STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CALVIN D. FORD,

APPELLANT

APPELLATE CASE NO. 2019-001912

INITIAL REPLY BRIEF OF APPELLANT

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I. The circuit court erred in allowing the lawyer for a witness whom Appellant wanted to call during the hearing on his request for immunity pursuant to the Protection of Persons and Property Act to invoke the witness's privilege against self-incrimination pursuant to the Fifth Amendment where (1) the privilege is personal and must be invoked by the person to whom the privilege belongs, (2) there was no evidence that the witness would have invoked the privilege had he been asked, and (3) the evidence in the record showed the witness could not have invoked the privilege as his testimony was not self-incriminating.

In its brief, Respondent misconstrued Appellant's first issue on appeal. Respondent discussed whether the presiding judge erred in not allowing Appellant to call the witness to the stand for the sole purpose of invoking his privilege against self-incrimination. Quite simply, this was not the issue raised by Appellant. As articulated in the brief, Appellant challenged the presiding judge's decision to allow the privilege, which is personal in nature, to be invoked by the witness's lawyer where there was no evidence the witness would have invoked the privilege, and the proposed testimony was not incriminating of the witness.

Respondent pointed to no authority that would permit the witness's counsel to invoke his privilege against self-incrimination for him. In fact, case law from the South Carolina Supreme Court and the United States Supreme Court make clear that the right is a personal one that can be invoked only by the individual whose testimony is being compelled. See Moran v. Burbine, 475 U.S. 412, 433 n.4 (1986); State v. McGuire, 272 S.C. 547, 550, 253 S.E.2d 103, 104-105 (1979).

Similarly, Respondent made no argument that the proposed testimony was incriminating of the witness. According to Respondent's recitation of the witness's proposed testimony, the witness was not involved in the shooting at all. Yet, the presiding judge undertook no analysis of

whether the testimony would have incriminated the witness, which was a necessary precursor to the witness invoking the privilege. See Grosshuesch v. Cramer, 377 S.C. 12, 23-24, 659 S.E.2d 112, 117-118 (2008). Critically, Respondent argued Campbell's statement was not self-incriminating. See Resp. Br. at 11-13.

Respondent argued that any error in the presiding judge's refusal to require the witness to invoke the privilege personally was harmless beyond a reasonable doubt because it would have been cumulative to other testimony admitted during the immunity hearing. According to Respondent, testimony from this witness – Aliga Campbell – was cumulative to the testimony of Appellant and his cousin, Everette Ford. In light of the state's argument at trial that Everett was not even an eyewitness to the altercation, the argument on appeal that Campbell's testimony would have been merely cumulative to Everette's testimony is disingenuous, at best. See Hrg. 190, ll. 21-24. Not only did the state believe Campbell was present at the time of the shooting, but the state believed Campbell was involved in the shooting and had indicted him accordingly. Thus, the argument the state used in its attempt to discredit Appellant's witness, Everette, would not have been successful in an attempt to discredit Campbell. While the judge failed to articulate his reasons for denying the request for immunity, it is hard to imagine the judge would have viewed testimony from Campbell, an indicted co-conspirator, as merely cumulative to the testimony from Appellant and his cousin. Here, Campbell's testimony is most properly viewed as corroborative, not cumulative.

II. In the alternative, if this Court determines that the witness's statement was self-incriminating, the circuit court erred by refusing to permit defense counsel to call his investigator to testify to the contents of the statement pursuant to Rule 804(b)(3), SCRE, where the witness was unavailable due to the invocation of his privilege against self-incrimination, the witness's statement was corroborated by other testimony, and the cumulative nature of the witness's statement enhanced his probative value to render its exclusion not harmless beyond a reasonable doubt.

Incredulously, Respondent argued *both* that the presiding judge did not err in allowing Appellant's witness, Campbell, to invoke his right against self-incrimination in order to avoid testifying, *and* that Campbell's proposed testimony, which was contained in his statement to police, was not a statement against interest. The two are mutually exclusive. Appellant argued the proposed testimony was not incriminating of Campbell, but in light of the trial judge's ruling allowing Campbell's lawyer to invoke his privilege against self-incrimination, Appellant argued he should be permitted to call his private investigator to introduce the statement.

Respondent cannot have it both ways. Either Campbell's proposed testimony, which was based on his statement to police, was self-incriminating such that invocation of his Fifth Amendment privilege was proper, or his statement to police was a statement against penal interest and admissible as an exception to the rule against hearsay. Campbell's statement corroborated Appellant's version of events and supported granting immunity to Appellant. The exclusion of the statement was error.

III. The circuit court erred by failing to make specific findings of fact and conclusions of law on the elements of self-defense and the relevant statutory provision where Appellant sought immunity from prosecution under the Protection of Persons and Property Act.

Respondent seeks to excuse the presiding judge's failure to make specific findings of fact and conclusions of law when he ruled on Appellant's request for immunity by noting "[t]he requirements for a circuit court's immunity determination have evolved since the date that the court denied Appellant's motion for immunity from prosecution." Resp. Br. at 15. While it is true that our appellate courts have issued opinions providing guidance to the circuit courts regarding the Act after Appellant's hearing, it is equally true that Appellant is entitled to take advantage of those opinions. See Griffith v. Kentucky, 479 U.S. 314 (1987).

Further, the Supreme Court's request that trial courts "consider the elements of self-defense" and "at least make specific findings on the elements on the record" could hardly be considered novel. In 2013, the Supreme Court held the Act included self-defense. See State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). Therefore, it should be no surprise that a presiding judge must "consider the elements of self-defense" when ruling on a request for immunity. Finally, requesting presiding judges make specific findings on the record serves to aid in appellate review and is not unique to consideration of the Act. See e.g., State v. Spears, 403 S.C. 247, 254-255, 742 S.E.2d 878, 881-882 (Ct. App. 2013) (addressing a trial court's failure to conduct an on-the-record balancing test pursuant to Rule 403, SCRE); State v. Elmore, 368 S.C. 230, 239, 628 S.E.2d 271, 275 (Ct. App. 2006) (urging trial courts to articulate their rulings and the bases of their rulings when balancing the probative value of a prior conviction against its prejudicial effect pursuant to Rule 609(a)(1), SCRE); Burton v. York County Sheriff's Dept, 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct. App. 2004) (explaining that when an award of

attorneys' fees is requested and authorized by contract or statute, the trial court should make specific findings of fact on the record).

Respondent appears to concede that the presiding judge erred by failing (1) to consider the elements of self-defense and (2) to make findings on the elements on the record. Respondent argues only that the presiding judge "properly resolved Appellant's claim after considering all of the evidence presented and the arguments of the parties, which specifically addressed the elements of self-defense," but Respondent provides no citations to the record where the judge articulated such findings on the record.

IV. The presiding judge erred when he determined the Protection of Persons and Property Act "does not provide immunity from prosecution" for the crimes of possession of a firearm by a felon and possession of a weapon during the commission of a violent crime.

Respondent essentially conceded the presiding judge erred in his categorical conclusion the Act does not provide immunity from prosecution for weapons offenses. Despite Respondent's suggestion the presiding judge engaged in fact finding and legal analysis regarding this issue, the presiding judge made a simple legal conclusion that the Act does not provide immunity from prosecution for the weapons offenses. Therefore, this Court must reverse the presiding judge's legal conclusion.

Respondent argued that the plain language of the Act "precludes immunity from prosecution for one charged with unlawful possession of a weapon by a person convicted of a violent offense if the evidence shows that the defendant claiming immunity under the Act was **unlawfully armed prior** to the incident." Resp. Br. at 30 (emphasis in original). According to Respondent, "[i]f the evidence supports a finding that Appellant was in constructive possession of a firearm prior to such time as he became in imminent fear of death or serious bodily injury, the Act will not apply to the unlawful carry charge." Resp. Br. at 30. Respondent cites to no authority for this apparent supposition. Contrary to Respondent's unsupported declaration, an individual in unlawful possession of a firearm does not lose the protections afforded by the Act. Only when the unlawful possession of a firearm is the proximate cause of the death will the Act not apply. See State v. Glenn, 429 S.C. 108, 120, 838 S.E.2d 491, 49 (2019).

Despite Respondent's assertion that Appellant was not entitled to immunity because the evidence "raised a question of fact as to whether Appellant was in possession of a firearm prior to the escalation of the altercation" with the deceased, Respondent cited no case law to support

this claim or factual findings by the presiding judge in this regard. In fact, the presiding judge's ruling on this issue was that the Act simply did not apply to the charged weapons offenses. In other words, he determined immunity under the Act was reserved for certain offenses, and weapons offenses, were not among that group. The presiding judge undertook no analysis, contrary to Respondent's suggestion, to determine the facts presented did not support immunity under the Act.

V. In the alternative, if this Court determines the presiding judge's ruling on the question of immunity was sufficient, the judge erred in denying immunity from prosecution where the evidence demonstrated Appellant satisfied the elements of common law self-defense and the Act.

Respondent argued "a motion for immunity from prosecution should be denied where testimony from the accused 'varied "substantially"' from that given by the state's witnesses." Resp. Br. at 25. To support this proposition, Respondent cited State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014) and State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013). Resp. Br. at 25. Further, Respondent argued that "'[w]hen the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury'" and cited State v. Butler, 407 S.C. 376, 755 S.E.2d 457 (2014) for the proposition. Resp. Br. at 25. Neither contention applies here.

Recently, the Supreme Court made clear "just because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the 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). While the Court did not overrule Curry, the Court clarified that the existence of conflicting evidence, even in the form of testimony varying substantially between witnesses, does not relieve the presiding judge of his duty to sit as the fact-finder. Id. Thus, Respondent's reliance on Douglas and Curry to support the presiding judge's decision to deny immunity based upon conflicting evidence is misplaced.

Furthermore, Respondent's use of Butler to save the presiding judge's ruling borders on absurdity. The issue presented in Butler was whether the trial judge erred in failing to require the state to disprove self-defense beyond a reasonable doubt at the directed verdict stage. State v.

Butler, 407 S.C. 376, 380-381, 755 S.E.2d 457, 460 (2014). The Court explained that at the directed verdict stage, even in a self-defense case, the trial court is concerned with the existence of evidence. Id. Therefore, if evidence is susceptible of more than one inference and all of the potential inferences do not point to the same conclusion, then the questions of fact must be submitted to the jury. Id. Butler's reasoning has no place in the analysis of the issue presented in the case sub judice.

Appellant respectfully requests this Court grant him immunity from prosecution if this Court determines the presiding judge's ruling was sufficient to permit appellate review.

VI. The trial judge erred by allowing the state to introduce a prior consistent statement of its star witness where there was no express or implied charge of recent fabrication or improper influence or motive because defense counsel simply impeached her with other prior inconsistent statements.

Respondent's recitation of the facts regarding the state's star witness's testimony highlighted the witness's varied and inconsistent statements. Resp. Br. at 32-35. The star witness told the police one story when she was questioned shortly after the shooting. Resp. Br. at 32-35. When she testified during the pre-trial hearing, she told the presiding judge a different story, but one that was not entirely inconsistent. Resp. Br. at 32-35. Finally, the state's star witness told the jurors a version of events that was inconsistent in parts and consistent in other parts with her prior statement and testimony. Resp. Br. at 32-35. As permitted under the Rules of Evidence, defense counsel used the prior inconsistent statements to impeach the witness. The trial judge allowed the state to introduce the entirety of the star witness's prior statement to police, including the portions that were consistent with her testimony. At trial, and on appeal, the state alleged the admission was proper to rebut an implied allegation of recent fabrication. On appeal, the state claimed the admission was proper pursuant to the rule of completeness. These arguments must fail.

"When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106, SCRE. "Rule 106 is based on the rule of completeness and seeks to avoid the unfairness inherent in the misleading impression created by taking matters out of context." State v. Cabrera-Pena, 361 S.C. 372, 379, 605 S.E.2d 522 525 (2004). Importantly, "[w]here Rule 106,

SCRE, applies, it does not require all of the document to be introduced, merely *any other part* of any other writing or recorded statement *which ought in fairness to be considered contemporaneously with it*." State v. Taylor, 333 S.C. 159, 171, 508 S.E.2d 870, 876 (1998) (internal quotation omitted) (emphasis in original). "Only that portion of the remainder of a statement which explains or clarifies the previously admitted portion should be introduced." Id.

On appeal, the state argued the star witness's prior consistent statement was admissible under the rule of completeness because it "explained or clarified 'all the testimony that's been given up to this point' about the contents of the recording." Resp. Br. at 36. Such a broad reading of the rule of completeness allows the exception to swallow the rule. Without pointing to a single section of the prior consistent statement that explained or clarified the testimony, Respondent boldly claim it did. The star witness's prior consistent statement was unnecessary to explain or clarify the portions of the statement about which defense counsel questioned her.

Further, the state argued that because defense counsel relied on the import of the witness's prior inconsistent statements, "the rule of completeness required that the state be permitted to inquire into the full substance of the initial recorded statement on redirect examination for the purpose of clarifying just exactly what [the witness] said most contemporaneous to the shooting." Resp. Br. at 36. If the rule of completeness required the introduction of the full prior statement, including the consistent portions, when an opposing party relies on and impeaches a witness with portions of the statement that were inconsistent, then there would be no need for any of the Rules of Evidence. Trials would be had based on the prior statements made by witnesses because in an adversarial system it is incumbent upon counsel to impeach a witness with prior inconsistent statements when advantageous to the counsel's client.

Finally, the state argued on appeal that defense counsel's questioning of the star witness about her friendship with another witness was an implied charge of fabrication or improper motive. While defense counsel asked the star witness if she were friends with another witness and if the two had spoken about their testimony, defense counsel never suggested or insinuated collusion by the two. In fact, the star witness admitted she had discussed the shooting with the other witness and many other people. However, such questioning does not equate to an implied charge of recent fabrication or improper motive. Witnesses who know each other and live in the same community are highly likely to discuss a shooting with each other. Had the star witness denied talking to anyone else about the shooting, then it would have cast doubt on her credibility. Witnesses talking to each other does not imply the witnesses colluded to lie on the stand, and defense counsel's questions made no such implication.

Here, the state wanted the jury to have its star witness's statement to police in the jury room as it deliberated because she told the police that Appellant fired the first shot, which the prosecutor used her testimony to disprove self-defense. The improperly admitted prior consistent statements, particularly on the critical issues of whether the deceased was armed and whether Appellant fired the first shot, heightened the star witness's credibility during the jury's deliberative process.

VII. In light of Appellant's sentence of life imprisonment without the possibility of parole for murder, the trial judge's imposition of a five-year sentence for possession of a weapon during the commission of a violent crime violated the plain language of section 16-23-490(A) of the South Carolina Code, which forbids such a sentence when the defendant is sentenced to life imprisonment.

Respondent conceded the trial judge improperly sentenced Appellant to five years imprisonment for possession of a weapon during the commission of a violent crime. Resp. Br. at 41. As admitted by Respondent, the trial judge imposed a sentence on Appellant despite a statutory prohibition on such a sentence and numerous appellate opinions discussing the prohibition. Resp. Br. at 41. Appellant respectfully joins in Respondent's request that this Court vacate his illegal sentence.

CONCLUSION

As to Issues I, II, III, and IV, Appellant respectfully requests a new immunity hearing related to murder, possession of a weapon during the commission of a violent offense, and unlawful possession of a weapon by a person convicted of a violent crime. As to Issue V, Appellant respectfully requests this Court hold he is entitled to immunity from prosecution concerning murder, possession of a weapon during the commission of a violent offense, and unlawful possession of a weapon by a person convicted of a violent crime. As to Issue VI, Appellant respectfully requests this Court reverse Appellant's convictions and order a new trial. Finally, as to Issue VII, Appellant respectfully requests this Court vacate his sentence of five years for possession of a weapon during the commission of a violent crime.

s/Susan B. Hackett
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of April, 2021.

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Paul M. Burch, Circuit Court Judge

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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 Initial Reply Brief of Appellant in the above referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is mbrown@scag.gov; and a copy of the Initial Reply Brief of Appellant have been served on Calvin D. Ford, #342303, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 26th day of April, 2021.

s/Susan B. Hackett
Susan B. Hackett
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