didn’t say I knew for a fact that he wasn’t [armed]. I said that I don’t think he was after the fact when I was reflecting back on what actually happened.” R. 155, ll. 10-12.

Appellant would go on to testify at trial that, although he continued to back away towards his car, he was afraid to turn his back on the Decedent. R. 500, ll. 21-22.

The immunity hearing proceeded under subsection (C) of the Act. R. 176, ll. 15-16. S.C. Code Ann. § 16-11-440(C) provides that

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.

However, the circuit court denied immunity, and ruled: “Under the Castle Doctrine, one which is attack[ed] without qualm upon his part on his own premises has a right in establishing self-defense, to claim immunity from the law of the retreat which ordinarily is an essential element of that defense.” R. 184, l. 22 – 185, l. 5. The judge found Appellant ineligible for immunity because, even if Appellant had a right to be in the apartment, the altercation itself occurred outside. Further, to the extent Appellant was eligible for immunity, she found he did not prove the elements of self-defense by a preponderance of the evidence. R. 185, ll. 5-13.

The circuit court found that Appellant was at fault in bringing on the difficulty for two reasons. First, he “was sleeping with the victim’s spouse and was around his minor children” and “[a]lthough they were separated, they were still legally married and he knew that.” Under those circumstances, she reasoned that Appellant knew, and been warned, that there would be a potential conflict if he and Decedent ever met. R. 185, ll. 14-21; R. 186, ll. 7-11. Second, she found that Appellant showed a “complete disregard of the victim’s car and her timing and her requirement that she pick up her children on time,” which resulted in the victim bringing the children home. R. 185, l. 22 – 186, l. 9.

The circuit court found that Appellant failed to prove he actually believed he was in imminent danger of sustaining serious bodily injury, noting that Decedent never said to Appellant: “I’m going to shoot you. I’m going to stab you. I’m going to kill you.” R. 186, ll. 11-17. The circuit judge further noted that Appellant “did not think that the victim was armed with a weapon, that he never saw a weapon, and had he had a weapon, he would’ve had enough time to pull it out.” R. 186, ll. 18-22. In finding that the circumstances were not such that a reasonably prudent man of ordinary firmness and courage would have been warranted in striking the fatal

blow, the circuit judge noted the similarity in size between the men, that Decedent was not armed, and that it was Appellant who pointed a gun at Decedent. With respect to the text message, the court found that it could be viewed and interpreted “in many different ways,” including the view taken by Heather, which was that it was not a threat. R. 186, l. 23 – 187, l. 17.

Inexplicably, the circuit judge then discussed the duty to retreat, finding that Appellant did not prove that he had no other probable means of avoiding the danger. R. 187, l. 17 – 188, l. 2. *See State v. Curry*, 406 S.C. 364, 752 S.E.2d 263 (2013) (“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. This includes all elements of self-defense, *save the duty to retreat.*” (emphasis added); S.C. Code Ann. § 16-11-440(C) (“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 . . .”)

However, the judge found that “as soon [as Appellant] saw the victim, he could have just turned around and walked away.” Alternatively, he could have said “sure, I’m not going there” instead of “insisting that he go into the residence.” R. 187, l. 21 – 188, l. 2. Accordingly, the circuit court denied the motion for immunity. R. 188, l. 2-3. The court maintained its ruling upon renewal of the motion. R. 416, l. 18 – 417, l. 6; R. 507, ll. 14-21.

In *State v. Himes*, 2020-UP-178 (S.C. Ct. App. filed June 10, 2020), this Court found “the trial court did not abuse its discretion in determining Himes failed to prove he was entitled to immunity under the Act because a reasonably prudent man of ordinary firmness and courage would not have entertained the same belief that he was in imminent danger of serious bodily injury or death.”

This Court reasoned,

The evidence indicates the victim's primary goal was to prevent Himes from entering the victim's ex-wife's apartment, not to attack Himes. Himes agreed the only threatening thing the victim said to him the night of the fatal shooting was "you're not going into that apartment where my two kids are." Himes stated he shot the victim because he was scared. The night of the incident, he told police officers he shot out of fear because "My father hurt me so much in the past mentally, physically and emotionally and I was going through it all over again." We find Himes failed to meet the elements of self-defense; thus, we find no abuse of discretion by the trial court in denying Himes's motion for immunity under the Act.

