

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Feb 28 2022

S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Pickens County
Letitia H. Verdin, Circuit Court Judge

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

THE STATE,

RESPONDENT,

v.

JOHN WILLIAM MCCARTY,

PETITIONER.

APPELLATE CASE NO. 2021-000062

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

I. The Court of Appeals erred 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.

To understand the trial judge’s ruling on the pre-trial request for immunity, the exact words used by the trial judge as well as the context in which those words were used provides tremendous assistance in determining the judge’s meaning. After reading a portion of the Act, the prosecutor argued there were “a couple of key words in there that raise the jury questions.” R. 116, ll. 22-24. Thereafter, the state specified that because there was “testimony that [Wilson] provoked the situation and because he is at fault with bringing about the difficulty, then that element of self-defense is not satisfied, and therefore, is not available to him.” R. 124, ll. 7-12. Thus, according to the prosecutor, simply because there was testimony that allegedly supported the prosecutor’s position that Petitioner was not at fault for bringing on the difficulty, the judge had to deny the request for immunity. R. 124, ll. 12-13. The prosecutor made this point clear when he concluded that “because there is a conflicting account of what happened that night, that there is evidence that [Wilson was the aggressor in this situation], then immunity [did] not apply and it’s a question of defense of others that should be submitted to the jury.” R. 125, ll. 16-21; see also, R. 77, ll. 4-10. Put simply and succinctly, the prosecutor argued: the case presented “the word of two witnesses” and “because it’s essentially word versus word, that that is a determination that the jury should make and they haven’t proven it to the standard that is required in this case law as the self-defense and defense of others standard.” R. 126, ll. 1-6.

With this as her backdrop, Judge Verdin determined Petitioner “failed to meet the burden of proof” and denied his request for immunity. R. 132. Judge Verdin then explained that the case presented conflicting facts:

Wilson testified that he had not had much to drink that night, and that Kirk and Bradley had acted aggressively toward him. Wilson also testified that due to a previous neck injury, he feared for his life as Bradley had him pinned in the corner of the porch. Kirk testified that it was Wilson that incited the argument, specifically indicating that Wilson destroyed some of Bradley’s property that was outside on the porch, angering Bradley enough to shove Wilson down the stairs. When Wilson came back on the porch, he slapped Bradley’s beer away, which provoked Bradley to push him in the corner. Kirk also testified that he did not perceive the fight to be serious, and knowing of Wilson’s previous injuries, he would not have allowed the fight to continue if Bradley was seriously injuring Wilson.

R. 133. Judge Verdin never resolved the disputes between these conflicting facts.

Instead, the order provided “we find [Petitioner] failed to meet his burden because he did not prove that Wilson was without fault in bringing about the difficulty.” R. 134. Judge Verdin determined the case presented “a factual question that must be answered by a jury” because “the evidence presented conflicting views as to Randy Wilson’s involvement in the argument that led to the fatal encounter.” R. 135.

Quoting State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013), Judge Verdin concluded that “[w]hether or not a defendant is without fault in bringing on the difficulty presents ‘a quintessential jury question’ which is ‘not a situation warranting immunity from prosecution.’” R. 134. Judge Verdin concluded the “evidence presented conflicting views as to Randy Wilson’s involvement in the argument that led to the fatal encounter, and that presents a factual question that must be answered by a jury.” R. 135. Therefore, she denied the request for immunity.

This context and the actual words used by Judge Verdin demonstrated she did not sit as factfinder. Instead, she abdicated that duty. She concluded that where the evidence was in conflict regarding who brought on the difficulty, the request for immunity must be denied. This was the exact request made by the solicitor in his argument at the conclusion of the presentation of evidence.

According to Respondent, the Court of Appeals “specifically found Judge Verdin’s order lined up with State v. Andrews, 427 S.C. 178, 830 S.E.2d 12 (2019).” BOR at 4. The Court of Appeals made no specific finding to this effect. Instead, the Court of Appeals concluded “the trial court did not abdicate its role when finding one of the elements of self-defense presented a jury question.” App. 2. In the string citation following this statement, the Court of Appeals included a citation to Andrews for the propositions that “the relevant inquiry is not merely whether there is a conflict in the evidence but, rather, whether the accused has proved an entitlement to immunity under the Act by a preponderance of the evidence” and “while the circuit court may not have set forth 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.” App. 3. Thus, the Court of Appeals did not make the specific finding as claimed by Respondent.

