

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SUMTER COUNTY
George C. James, Jr., Circuit Court Judge

Appellate Case No. 2012-212546

THE STATE,RESPONDENT

v.

CHRISTOPHER WAYNE GAINEY,APPELLANT.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court properly found Appellant failed to carry his burden of proving by a preponderance of the evidence that he was entitled to immunity from criminal prosecution under the Protection of Persons and Property Act, S.C. Code Ann. §§ 16-11-410 to -450?

STATEMENT OF THE CASE

Appellant (Gainey) was indicted at the October 28, 2010, term of the grand jury for Sumter County for attempted murder (2010-GS-43-1239). He was represented by John D. Clark, Esquire, and Respondent (the State) was represented by Assistant Solicitor W. Jason Corbett. On July 16, 2012, the case was called for trial at the Sumter County Courthouse before the Honorable George C. James, Jr. Prior to the jury being sworn, Gainey made a pre-trial motion to dismiss the action pursuant to the Protection of Persons and Property Act (S.C. Code Ann. §§ 16-11-410 to -450) (the Act) and the procedures set forth in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). On July 17, 2012, after taking testimony and hearing arguments from both sides, the trial court found Gainey had failed to establish immunity under the Act and denied Gainey's motion to dismiss. Gainey timely filed a notice of intent to appeal the denial of his motion and subsequently submitted a Brief. This Brief of Respondent follows.

STATEMENT OF FACTS

In the early morning hours of July 11, 2010, Gainey struck James Michael Compton (Compton) in the head with a board at least four times, causing Compton great bodily injury. (R.p.35, lines 9-p.37, line 6; p.50, line 20-p.55, line 4; p.55, lines 5-7). Although Compton had very little recollection of the assault, he was able to describe his physical condition both before and after he was beaten. (R.p.143, lines 6-p.144, line 16). Immediately after the beating, Compton was hospitalized and put into an induced coma. He lost vision in the inner lower portion of one eye and the outer lower portion of his other eye, and lost some of his ability to speak. Compton also suffered erectile dysfunction, partial loss of the use of his right arm, and reduced lung capacity. He spent more than two years in physical rehabilitation trying to regain normal bodily functions. (R.p.144, line 17-p.146, line 14).

When the case was called for trial, prior to the jury being sworn, Gainey made a motion to dismiss the action pursuant to the Act and the procedures set forth in State v. Duncan, supra. Gainey explained he was specifically seeking immunity under subsection 16-11-440(C) of the Act on grounds that he was attacked in a place he had a right to be. (R.p.7, line 7-p.8, line 10). He presented testimony in support of his motion. First, Gainey called Compton to the stand. Compton testified he was at Gainey and Kimberly Compton's residence on July 11, 2010, after he, Gainey, and two others returned to the house from Scott's Place;¹ however, he did not remember anything about an incident or altercation with Gainey. (R.p.10, line 1-p.12, line 12).

¹ Scott's Place is a small local bar about a mile from the house. (R.p.20, line 20-p.21, line 4).

Next, Gainey testified on his own behalf. He said he and Kimberly Compton (Kim) had been together for twenty years and have three daughters, and though they are not technically married he considers Kim to be his wife. Gainey explained that Compton is Kim's little brother, and that he had known Compton since Compton was a little kid. (R.p.14, line 1-p.15, line 18). Gainey testified that the incident in question happened near the back door to his house on July 11, 2010, when he, Compton and two other revelers came home from Scott's Place after it closed for the night.

Gainey explained that when he came home from work earlier that afternoon, Kim, Compton, and a man named Christopher "Marquis" Hunter (Marquis) were at the house looking for something to do. The four decided to get drunk and started drinking liquor but eventually ran out and drove to Scott's Place to continue drinking. At some point Kim and Marquis "passed out" and were left sleeping in the back of the truck while Compton and Gainey continued to drink in the bar. (R.p.15, line 19-p.23, line 12). Gainey claimed that when the bar was going to close, Compton tried to order one more drink but was refused service because the two men were already so drunk. He said Compton got mad and threw a lighter across the bar before they left to go home. (R.p.25, line 17-p.26, line 8).