State v. Himes, 2020-UP-178 (S.C. Ct. App. filed June 10, 2020),

As to whether a reasonably prudent man would have believed he was in imminent danger of serious bodily injury or death, this Court's decision focused primarily on an unexplained remark in Appellant's written statement to Detective Weaver that the violent encounter with Decedent brought back memories of abuse by his father. However, counsel respectfully submits this Court overlooked other facts that went to the heart of the reasonableness of Appellant's fear. In the same statement, Appellant also said that, at the time, he was "thinking how much he [Decedent] hurt Heather." R. 586.

Also, counsel submits this Court's reasoning that "Himes agreed the only threatening thing the victim said to him the night of the fatal shooting was 'you're not going into that apartment where my two kids are,'" overlooked other threatening remarks testified to by Appellant. In particular, Decedent repeatedly told Appellant that, "He wasn't going to allow his kids to call me daddy," and "he wasn't going to allow me to be a father to his kids." R. 132, ll. 3-24. These words, combined with Decedent's actions of continuously coming towards Appellant, while Appellant retreated, were also threats as they conveyed Decedent's intent to act to ensure Appellant never became a father to the children.

Appellant believed he had backed up about fifty feet by then, and police officers would estimate the fatal encounter took place about thirty-three to thirty-nine feet from the breezeway that led to the apartment. R. 98, l. 19 – 99, l. 4; R. 133, ll. 13-19. At that point, Appellant pulled out a gun. R. 133, ll. 1-19. (Appellant had bought the gun because Heather was raped by an acquaintance on October 26, 2015.) R. 126, l. 5 – 127, l. 14.

Appellant continued backing away towards Heather’s car, but Decedent, “was yelling at me. He said I’m not scared of your punk ass gun.” R. 134, ll. 6-12. That too, was a threatening remark by the Decedent that night.

Counsel respectfully submits that the Court overlooked other significant evidence offered at the immunity hearing on the reasonableness of Appellant’s fear. *See* BOA at 6 – 10; BOA at 20 – 22; BOA at 25 – 28. In particular, Appellant’s knowledge of Decedent’s prior violent physical conduct towards Heather was relevant to the reasonableness of Appellant’s fear. Appellant knew Decedent had physically abused Heather at least twice. Once, Decedent’s violent physical abuse of Heather was so severe it left her with permanent facial scarring.

Counsel also submits this Court misapprehended the threatening nature of the text message sent by the Decedent, particularly in the context that it was sent just two days before the confrontation. Given Decedent’s use of the words, “don’t let me catch him slipping,” Appellant quite reasonably feared being assaulted by an angry and violent Decedent, when he was caught by Decedent heading to Heather’s apartment. *See People v. Arellano*, 23 Cal. Rptr. 3d 172, 174 (Cal. Ct. App. 2004); *Boddie v. State*, 494 S.E.2d 651, 652 (Ga. 1998). This message must also be considered in the context that Appellant went out of his way to hide from and avoid Decedent on previous occasions and on the night in question.

Appellant was also in reasonable fear because the decedent began reaching in his pocket, ignored multiple pleas from Appellant to back up, and lunged at Appellant. “A defendant, in a self-defense case, has the right to act on appearances.” *State v. Fuller*, 297 S.C. 440, 443, 377 S.E.2d 328, 331 (1989). That is true even if the defendant’s belief about those appearances is ultimately mistaken. *State v. Dickey*, 394 S.C. 491, 501, 716 S.E.2d 97, 102 (2011). Similarly, the accused does not have to wait until his assailant gets the drop on him—he has the right to act under the law of self-preservation and prevent his assailant “from getting the drop on him.” *State v. Rash*, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936). Appellant told Decedent to “back up” at least three times, pleas that were overheard and confirmed by Heather. Appellant himself had also backed up more than thirty feet before the fatal shot was fired, yet the Decedent kept coming at him.