Respondent appeared to argue that this Court broke new ground in State v. Cervantes-Pavon, 426 S.C. 442, 837 S.E.2d 564 (2019), when this Court made clear that the circuit court judge must act as fact-finder. BOR at 4 n.2. According to Respondent, Curry “only required a trial judge to consider the elements of self-defense in making its determinations.” BOR at 4 n.2. To the contrary, this Court plainly stated “[a] claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard.” Curry, 406 S.C. at 371, 752

S.E.2d at 266 (citing State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011)). This Court continued by explaining that immunity under the Act “is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence.” Id. at 372, 752 S.E.2d at 267. Therefore, it was clear that the judge must act as finder of fact long before the two recent cases cited by Respondent.¹

Contrary to Respondent’s contention that “Judge Verdin ultimately concluded Petitioner was not entitled to immunity because she was not convinced Wilson was without fault in bringing on the difficulty; the record showed Wilson instigated the argument and continued to act to egg it on,” BOR at 11, the order issued by Judge Verdin provides no such cause-and-effect relationship. R. 132-135. Instead, the order made it abundantly clear that Judge Verdin found the evidence was conflicting as to one element of defense of others and based upon the conflicting nature of the evidence, she denied immunity. R. 132-135.

While Respondent attempts to insulate Judge Verdin’s conclusion that the conflicting evidence presented a quintessential jury question by noting that this statement appeared in a separate paragraph from her finding that Petitioner had not satisfied his burden of proof, the structure of the order is of no consequence because her meaning is clear. See BOR at 11.

¹ Based on the controlling case law requiring judges to decide whether a person is entitled to immunity based upon a preponderance of the evidence standard, judges have a duty to make credibility findings to the extent there was conflicting testimony during the immunity hearing. This is no different than any other setting in which the judge must act as finder of fact and judge of the law, including family court cases and matters in equity. See e.g., Brown v. Allstate Ins. Co., 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001) (“A trial judge’s role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting.”); Rule 52 (a), SCRCF (explaining that in non-jury actions, “the court shall find the facts specially and state separately its conclusions of law thereon”); In re Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002) (in a SVP case, holding “[t]he order did not find any facts to support its legal conclusion that the state failed to carry its burden of proof.”); S.C. Code Ann. § 17-27-80 (explaining the PCR court must “make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.”).

In its brief, Respondent asserted “[a]n invited guest of a resident has an equal right to be in the dwelling or premises as the resident.” BOR at 13. To support this position, Respondent inexplicably cited to 16-11-440(B) of the South Carolina Code. BOR at 13. This subsection does not support Respondent’s contention as it provides only that the presumption of reasonable fear does not apply when the person against whom deadly force is used has a right to be in or is a lawful resident of the dwelling. See S.C. Code Ann. § 16-11-440(B). Furthermore, while “[a] lawful guest attacked in the home of another person has no duty to retreat where the attacker is an intruder,” “[t]his principle ... is inapplicable where the attacker is the homeowner.” State v. Chambers, 310 S.C. 43, 44, 425 S.E.2d 45, 45 (Ct. App. 1992). Being an invited guest does not grant one a blank check to attack the homeowner or prevent the homeowner from using deadly force against an invited guest.

To further support its proposition, Respondent cited to State v. Glenn, 429 S.C. 108, 838 S.E.2d 491 (2019) in a footnote. BOR at 13 n.9. Specifically, Respondent claimed Glenn’s “argument for immunity failed solely on the issue of whether he had a right to be there.” BOR at 13 n.9. To the contrary, this Court held Glenn was entitled to a new immunity hearing because the circuit court committed reversible error by not addressing the elements of self-defense and going straight to the Act. Glenn, 429 S.C. at 123, 838 S.E.2d at 499. Regarding whether Glenn had a right to be where the attack occurred, this Court explained circuit courts must conduct a proximate cause analysis for this aspect of the Act. Id. at 119-120, 838 S.E.2d at 497.²

² Respondent also cited State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 568 (2019) for the quotation that “[u]nder the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative or bystander would likewise have the right to take the life of the assailant in self-defense.” Although Petitioner agrees with the legal principle stated, the principle is not contained within the case cited by Respondent.

Notably, Respondent argued Judge Verdin *implicitly* ruled on the credibility of the witnesses because in order “[t]o deny immunity, the court would *have* to find Kirk’s version of events more credible than Wilson’s.” BOR at 18 (emphasis in original). Respondent’s contention ignores the very issue raised on appeal – the circuit court abdicated her duty as factfinder because the evidence presented was in conflict. In reality, the circuit court did not implicitly rule on the credibility of witnesses as she simply refused to act as factfinder at all. The judge abused her discretion by failing to resolve the factual dispute and judge the credibility of the witnesses in order to do so. Respondent’s claim that the judge made implicit credibility findings runs counter to the words used by the judge in her order denying immunity – she determined the conflicting evidence presented a quintessential jury question.

Here, the circuit court’s ruling that because testimony was conflicting it created a *jury question* was an abdication of the circuit court’s obligation to Petitioner, and the law.

II. The Court of Appeals erred 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 argued the state's presentation of evidence that "Wilson was rummaging through and throwing Bradley's cigarettes on the ground" was "unlawful and 'reasonably calculated to produce the occasion.'" BOR at 20. According to Respondent, "Wilson knew it would stir up anger in Bradley." BOR at 20. Of course, the evidence of Wilson messing with Bradley's cigarettes and beers was disputed. Nevertheless, even if the circuit court found Wilson had done so, those acts would not be "in violation of the law and reasonably calculated to produce the occasion" of Bradley shoving him down the stairs and slamming him against the door. See e.g., State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) (holding breaking into the car of another is an act in violation of the law reasonably calculated to bring on the difficulty); State v. Douglas, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014) (explaining that Douglas was not at fault for bringing on the difficulty where "Smith's violent behavior was an unreasonable reaction to a reasonable demand for Smith to return [Douglas]'s medicine"); State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52-53 (2007) (holding Slater's act of approaching an altercation that was already underway with a loaded weapon could be reasonably calculated to bring the difficulty that arose in this case); State v. Williams, 427 S.C. 246, 250-251, 830 S.E.2d 904, 906 (2019) (holding that taking a loaded weapon to a drug deal was in violation of law and reasonably calculated to bring on the difficulty).

Furthermore, Wilson's messing with Bradley's items was not the proximate cause the shooting death of Bradley. See State v. Glenn, 429 S.C. 108, 120-121, 838 S.E.2d 491, 497 (2019) (holding that a proximate cause analysis must be applied to the unlawful activity element of

subsection (C) of the Act). Wilson had not acted aggressively or engaged with Bradley physically. Instead, Wilson had asked Bradley to leave his home, and had called the police to assist him in having Bradley removed. Respondent's argument that "in the real world one can reasonably expect [Wilson]'s conduct to start a fight" where, at most, Wilson rummaged through and threw Bradley's cigarettes on the ground, Wilson raised his voice at Kirk, not Bradley, Wilson yelled at Bradley, Wilson dumped his beer or beers out, and knocking a beer from Bradley's hand is farcical. See BOR at 20-22. Even Bradley's brother, Kirk, admitted that "messing" with someone's cigarettes and beers was not something that would result in a physical confrontation for most people.

Notably, Respondent failed to address Petitioner's argument that even if Wilson's conduct of messing with the cigarettes and beers could be construed as bringing on the difficulty, then the undisputed evidence showed that Wilson withdrew from the conflict and communicated that withdrawal to Bradley. As explained in the brief of petitioner, the undisputed evidence showed Wilson withdrew from any altercation he may have instigated. In light of Wilson's withdrawal, his right to self-defense was restored to the extent it could be construed that he was at fault for bringing on the difficulty for messing with Bradley's cigarettes and beers. See State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999); see also State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973); State v. Hendrix, 270 S.C. 653, 659 n.3, 244 S.E.2d 503, 506 n.3 (1978).

Petitioner was entitled to immunity from prosecution where the preponderance of the evidence demonstrated he satisfied the elements of common law self-defense and the Act. The circuit court erred in denying his request, and the Court of Appeals erred in affirming the circuit court.

CONCLUSION

Petitioner respectfully requests this Court reverse the Court of Appeals and remand this case for a new immunity hearing. In the alternative, Petitioner respectfully requests this Court reverse the Court of Appeals and hold Petitioner is entitled to immunity from prosecution.



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This 28th day of February, 2022.