Gainey testified that as he was walking up the back steps to enter the house, Compton took off his shirt, started yelling profanities, and tried to goad Gainey into a fight. Gainey said he did not engage Compton and instead turned like he was going to open the door. He said Compton then grabbed the wooden porch rail and ripped it loose. Gainey said when he turned his back to try and go inside, Compton hit him from behind with the board. He said Compton struck him at least two times across the back before he

could react. Gainey testified he picked up one of the slats from the now broken porch rail to use as a weapon, and “fought fire with fire.” He claimed he couldn’t get into the house because the door was locked, and couldn’t get back down the steps because Compton was blocking them, and felt there was nothing else he could do. Gainey testified he was in fear of death or great bodily injury and believed Compton could kill him with the board. (R.p.26, line 25-p.32, line 7). Gainey testified he hit Compton in the head with his board three times before Compton finally went to the ground, and then hit him one more time in the head because Compton was “forcing his way back up.” He claimed he was in fear for his life the whole time he was hitting Compton with the board, and he believed the action he took was reasonably necessary to prevent his death or great bodily injury. (R.p.35, line 10-p.43, line 2).

On cross-examination Gainey acknowledged he left the scene and went to his mom’s house after the incident and did not call 911. He testified that during the fight he was swinging directly for Compton’s head, that each blow was intended to knock Compton out, and that the final blow to the head was after Compton was on the ground. Gainey claimed that once Compton was down for good, he briefly went into the house, and when he came back out, Compton was gone. (R.p.44, line 10-p.46, line 6; p.50, line 20-p.55, line 4). Finally, Gainey called Martha T. Rogers to the stand. She testified she worked as a bartender at Scott’s Place, and was there the night Gainey, Compton, Kim, and Marquis came to the bar, even though she was not actually working that night. Rogers said the four were drinking heavily, and that at the end of the night Gainey wanted to buy another “shot,” but was refused alcohol service. (R.p.68, line 7-p.72, line 8).

The State then called Kimberly Compton (Kim) to the stand. She described her relationship to Gainey and Compton and the events leading up to the incident. Kim testified she was already “slammed” when they got to Scott’s Place, that she drank a whole bunch but eventually made her way outside, crawled into the back of Compton’s truck, and passed out. She said she woke up when she heard an altercation, got out of the truck, and came around the side of the house. Kim testified she saw Gainey hit Compton once, at which point she jumped on top of Compton. (R.p.74, line 15-p.80, line 4). She was then questioned about a two page written statement she had given to the police two days after the event, which was inconsistent with her testimony. She explained there were more details in the written statement because it had been two years and that it “gets sort of fuzzy.” (R.p.83, lines 13-24).

Gainey objected to the State’s request to have Kim read the statement into the record. The trial judge reviewed the statement and initially limited the State to questioning Kim about the particular inconsistencies between the written statement and her testimony. (R.p.84, line 5-p.86, line 14). She testified she saw Gainey hit Compton once with a board, that she jumped on Compton to protect him, and that Gainey wasn’t able to strike Compton anymore because she was on top of him. Upon hearing this testimony the trial court overruled Gainey’s previous objection and allowed the State to go into the details of the statement by having Kim read a portion of it into the record. In the statement she said:

. . . Chris [Gainey] and James [Compton] were still inside drinking. Later they finished and when then came back they were getting along fine. We went home and walked to the back door. At that time they were arguing and then they started fighting. That’s when I tried to unlock the back door to get in the house. I was having trouble getting the door

unlocked and when I turned around I saw James getting hit and falling to the ground. Chris was still hitting him and I ran over and saw a big gash on James' head and tried to pinch it together to try and stop the bleeding. I was crouched over James and Chris was still hitting him and yelling at him. I could see light from inside my house and I heard my 15 year old daughter yelling at Chris "Dad stop, Dad stop your gonna kill him and your hurting mom." That's how I knew the door was open. I stayed on top of Michael [Compton] trying to protect him and Chris was hitting me and was yelling and screaming at me. I don't know what made Chris stop but he did. James came to and got up and started running away. I found him on a neighbor's porch and I ran to him and was cradling him in my arms and beat on the neighbor's door yelling for them to call the police and an ambulance. While Chris was beating James I kept trying to tell James everything was going to be OK. James told me "just let him finish, just let him finish." The police came and then the ambulance came and took James to the hospital. I never saw James hit Chris at any time.

(R.p.90, line 13-p.91, line 24; R.p.208 Kim claimed that when she described Gainey "hitting" Compton in the written statement, she meant Gainey was "kicking" Compton, not hitting him with the board. (R.p.92, line 16-p.93, line 23). On cross-examination she testified that when she first saw Compton getting hit he was up "a little" and then she saw Gainey hit Compton with the board once while Compton was actually on the ground. (R.p.99, line 21-p.100, line 15).

Finally Gainey's daughter Christian was called by the State. She testified she was home on the night of the incident and woke up to the sound of wild knocks on the back door. Christian said that when she stepped outside, her mother and father [Gainey and Kim] were at the door. She said she heard a bunch of arguing, then her dad went inside and she saw her mother on top of Compton, holding him. Christian testified that when her dad came back outside she "saw him hit [Compton] once, or try to" so she ran inside to call an ambulance. (R.p.138, lines 6-25).

At the conclusion of the testimony, the trial court heard arguments from Gainey as to why he believed he was immune from prosecution under the Act. The judge pointed out the glaring inconsistency between Gainey's claim that he simply went into the house after beating Compton to the ground with a board and came back outside to find him gone, and Christian's testimony that Gainey actually came back out and tried to hit Compton again with his foot after the initial beating was over. The judge explained that he had to make a determination about whether to believe Gainey or not, and that the inconsistency in the stories impacted Gainey's credibility as a whole, as well as showing that Gainey's motivation may not have been to defend himself from attack. (R.p.164, line 24-p.168, line 7). Gainey argued that unless the State presented evidence to refute or directly contradict his version of events, the court had no choice but to find he had carried his burden by a preponderance of the evidence, even if his testimony was deemed not credible. (R.p.168, line 8-p.171, line 7). In response, the State focused on the inconsistency noted by the trial court as well as inconsistencies between Gainey's testimony and Kim's written statement, and argued Gainey had not carried his burden of proof. (R.p.171, line 11-p.174, line 14).

After hearing from both parties, the trial court made detailed findings on the record. The judge noted that per Duncan, he had to determine whether or not Gainey had established his right to immunity by the greater weight of the evidence. The judge explained Gainey had the burden of tipping the scales ever so slightly in his favor and that if the scales remained perfectly even, Gainey would not have met his burden. The judge went on to explain that his decision hinged on an assessment of Gainey's credibility. He noted that although Gainey's matter-of-fact way of speaking made him

seem “extremely credible,” the inconsistencies made the judge question whether or not Gainey was telling the whole truth. Ultimately, the trial court found:

All in all, I do not believe that he’s established his immunity. . . . I make a determination solely on the evidence as to whether or not the defendant has met his burden by the greater weight of the evidence. I find that at least - - I find that he has not.

(R.p.180, line 1-p.184, line 10). Thus, the court concluded Gainey failed to establish he was entitled to immunity under the Act and denied Gainey’s motion to dismiss the criminal prosecution. (R.p.180, line 1-p.184, line 10).

ARGUMENT

The trial court properly found Appellant failed to carry his burden of proving by a preponderance of the evidence that he is entitled to immunity from criminal prosecution under the Protection of Persons and Property Act, S.C. Code Ann. §§ 16-11-410 to -450.

Gainey argues the trial court erred in failing to find he was immune from prosecution under the Protection of Persons and Property Act (the Act) because he was not engaged in unlawful activity, was attacked with deadly force, and feared for his life in a place where he had the right to be. Gainey specifically claims entitlement to immunity under sub-section (C) of Section 16-11-440 of the Act. The State disagrees and submits Gainey's argument is without merit. The trial court's finding that Gainey failed to carry his burden of proof is supported by the evidence and is not controlled by an error of law; therefore, it must be affirmed.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012); State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence but, instead, simply determines whether the trial judge's ruling is supported by any evidence. Wilson at 6, 545 S.E.2d at 829 (emphasis added); see also State v. Gracely, 399 S.C. 363, 371, 731 S.E.2d 880, 885 (2012) ("The trial court will only be reversed when there is no evidence to support the ruling below."). "[T]he trial court's ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs when the trial

court's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010); see also Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) (“In appeals of pretrial rulings, this Court is ‘bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.’ ” (quoting State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993))).

In relevant part, the Act provides:

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.

S.C. Code Ann. § 16-11-440(C) (Supp. 2012). The immunity provision at issue provides:

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, unless the person against whom deadly force was used is a law enforcement officer

S.C. Code Ann. § 16-11-450 (Supp. 2012). Immunity under the Act must be determined pre-trial and the defendant has the burden of proving entitlement to immunity by a preponderance of the evidence. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). This is the same burden of proof required to demonstrate mental incompetence or incapacity. See Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992) (discussing a defendant's post-conviction relief claim of incompetence at the time of his plea); State v. Lee, 274 S.C. 372, 374, 264 S.E.2d 418, 419 (1980) (examining a defendant's claim of incompetence to stand trial); Macaulay v. Wachovia Bank of South Carolina, N.A., 351

S.C. 287, 295, 569 S.E.2d 371, 376 (Ct. App. 2002) (involving a challenge to a transaction on grounds of incompetence); In re Thames, 344 S.C. 564, 572, 544 S.E.2d 854, 858 (Ct. App. 2001) (reviewing a claim of mental incapacity to execute a challenged instrument).

In mental competency cases, any evidence of probative value to support the lower court's findings is sufficient to uphold those findings on appeal. See, e.g., Jeter at 232, 417 S.E.2d at 596 (finding that where the PCR applicant bears the burden of proving by a preponderance of the evidence that he was incompetent at the time of his plea, "any evidence of probative value to support the post-conviction judge's factual findings is sufficient to uphold those findings on appeal."). Thus, where contradictory evidence is submitted regarding competency, the issue is reserved for determination by the judge, and the appellate courts will find no error on the part of the judge in ordering a defendant to trial. Lee at 375, 264 S.E.2d at 419. Reversal of the trial court's finding that a proponent has carried his or her burden of proof is only required under circumstances where no competent evidence was presented in support of that finding. Macaulay at 295-96, 569 S.E.2d at 376 (emphasis added). Conversely, the State submits reversal of the trial court's finding that a proponent has failed to carry his or her burden of proof is only required under circumstances where the proponent's evidence is wholly uncontradicted, and deemed credible by the court. Since the burden of proof is the same, the State respectfully submits that appellate review of the trial court's immunity ruling under the Act should be controlled by a similar analysis.

Argument

The lower court's finding that Gainey did not meet his burden of proof is supported by the evidence, or lack thereof; therefore, the State submits it must be affirmed. Here, the State did not contend Gainey was engaged in unlawful activity prior to beating Compton with the board. Instead, the State challenged Gainey's entire version of events, from his claim of first being attacked by Compton, to his claim that he reasonably believed his actions were necessary to prevent death or great bodily injury to himself. Gainey and Compton were the only people present when Gainey began striking Compton in the head with a board, and Compton was beaten so severely he was unable to remember the incident. Thus, the trial court's analysis turned almost entirely on an assessment of Gainey's credibility. Although the trial court noted certain aspects of Gainey's testimony weighed in favor of his credibility,² the judge ultimately found Gainey's version of events could not be believed. (R.p.183, lines 11-25).

Gainey places great emphasis on his contention that his testimony was largely "undisputed" and claims there is "no evidence" in the record to show he was not attacked with deadly force and did not reasonably believe deadly force was necessary to prevent his death or great bodily injury. (Brief of Appellant p.5-p.8). However, this emphasis and lack of directly contradictory evidence improperly discounts Gainey's burden of proof. Undisputed testimony is of no value if the testimony is not credible, and a lack of contradictory evidence does nothing to carry a proponent's burden of proof.

Next, Gainey cites Elwood Constr. Co. v. Richards , 265 S.C. 228, 217 S.E.2d 769 (1975), for the proposition that un-contradicted evidence should be accepted by the

² In addressing Gainey's credibility, the trial judge noted: "On the one hand, I think he's extremely credible because of his matter-of-fact way of speaking." However, the trial court went on to explain how contradictions in Gainey's testimony weighed against finding him credible. (R.p.183, lines 11-25).

trier of fact unless there is reason for disbelief, and argues there was “no evidence or reason not to accept Appellant’s testimony.” (Brief of Appellant p. 8-p.9). Yet here there were three significant reasons to disbelieve Gainey’s testimony, two of which were specifically mentioned by the trial court. First, the trial judge addressed Kim Compton’s neutral testimony at the immunity hearing as compared to her “remarkably contrary” written statement which given to the police shortly after the assault, and which failed to support Gainey’s version of events. (R.p.182, line 18-p.183, line 5). Second, the trial judge addressed Christian Gainey’s testimony which contradicted Gainey’s testimony about what transpired when he came back outside after the initial assault. (R.p.183, lines 6-10). Third, though not mentioned by the trial court, Gainey’s claim that Compton ordered and was refused a final drink at Scott’s Place, was contradicted by Rogers’ testimony that it was actually Gainey who wanted to buy another “shot,” but was refused service. (R.p.25, line 17-p.26, line 8; p.71, line 25-p.72, line 8). Under these circumstances, the trial court was certainly under no obligation to accept Gainey’s testimony as the truth.

Finally, Gainey argues the trial court erroneously gave undue weight to Kim’s out of court statement by finding that it was equal to or exceeded the weight given to Gainey’s un-contradicted testimony. (Brief of Appellant p. 12). However, the trial court never found Kim’s written statement should be given equal or greater weight than Gainey’s testimony. Rather, the court simply found Kim’s statement was one factor that caused it to question Gainey’s credibility.

In essence, Gainey’s appeal boils down to his request that this Court overturn the trial judge’s credibility finding in regard to his testimony. However, our case law is

clear: the trial judge is in the best position to make credibility findings, not an appellate court. See State v. Smith, 383 S.C. 159, 167-168, 679 S.E.2d 176, 181 (2009) (“Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial.”); State v. Cutro, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) (“The trial judge, not this Court, is in the best position to be arbiter of [the witness’] credibility.”); State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) (“The determination of a witness’s credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity.”) Taken as a whole, the testimony and evidence presented at the immunity hearing supported the trial judge’s factual finding that Gainey failed to carry his burden of proof. Moreover, the trial judge was in the best position to weigh Gainey’s credibility and conclude that his version of events was not accurate. Simply put, Gainey failed to meet his burden. His testimony was not wholly uncontradicted, and it was not deemed credible by the trial court. Therefore, this Court must accept the trial judge’s factual findings, and must affirm the trial judge’s ruling that Gainey was not entitled to immunity under the Act. Black, supra; Gracely, supra, Wilson, supra.

CONCLUSION

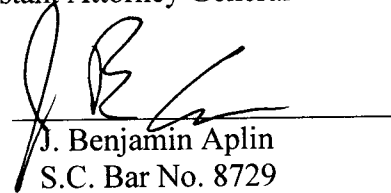
For all of the foregoing reasons, the State respectfully requests that this Court affirm the trial court's ruling that Appellant was not entitled to immunity under the Protection of Persons and Property Act, and remand for the trial to resume.

Respectfully submitted,

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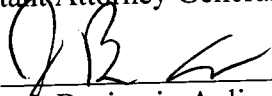
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, Executive Legal Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated April 19, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

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I further certified that all parties required by Rule to be served have been served.
This 19th, day of April, 2013.



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