STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Pickens County
Court of General Sessions
The Honorable Letitia H. Verdin, Circuit Court Judge

Opinion No. 2020-UP-269 (S.C. Ct. App. filed Sept. 23, 2020)
Appellate Case No. 2021-000062

THE STATE

RESPONDENT,

V.

JOHN WILLIAM MCCARTY,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I. Did the Court of Appeals err by holding "the trial court did not err in failing to resolve evidentiary conflicts or in abdicating its role as fact finder" where the trial court found that whether the third party, on whose behalf Petitioner was interceding, was at fault in bringing on the difficulty presented a "quintessential jury question" under the Protection of Persons and Property Act?

II. Did the Court of Appeals err by ruling, in the alternative, that the trial judge did not err by failing to find Petitioner was immune from prosecution under the Act where Petitioner proved by a preponderance of the evidence that he acted in defense of others?

RESPONDENT'S STATEMENT OF THE CASE

In December 2015, the Pickens County Grand Jury returned indictments against petitioner for murder and possession of a firearm during the commission of a violent crime. (R. 564-68). Prior to trial, petitioner sought immunity from prosecution under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, *et. seq*. Specifically, petitioner claimed that he lawfully used deadly force in defense of another. (R. 114, l. 21-25). The circuit court presided over an immunity hearing in February 2017 to consider the merits of the claim. (R.1). Assistant Solicitors Baker Cleveland and Britni McCall represented the State of South Carolina. (R. 1). Attorney Robert Newton represented petitioner. (R. 1).

After a full evidentiary hearing, the circuit court denied petitioner's claim of immunity from prosecution. In a written order, the court found that petitioner had not met his burden of proof to establish immunity. (R. 132). According to the court, the preponderance of the evidence did not support the claim that the third party, in whose defense petitioner was acting, was without fault in bringing about the difficulty. (R. 134). A jury would later find petitioner guilty as charged

on both counts in October 2017. (R. 541, l. 14-15). The court sentenced petitioner to thirty years for murder and five years (concurrent) for possession of a firearm during the commission of a violent crime. (R. 543, l. 14-17).

Petitioner appealed his convictions and sentences to the South Carolina Court of Appeals. He argued that the circuit court failed to resolve conflicting evidence presented at the immunity hearing. Alternatively, he claimed that the circuit court abused its discretion in holding that he was not entitled to immunity from prosecution. The Court of Appeals rejected both claims in an unpublished decision. State v. McCarty, No. 2017-002377, 2020 WL 5652498, (Ct. App. Sep. 23, 2020). It noted that the circuit court cited the correct burden of proof, considered the evidence, and simply found petitioner failed to meet his burden. Id. at * 1. In reaching this conclusion, the court specifically cited, among other cases, this Court's recent decision in State v. Andrews.[1] Id. As for the second issue, the court held that petitioner failed to establish by a preponderance of the evidence that the third party was not at fault in bringing about the difficulty. Id. at *2. Petitioner now seeks certiorari on both issues.

RESPONDENT'S STATEMENT OF FACTS

Respondent incorporates by reference its "Statement of Facts" in its Final Brief of Respondent. (Resp. Br. 4-10).

[1] 427 S.C. 178, 830 S.E.2d 12 (2019).

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE CIRCUIT COURT SAT AS THE FACT FINDER, APPLIED THE CORRECT BURDEN OF PROOF, AND RESOLVED CONFLICTING EVIDENCE AT THE IMMUNITY HEARING.

As the Court is well aware, pursuant to the Protection of Persons and Property Act (the Act), an individual who is justified in the use of deadly force can seek immunity from prosecution at a pre-trial hearing. S.C. Code Ann. § 16-11-450; State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013). To obtain immunity, the accused must establish by a preponderance of the evidence that his use of deadly force was justified. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). The circuit court "must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act." State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019). If the circuit court determines that the accused has not met his burden of proof, the case will proceed to trial for the jury to consider the issue of self-defense. Id. at 451, 827 S.E.2d at 569.

Petitioner argues that the circuit court failed to determine whether he established immunity by a preponderance of the evidence. (Pet. 12-15). In support of the claim, he points to one portion of the circuit court's order. Specifically, after finding petitioner failed to establish immunity by a preponderance of the evidence, the circuit court noted "[t]he evidence presented conflicting views as to [the third party's] involvement in the argument that led to the fatal encounter, and that presents a factual question that must be resolved by a jury." (R. 135). According to petitioner, this language indicates an "abdication" of the court's duty to resolve conflicting evidence. (Pet. 15).

