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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from McCormick County

Appellate Case No. 2012-210646

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

APPELLANT'S MOTION TO REMAND

Appellant Joe Ross Worley (hereinafter "Worley") moves this Honorable Court for an order to remand this matter to the circuit court for a *de novo* hearing on the issues which are currently on appeal. In support of his motion, Worley will show:

1. Worley was arrested following events at his mother's home in the early morning hours of November 15, 2009. He has been incarcerated since that time in the McCormick County jail as a pretrial detainee[1]. He has not been tried for the alleged crimes for which he has been incarcerated for more than three years.

2. The exact events of those early morning hours are heavily disputed between the parties to this appeal, but from Appellant's perspective, a full and complete record of the underling proceedings would demonstrate the following:

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[1] On three (3) occasions (December 3, 2009, February 23, 2010, and August 11, 2010), the circuit court, via Judge Keesley, denied pretrial bond, finding Worley is a "danger to the community." On the fourth (4th) occasion on which Judge Keesley considered the issue, he recused himself. Judge Frank Addy then heard the pretrial bond motion, and denied it, essentially concluding he could not overrule Judge Keesley. (Order dated September 28, 2011)

On the darkest night of the month, and in the wee hours of the morning, two McCormick County Sheriff's Office deputies (Moore and McAllister) and another employee of the Sheriff, Rushton[2], approached Worley's mother's house to investigate a gunshot complaint made by Worley's next door neighbors. Worley was sound asleep in his bed but awoke when the police arrived and began ringing the doorbell.[3] His mother remained asleep. Worley's bedroom and his mother's bedroom were upstairs, inside of a dwelling that was well insulated. Worley's windows were closed, and the HVAC unit was on and heating the house.

Worley's neighbors had called 911 to complain that Worley had fired a weapon earlier in the evening. The neighbors didn't contact Worley directly to complain and didn't tell Worley they had called the police. Rushton, Moore, and McAllister didn't telephone, or have police dispatch call, the Worley residence, even though Mrs. Worley's telephone number was listed in the local telephone book.

Rushton, Moore, and/or McAllister repeatedly rang the doorbell located at the ground level door. This door is the only entrance to the house. This door has no peephole or other means to examine the identity of the person(s) on the other side, which is why Worley didn't go downstairs and open this door. Also, there were no windows on the ground level of the house.

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[2] Rushton's status as a law enforcement officer on the night of the shooting is disputed. Rushton was a former McCormick County deputy who was newly re-hired by the McCormick County Sheriff's Office after several years of other overseas employment. However, Rushton had not been recertified as a law enforcement officer, and had not been duly qualified to serve as a deputy sheriff, at the time he approached Worley's mother's house and aimed his gun at Worley.

[3] Testimony conflicted regarding the exact time of the shots, although witnesses seemed to agree that there were only two (2) shots fired. Rushton admitted that he believed a deer poacher was active in the area and was responsible for the prior shots complained of by the neighbors. Regardless, Worley asserts he went to sleep afterward until roused from his bed by the ringing of the doorbell, and there is no evidence in the record to the contrary. Even using a time later than Worley's own recollection, the 3:30 a.m. time testified to by the neighbor still puts an hour between the final shot and when Rushton arrived on scene, which was more than ample time for Worley to reach a deep sleep prior to being awakened by the ringing doorbell

Worley couldn't see any police cars from the upstairs windows. Rushton's police car, without flashing blue lights on, was parked on the other side of the house and out of Worley's line of sight anyway. Moore's car and McAllister's car weren't parked on Worley's property. No one used sirens, a loud speaker, a bullhorn, or any other device in order to let Worley know that law enforcement was in his mother's yard.

Worley presented evidence that the night in question was the darkest night of the month. Worley testified that he did turn on the light while still inside the house, but did not see anyone and only saw total darkness. Moore and McAllister testified that they saw the light come on initially as they were at the rear of Worley's house getting to ready to leave. Rushton saw the light come on while walking from the neighbors' house to Worley's mother's house. This clearly explains why Worley did not see any person in his yard when he first turned on the light and looked out over the yard from within his house.

Worley testified that he then turned off the light. Every witness is consistent in acknowledging the light was not on continuously. Worley stated he turned off the light to ensure his rifle's safety was off before turning the light on again and exiting onto the balcony. Worley had the rifle in the port position (pointed upward and not at anyone) when he exited onto the balcony. Rushton agreed that Worley had the rifle in the port position when Worley exited onto the balcony. Worley testified that he saw Rushton, yelled "freeze," and then Rushton aimed his weapon at Worley. Rushton's testimony confirms that he aimed his weapon at Worley, despite no menacing, threatening, or illegal action having been taken by Worley, even according to Rushton himself. Worley testified that he would not have shot Rushton if he had known Rushton

was with the McCormick County Sheriff's Office.

Worley was armed with a semi-automatic rifle, and said he could have shot Rushton again when Rushton fell to the ground after being shot. Rushton testified the shot knocked him to the ground. Instead, Worley fired a warning shot into the air over Rushton's head when Rushton started running toward Worley's ground level door, in an effort to motivate the suspected burglar to vacate the premises.

3. Both parties agree that law enforcement officers arrested Worley at his mother's house that morning. Worley was charged with three (3) counts of assault and battery with intent to kill (S.C. Code Ann. § 16-3-0620) and three (3) counts of use of a weapon during a violent crime (§ 16-23-0490).

4. At a pretrial hearing, Worley raised the Castle Doctrine by way of defense. S.C. Code Ann. § 16-11-420 (hereinafter the "Act") codifies the common law Castle Doctrine, and provides for the ability of law-abiding citizens to protect themselves via their constitutional right to bear arms, and thereby protects their right to "expect to remain unmolested and safe within their homes." Id.

5. The Act provides for true immunity from prosecution, and the applicability of the statute is to be determined pretrial. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). Judge William P. Keesley held a hearing on May 31, 2011 (continued over onto June 1, 2011) to determine whether Worley was entitled to immunity under the Act, and concluded that Worley was not protected from prosecution. (Orders dated June 24, 2011 and July 5, 2011). Appropriate motions for reconsideration were filed and denied.

6. In his ruling on immunity, Judge Keesley recused himself from further proceedings in this case. Id. This presented such a complex procedural hurdle that Judge Keesley sought

expert advice from retired law professor John Freeman about his ability to decide the motions for reconsideration after having already recused himself. After receiving advice from Freeman, Judge Keesley addressed the motions for reconsideration.[4]

7. The Act does not explicitly provide a procedure for determining immunity. Duncan, 409, 664. In Duncan, the Supreme Court held that the immunity determination under the Act "must be decided prior to trial" upon motion of either party. Id. at 410, 665. The particular facts at issue in Duncan involved a grant of immunity, so the State's appeal was, in fact, an appeal from a final order. Id. at 407, 663. However, the Supreme Court said a denial determination under the Act "is immediately appealable, as it is in the nature of an injunction." Id. (footnote 2).

8. Unanswered, however, is whether a defendant who is denied the immunity in a pretrial order must appeal that order pretrial, or simply may do so and preserve the ability to raise the immunity at trial, especially since determination of immunity is not automatic or required but is triggered by pretrial motion of either party.

9. In this case, after the denial of pretrial bond, Worley has thus been given a Hobson's choice: (1) not appeal Judge Keesley's order, then go to trial with the risk he will be denied the ability to raise protections afforded by the Act as a defense at trial, or (2) remain in jail while he appeals the pretrial order denying applicability of the Act. In order to protect his rights, Worley has remained in jail while pursuing this appeal. Worley's effort to seek extraordinary relief from the Supreme Court on the bond issue was denied. Order dated January 25, 2012.

[4] Eleventh Judicial Circuit Judge R. Knox McMahon has also recused himself from hearing this matter.

10. This appeal from Judge Keesley's Orders addresses the substantive issue of whether Worley is entitled to the immunity provided by the Act. In preparing the appeal, it was discovered that the court reporter who had recorded the hearing before Judge Keesley could not produce the entire transcript of the proceeding[5]. Oddly enough, all of Worley's testimony was missing, while all of the testimony from law enforcement was intact.

11. To avoid the delays which would accompany a remand, Worley attempted to supplement the appellate record with notes from the hearing taken by Worley's trial counsel. This effort was opposed by the State, and by order dated December 19, 2012, this Court ordered Worley's appellate counsel to amend the initial brief (and designations) to strike the proposed supplements to the record.

12. Following filing of Worley's amended initial brief, the State moved to remand the matter to the circuit court to reconstruct some portion of the record. Worley agreed in a return dated February 15, 2013, and asked that this Court construe the missing evidence adversely to the State.

13. The State has lobbied this Court, by letter dated February 20, 2013, to place some restrictions on the scope of the remand that will be made pursuant to its motion. However, in light of Judge Keesley's recusal, it is apparent that any remand must be a hearing *de novo* so that a complete record can be created for the review of this issue.

14. Cases cited by the State which suggest the trial judge should use his discretion to determine what to reconstruct on remand are not applicable here because Judge Keesley has recused himself. The judge to whom the matter is assigned for remand must start from

[5] The court reporter produced a police report which indicated her car had been broken into and some tapes stolen. However, most tapes from the hearing before Judge Keesley remained. The only missing tapes included a portion of the neighbor's testimony and all of Worley's testimony.

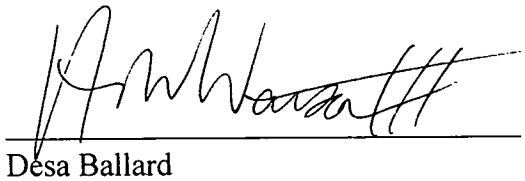
scratch.

15. During the remand proceedings, the trial judge can address issues regarding any inferences that must be drawn from the failure of the State to produce the entire proceeding before Judge Keesley.

16. Worley moves for remand in total, with direction to the trial court to expedite the proceeding. In essence, this matter has to start again. A new judge will have to hear new evidence, and could well make a different ruling which would moot this appeal.

17. Because Worley remains incarcerated, without availability of bond, due to the State's (or its agents) failure to produce the entire transcript of the proceedings before Judge Keesley. Worley has been in jail since his arrest more than three years ago, all because the State (or its agents) cannot produce a complete record for appeal. For that reason, Worley respectfully requests that this Court's order of remand require expedited proceedings.

Respectfully submitted,



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March 6, 2013

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM McCORMICK COUNTY

Honorable William P. Keesley, Circuit Judge, 11th Judicial Circuit
Appellate Case No. 2012-210646

Joe Ross Worley,

Appellant

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Malory L. Hogg, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on March 6, 2013, I served a copy of the **APPELLANT'S MOTION TO REMAND** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

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March 6, 2013
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March 6, 2013

Via US Mail
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Re: Appeal Related to *State of South Carolina v. Joe Ross Worley*
Appellate Case No. 2012-210646

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven (7) copies of the Appellant's Motion to Remand for the above referenced matter. Also enclosed, please find a check for $25.00 for the filing fee. Please return the copy to our office in the enclosed, self-addressed, stamped envelope.

Please do not hesitate to contact our office if you should have any questions. With warm personal regards, I am,

Sincerely yours,

Malory L. Hogg
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Enclosures

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