In *State v. Dickey*, 394 S.C. 491, 716 S.E.2d 97 (2011), our Supreme Court held that the defendant, a security guard, was entitled to a directed verdict on self-defense when he fatally shot a man he was lawfully ejecting from an apartment building. The Court determined that the defendant reasonably believed he was in actual danger of death or serious bodily injury because the victim was highly intoxicated, acted aggressively over the course of the conflict, began advancing toward the defendant quickly with the purpose of assaulting him and continued advancing toward the defendant after defendant pulled the gun. *Id.* at 501, 716 S.E.2d at 102. Similarly, here, Decedent was highly intoxicated, was undeterred by the threat of the gun, and he kept advancing on Appellant despite being exhorted to back up. It was only when Decedent finally lunged at Appellant that Appellant fired a single shot.

Counsel also respectfully submits the Court overlooked the fact that Appellant did not bring about the difficulty. *See* BOA at 17 – 18; BOA at 22 - 24. To the extent that the solicitor

contended Appellant was acting unlawfully because he was not in lawful possession of the gun, “a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting.” *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). And, the circuit court’s overly moralistic conclusion that Appellant brought about the difficulty because he was in a relationship with Heather did not take into consideration the fact that Decedent and Heather had been separated for eighteen months and lived in different residences, and Appellant was living with Heather.

Nor was Appellant’s tardy arrival responsible for bringing about the difficulty. Under that erroneous line of reasoning espoused by the circuit court, Decedent should be at fault for bringing on the difficulty because he only encountered Appellant pursuant to his decision to drive his children while grossly intoxicated, instead of waiting until the next day. However, it was, in fact, the Decedent’s conduct in continuing to force Appellant backward and ignoring his pleas to stop, culminating in Decedent’s decision to charge at and lunge at Appellant that brought about the difficulty here.

Moreover, counsel submits that this Court overlooked the fact that Appellant was in a place where he had a right to be. *See* BOA at 18 – 20. In *State v. Jones*, 416 S.C. 283, 296-97, 786 S.E.2d 132, 139 (2016), our Supreme Court clarified the scope of subsection (C) of the Act, finding that it is “broadly worded” and that the Legislature intended its protection “to apply to incidents, provided the other requirements are met, without a geographical restriction.” Appellant had been staying at Heather’s apartment for several weeks. His clothing and toothbrush were there. He was an invited guest, expected by Heather to come back.

This Court also overlooked the fact that Appellant had no duty to retreat. *See* BOA at 28 - 29. The circuit court’s findings in this regard, that Appellant should have walked away, are

inexplicable. *See* S.C. Code Ann. § 16-11-440(C) (“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** . . .”) (emphasis added). Our Courts have determined that, in order to be granted immunity from prosecution under the Act, a defendant must also prove all the elements of self-defense, **except the duty to retreat**, by a preponderance of the evidence. *State v. Curry*, 406 S.C. 364, 371-72, 752 S.E.2d 263, 266-67 (2013). “[T]he duty to retreat, need not be shown when seeking immunity under the Act.” *State v. Douglas*, 411 S.C. 307, 318, 768 S.E.2d 232, 239 (Ct. App. 2014). Moreover, any further retreat by Appellant could have put him in danger, since Decedent was unsatisfied with Appellant’s attempts to retreat. Decedent continued to follow Appellant and charged at him, even though Appellant was retreating and Appellant had repeatedly entreated Decedent to back up.

The trial court erred by finding Appellant was not eligible for or entitled to immunity from prosecution under the Protection of Persons and Property Act. Based on the above arguments, counsel for Appellant respectfully seeks rehearing pursuant to Rule 221(a), SCACR, due to the significant points overlooked and/or misapprehended by the Court in affirming Appellant’s murder conviction.

Respectfully Submitted,

s/ Joanna K. Delany
JOANNA K. DELANY
Appellate Defender

This 25th day of June, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above referenced case has been served upon Melody Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Petition for Rehearing has been served upon Christian Anthony Himes, #344458, at Kirkland Reception and Evaluation Center, 4344 Broad River Road, Columbia, SC 29210, this 25th day of June, 2020.

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT