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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE CHARLESTON COUNTY
Court of Common Pleas

H. Bruce Williams, Court of Appeals Judge

Appellate Case No. 2018-001386
Common Pleas Case No.: 2015-CP-10-2178

Stacy Singletary, Individually and as Personal Representative of Sheldon Singletary……...Respondent

vs.

Kelvin Shuler……..…Appellant

THE APPELLANT'S MOTION FOR REHEARING

The appellant, Kelvin Shuler, pursuant to Rule 221, SCACR, moves to reconsider its June 2, 2021 opinion. In support of the motion, the appellant shows the following to the court:

1. **This Court Overlooked the Actual Language of *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011), by Misinterpreting the Language Governing when an Immunity Question May be Brought.**

    a. In *State v. Duncan*, the Court held "that when a defendant *raises the question of statutory immunity pre-trial*, the trial court must determine whether the defendant has shown by a preponderance of the evidence that immunity attaches." *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011) (emphasis added) (citing *Peterson v. Florida*, So.2d 27, 29 (Fla.1st D.C.A. 2008)). The wording in *Duncan* implies that when the question of immunity is brought *prior to trial*, the court must determine whether the defendant has presented enough evidence to have immunity attach. *See*, *Id.*; *See also*, *Pretrial*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/pretrial (last visited June 14, 2021) (defining "pretrial" as "occurring or existing before a trial").

    However, this court misinterpreted the language in *Duncan* to mean the question of statutory immunity must be brought at a pretrial hearing. S.C. Ct. App. Affirm at 6, June 2, 2021. This misinterpretation is primarily a result of misapplying the Supreme Court's analysis over an issue that occurred during a pre-trial hearing to all determinations of immunity under the Protection of Persons and Property Act. *See*, *Duncan*, 392 S.C. 404,

709 S.E.2d 662. In *Duncan*, the Court was presented with the questions of whether the circuit court erred in making a pre-trial determination of immunity and whether the circuit court erred in finding the respondent was entitled to immunity. *See*, *Id.* at 407, 709 S.E.2d at 663. The Court ultimately held "a pre-trial determination of immunity under the [Protection of Persons and Property] Act *is proper*." *Id.* at 411, 709 S.E.2d at 665 (emphasis added). While the Court held a pre-trial determination of immunity *was proper* in resolving an issue that occurred at a pre-trial hearing, the Court did not express or imply that it *was mandatory* for the Defendant to request a pre-trial hearing to determine all claims of immunity under the Protection of Persons and Property Act. *See*, *Id.* Therefore, if the issue of immunity is brought before trial, the court is obligated to determine whether the immunity attaches. *See*, *Duncan*, 392 S.C. at 411, 709 S.E.2d at 665.

Appellant's Counsel raised the question of immunity for self-defense and defense of property in its Answer and Counterclaim on May 2, 2015. *See*, ROA 22-23. The trial court acknowledged the question of immunity in its closing statements and even suggested both counsels narrow their analyses of the self-defense issue rather than dismiss the immunity claim for not being brought by the defendant at a pre-trial hearing as this court suggests was required. *See*, ROA 187-189. Therefore, the trial court was proper in *when* it decided to determine Appellant's immunity.

2. The Holding in *Duncan* is Ambiguous.

a. This court stated the holding in *Duncan* requires all immunity claims under the Protection of Persons and Property Act to be determined at a pretrial hearing. S.C. Ct. App. Affirm at 6, June 2, 2021. However, this court's interpretation is not consistent with the language of S.C. Code Ann. § 16-11-420 and § 16-11-450. S.C. Code Ann. § 16-11-420 states,

> "(B) The General Assembly finds that *it is proper for law-abiding citizens to protect themselves*, their families, and others from intruders and attackers *without fear of prosecution or civil action* for acting in defense of themselves and others. . . . (E) The General Assembly finds that *no person or victim of crime should be required to surrender his personal safety to a criminal*, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420 (emphasis added).

Further, S.C. Code Ann. § 16-11-450 governs immunity from criminal prosecution and civil actions and states, "(A) A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and *is immune from criminal prosecution and civil action for the use of deadly force*, ..." S.C. Code Ann. § 16-11-450 (emphasis added).

The language "*without fear of prosecution or civil action*" and "*immune from criminal prosecution and civil action*" implies that an individual who meets the elements laid out in *State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011), is immune from suit. However, upholding the decision of this court would add another element to the test that was never originally required before. This court held Appellant must file a pre-trial motion to determine immunity under the Protection of Persons and Property Act, otherwise it is

presumptively waived. *See*, S.C. Ct. App. Affirm at 6, June 2, 2021. However, one cannot waive immunity if one does not have immunity and the law does not support that it must be brought at a pre-trial hearing to be a valid claim of immunity. *See*, *Dickey*, 394 S.C. 491, 716 S.E.2d 97; S.C. Code Ann. § 16-11-440; S.C. Code Ann. § 16-11-450.

If Appellant would have otherwise been determined to have immunity but was not given immunity because he did not request a pre-trial hearing, then he never had immunity, and therefore, immunity could not be waived. Conversely, if Appellant would have otherwise been determined to have immunity, regardless of whether it was brought at pre-trial, then the *Duncan* pre-trial requirement is not an actual requirement, the interpretation of *Duncan* would be invalid, and Appellant would have had a claim of immunity at any point of the case. The converse analysis reflects the statute's wording ". . .without fear of prosecution or civil action for acting. . ." in S.C. Code Ann. § 16-11-420(B) and ". . . is immune from criminal prosecution and civil action" in S.C. Code Ann. § 16-11-450(A). If the Act allows for a person—who is otherwise justified in protecting himself or his property—to act "without fear of prosecution or civil action," then he should not be burdened with the fear of prosecution or civil action for not bringing the issue at a pre-trial hearing, but rather greeted with a resolute immunity as the statute expressly states.

Further, the law does not require a pre-trial hearing to be conducted to grant immunity under the Protection of Persons and Property Act, but rather suggests the determination of immunity *may* be resolved at a pre-trial hearing. The trial court stated in its order, "it is well established that in order to support a claim of immunity under § 16-11-440, there must be a valid case of self-defense. . . . The court considers the elements of self-defense in determining a defendant's entitlement to immunity." ROA 5. S.C. Code Ann. § 16-11-440 is this state's self-defense statute. In the United States, self-defense is an affirmative defense and affirmative defenses are proved during trial. Thus, the trial court and this court expect defendants to prove an affirmative defense at a pre-trial hearing to grant immunity. This reasoning does not make logical sense because, essentially, if immunity under the Protection of Persons and Property Act is treated separately from self-defense, then a determination of immunity at a pre-trial hearing would determine the outcome of the affirmative defense at trial. Conversely, if the two are treated as the same, then it is not mandatory for a pre-trial hearing to be conducted to determine immunity.

Neither *Duncan* nor the cases cited therein support a mandatory pre-trial hearing to determine immunity. *Duncan* holds it is proper to determine immunity at a pre-trial hearing but does not require a pre-trial hearing. *Duncan*, 392 S.C. at 411, 709 S.E.2d at 665. The cases cited for support in *Duncan* expressly state this assertion. In *Fair v. State*, the Supreme Court of Georgia considered whether the trial court erred in denying the defendants motion for a pre-trial determination of immunity. *Fair v. State*, 284 Ga. 165, 165-166, 664 S.E.2d 227, 230 (Ga. 2008). In *Fair*, Antron Fair and Damon Jolly filed motions to dismiss the indictment against them on the grounds that they were immune from prosecution under a statute similar to the ones under the Protection of Persons and Property Act. *See*, *Id.* at 165, 264 S.E.2d at 230. After hearing the defendants' motion in a pre-trial hearing, the trial court reserved its ruling in both defendants' cases until trial. *Id.* The court in *Fair* held, "the trial court erred in refusing to rule pre-trial on the defendants motions. . . ." *Id.* at 166, 264 S.E.2d. at 230.

In *Peterson v. Florida*, 983 So.2d 27 (Fla.1st D.C.A. 2008), petitioner sought a writ of prohibition to review an order denying his motion to dismiss based on a statutory immunity established by a statute similar to the one in this state. The court in *Peterson* held, "[W]hen immunity under [the statute] *is properly raised* by a defendant, the trial court *must decide* the matter by confronting and weighing only factual disputes." *Peterson*, 983 So.2d at 29 (emphasis added). In addition, the court held, "[A] defendant *may* raise the question of statutory immunity *pretrial* and, *when such a claim is raised*, the trial court *must* determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches. *Id.* (emphasis added).

In *Dennis v. State*, 51 So.3d 456 (Fla. 2010), the Supreme Court of Florida approved the reasoning of *Peterson*. *See*, *Duncan*, 392 S.C. at 409, 709 S.E.2d at 664. In *Dennis*, Clarence Dennis filed two motions to dismiss asserting that he was immune from criminal prosecution under a statute similar to the one in this state. *Dennis*, 51 So.3d at 458. The court in *Dennis* analyzed the statute along with one of their rules of civil procedure stating, "This plain reading of the statute compels us to reject the State's contention that a defendant must raise a pretrial claim of immunity *only* in [a state civil procedure rule] motion to dismiss." *Id.* at 462.

For the reasons stated, it is respectfully requested that this court reverse its holding that a pretrial hearing was required to establish a claim of immunity, hold Appellant is granted immunity from prosecution, and reverse the master-in-equity's civil judgement and awards.

Dated: June 17, 2021

Eduardo K. Curry
Curry Law Firm, LLC
Post Office Box 42270
North Charleston, SC 29423
(843) 767-5286
Attorney for Petitioner

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Stacy Singletary, by depositing a copy of it in the United States Mail via certified mail, postage prepaid, on June 17, 2021, addressed to: Stacy Singletary's attorney of record, Thad D. Doughty, 6650 Rivers Avenue, North Charleston, South Carolina 29406 and the South Carolina Court of Appeals, by depositing a copy of it in the United States Mail via certified mail, postage prepaid, on June 17, 2021, addressed to: Clerk of Court, P.O. Box 11629, Columbia, SC 29211; [by United States Postal Service and Electronic Email to her attorney of record, Thad D. Doughty, at doughtythad8@gmail.com, and by United States Postal Service and Electronic Email to the South Carolina Court of Appeals, at ctappfilings@sccourts.org].

Eduardo K Curry
Curry Law Firm, LLC
Post Office Box 42270
North Charleston, SC 29423
843-767-5284
Attorney for Appellant

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