Petitioner has taken this quote out of context. Read as a whole, the order reveals the circuit court sat as the fact-finder, applied the correct burden of proof, and resolved the conflicting evidence presented at the hearing. See Cervantes-Pavon, 426 S.C. at 451, 827 S.E.2d at 569. For

example, in its introduction, the order reads "[a]fter considering the evidence presented, it is the ruling of the Court that the Defendant failed to meet his burden of proof for the reasons set forth below." (R. 132). The court further noted, "[i]t is the Defendant's burden to prove by a preponderance of the evidence that he had the right to act in defense of others." (R. 134). The order continues, "[i]n considering the evidence presented, we find the Defendant failed to meet his burden because he did not prove that [the third party] was without fault in bringing about the difficulty." (R. 134).

The plain text of these passages confirm that the circuit court understood its role as fact-finder, weighed the evidence, and applied the correct legal standard. The subsequent portion of the order that petitioner cites is not evidence that the circuit court "abdicated" its role as fact-finder. (Pet. 15). To the contrary, it reflects the legal principle that because petitioner failed to satisfy his burden of proof at the hearing, he was not entitled to blanket immunity from prosecution. In other words, a jury would have to decide the merits of his self-defense claim. See Curry, 406 S.C. at 372, 752 S.E.2d at 267 ("Appellant's claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution.").

Furthermore, this Court recently addressed the precise issue for which petitioner now seeks certiorari. In State v. Andrews,[2] the trial court found that the defendant failed to establish immunity by a preponderance of the evidence. After issuing its ruling, the trial court remarked that the "very inconsistent" testimony of the witnesses created a question to be resolved by the jury. The case proceeded to trial, resulting in a conviction. On appeal, the defendant argued that the trial court had a duty to make credibility findings because the testimony of the witnesses differed. Additionally, the defendant claimed that the trial court's statement that the facts created

[2] 427 S.C. 178, 830 S.E.2d 12 (2019).

a "quintessential jury question" constituted reversible error. According to the defendant, the words indicated the trial court failed to resolve conflicting evidence presented by both sides.[3]

This Court rejected that argument, noting that the trial judge's language about the "quintessential jury question" was a direct quote from a prior decision, State v. Curry. See Curry, 406 S.C. at 372, 752 S.E.2d at 267. That quote "has been the source of much confusion for the bench and bar." Andrews, 427 S.C. at 181, 830 S.E.2d at 13. According to the Court, the situation in Curry was unique in that the defendant moved for immunity *after* the State had presented its case-in chief. As such, the language was not intended to allow trial courts "to automatically deny immunity in cases with conflicting evidence." Andrews 427, S.C. at 181, 830 S.E.2d 13. Instead, the language reflected the unique procedural posture of the case: because the defendant failed to establish his immunity during the State's case-in-chief, the trial court properly submitted the case to the jury. Id.

After addressing its prior opinion in Curry, the Court held that the trial judge's language did not indicate a failure to resolve conflicting evidence. To the contrary, the trial court correctly cited the preponderance of evidence standard as the burden of proof at the immunity hearing. Id. at 182, 830 S.E. 2d at 13. Although the trial court may not have articulated "every detail of its analysis in the record, the record is nevertheless adequate for a reviewing court to determine that the circuit court applied the correct burden of proof and made findings that supported its denial of immunity consistent with a correct application of this Court's precedent." Id. at 182, 830 S.E.2d at 14. As such, there was no error of law. Id.

The same reasoning applies here. Like the situation in Andrews, the circuit court's

[3] The facts of the Andrews case, including the accused's appellate arguments, are discussed in the Court of Appeals' opinion. See State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018) *vacated by* 427 S.C. 178, 830 S.E.2d 12 (2019).

collateral language regarding the "quintessential jury question" was a direct quote from Curry and does not suggest an abdication its role as fact-finder. (R. 134). The circuit court explicitly applied the correct burden of proof and resolved conflicting evidence in a manner consistent with existing precedent. Its order left no room for doubt regarding the basis for its ruling: "the Defendant failed to meet his burden because he did not prove that [the third party] was without fault in bringing about the difficulty." (R. 134). Rather than abdicating its role as fact-finder, the circuit court simply resolved the facts against petitioner. Accordingly, certiorari should be denied on this issue.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE CIRCUIT COURT'S RULING ON IMMUNITY HAS AMPLE EVIDENTIARY SUPPORT.

In order to be entitled immunity from prosecution under the Act, the accused must establish all the elements of self-defense, except the duty to retreat, by a preponderance of the evidence. E.g. State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 238 (Ct. App. 2014). The first element of self-defense is that the accused must be without fault in bringing about the difficulty. Id. When acting in defense of others, the accused must show that the person in whose defense he is acting would "likewise have the right to take the life of the assailant in self-defense." State v. Long, 325 S.C. 59, 64, 480 S.E.2d 62, 64 (1997). In other words, the third party must be without fault in bringing about the difficulty. Id. As applied here, certiorari should be denied because there was sufficient evidence to find the third party was at fault. See e.g. State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016)(noting an immunity claim is reviewed under an abuse of discretion standard, which only occurs when the trial court's ruling is based on an error of law or is without evidentiary support).

A. Petitioner Failed To Establish The Third Party Was Without Fault in Bringing About The Difficulty.

An individual who "provokes or initiates an assault" cannot claim self-defense. State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). Stated differently, "any act of the accused

in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for homicide." Id. Additionally, "the plea of self-defense is not available to one who uses language so opprobrious that a reasonable man would expect it to bring on a physical encounter, and which did actually contribute to bringing it on." State v. Strickland, 389 S.C. 210, 215, 697 S.E.2d 681, 684 (Ct. App. 2010)(quoting State v. Woodham, 162 S.C. 492, 502, 160 S.E. 885, 889 (1931)).

The circuit court's ruling that petitioner failed to prove the third party was without fault has ample evidentiary support. One of the State's witnesses testified that the third party "was instigating the entire thing from start to finish ... by the way that he was speaking to me, nagging us on physically, verbally." (R. 105, l. 22-25; 106, l. 1). The police were called to the scene before the murder, but they left after assessing that everyone had calmed down. (R. 81, l. 25). Thereafter, the third party began rummaging through and destroying the victim's property. (R. 92, l. 8-13). Specifically, he opened a carton of the victim's cigarettes, crumpled them up, and threw them all over the front porch. (R. 92, l. 10-13; 106, l. 24; 107, l.1-2). In response, the victim pushed the third party down the steps of the porch.

Nevertheless, the third party continued to provoke additional conflict. (R. 92, l. 17-19). He walked back up the steps, smacked the victim's beer off the railing, and tried to push him out of the way. (R. 94, l. 6- 24). Simply put, there was sufficient evidence to conclude the third party started the conflict that ultimately led to petitioner's use of deadly force. As such, the circuit court acted within its discretion in finding that the petitioner was not justified in using deadly force on his behalf. See State v. Strickland, 389 S.C. 210, 697 S.E.2d 681 (Ct. App. 2010)(holding that there was sufficient evidence that the defendant was at fault in bringing about the difficulty because he told the victim to "shut your fucking mouth").

B. Petitioner Failed To Establish The Third Party Withdrew From The Conflict.

Petitioner argues that even if the third party was at fault in bringing on the difficulty, he withdrew from the conflict and communicated that intent to the victim. (Pet. 22). But this argument lacks merit. As noted above, after being pushed down the steps, the third party walked back up, smacked the victim's beer off the railing, and tried to push him out of the way. (R. 16, l. 22-23; 37, l. 1; 94, l. 12-14). These actions communicate the *exact opposite* of withdrawing from a conflict. In fact, it is hard to imagine a better way the third party could have *escalated* the confrontation. As one of the State's witnesses testified, it was "like, screw you guys, basically." (R. 94, l. 24).

Furthermore, the third party's alleged "screams of terror" do not alter the analysis. Screaming for help only reveals that the third party had bitten off more than he could chew, not that he intended to withdraw. See State v. Taylor, 356 S.C. 227, 232 n. 2, 589 S.E.2d 1, 3 n. 2 (2003)(Noting that "[r]egardless of what extremity or imminent peril he may be reduced to in the progress of the combat," an individual must still in good faith withdraw from the conflict.). Yelling for help also indicates a desire to double down and bring more firepower to conflict. The third party never said "you win," "I quit," or "uncle." Nor did he have time to do so. As the State's witness testified, "they hadn't even had 10 seconds to fight" when petitioner appeared and shot the victim. (R. 100, l. 5-6). In short, there was sufficient evidentiary support for the circuit court's ruling. As such, certiorari should be denied on this issue as well.

CONCLUSION

For the foregoing reasons, certiorari should be denied and the judgment, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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February 18, 2021.

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JOHN WILLIAM MCCARTY,

PETITIONER.

CERTIFICATE OF SERVICE

I, Brandy Rankin, as an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Writ of Certiorari and Certificate of Service has been forwarded to Petitioner's counsel, Susan B. Hackett, Esq., via email today, February 18, 2021 to shackett@sccid.sc.gov, and to her assistant Kat Kasperski @ kkasperski@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 18th day of February, 2021.

Brandy Rankin

Brandy Rankin,
Legal Assistant to Michael D. Ross
Assistant Attorney General

Brandy Rankin

To:	shackett@sccid.sc.gov
Cc:	Kasperski, Katriel; Mike Ross; Melody Brown
Subject:	John William McCarty - Return to Petition for Writ of Certiorari, Appellate Case No. 2021-000062
Attachments:	RETURN TO PETITION FOR WRIT OF CERTIORARI & Cert of Serv, 2-17-21, John William McCarty (02493269xD2C78).pdf

Dear Ms. Hackett,

Please find attached the Respondent's Return to Petition for Writ of Certiorari and Certificate of Service in the above captioned case. These documents will be filed with the South Carolina Supreme Court this afternoon along with a copy of this email. Thank you.

Sincerely,

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