

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Anderson County
R. Lawton McIntosh, Circuit Court Judge
2011-GS-40-1022
2011-GS-40-2259
2011-GS-40-2260

THE STATE OF SOUTH CAROLINA,

Respondent,

RECEIVED
MAY 13 2013

v.

RAPHAEL PARKS,

SC Court of Appeals

Appellant.

Appellate Case No. 2012-213658

**RESPONDENT'S MEMORANDUM OF LAW ON APPEALABILITY OF MARCH 21,
2012 ORDER DENYING IMMUNITY FROM PROSECUTION**

On November 2, 2012, the Honorable R. Lawton McIntosh entered an Order denying the Motion for Immunity from Prosecution. The Appellant is charged with murder, attempted murder and possession of a weapon during the commission of a violent crime on the indictments from Anderson County Grand Jury. The Order arose from a hearing held on October 9-10, 2012 where evidence was taken concerning the motion. A motion to reconsider was made and denied on November 28, 2012. Parks, through defense counsel Norman Epps, Druanne White and Trevor White of the Anderson Bar made a notice of appeal to the South Carolina Court of Appeals on December 6, 2012. The prosecution was handle by Assistant Solicitors Rame L. Campbell and


Joshua Allen of the 10th Circuit Solicitors Office. Upon information and belief, the Appellant is currently on pretrial bond.

On May 3, 2013, the Clerk of Court requested counsel to submit a memorandum to the Court addressing the appealability of the matter.¹ This memorandum by Respondent State of South Carolina follows:

I.

The notice of appeal before this Court arises from the denial of a motion for immunity from prosecution wherein the hearing court.

In State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), the South Carolina Supreme Court stated in footnote 2:

 We find an order granting **or denying a motion to dismiss under the Act is immediately appealable, as it is in the nature of an injunction.** See S.C.Code Ann. § 14-3-330(4) (Supp.2010) (“The Supreme Court ... shall review upon appeal ... an interlocutory order or decree ... granting, continuing, modifying, or refusing an injunction....”).

State v. Duncan, supra., n. 2 (emphasis added). However, Respondent notes that § 14-3-330(4) expressly involves matters that arise from the Court of Common Pleas, not the Court of General Sessions. Thus, an immediate appeal of the denial has not been provided by the General Assembly. The matter, in dicta in Duncan, should be subject to an argument against the precedent because of this error. Respondent would submit that his appeal should be considered interlocutory and the notice dismissed. It is more akin to a double jeopardy which is not immediately appealable under state procedure. See State v. Miller, 289 S.C. 426, 346 S.E.2d 705

¹The Appellant made an initial extension request to file an Initial Brief of Appellant on March 8, 2012. It was extended by the Court until May 6, 2013. A second extension request by Appellant was made on May 3, 2013. It is currently pending before this Court.

(1896); State v. Gregorie, 339 S.C. 2, 528 S.E.2d 77 (2000)(general rule that there is no appeal except from a final sentence).

This is an order denying a motion to dismiss pursuant to the Act. At first blush, however, it would appear to meet the terms of footnote two in Duncan for appealability.

The Order

In the Order denying immunity, Judge McIntosh recognized that the evidence failed to meet the conditions precedent for consideration of the applicability of the Act. In his initial summary of the facts, Judge McIntosh stated in its pertinent part:

Facts

During the early morning hours of July 18, 2010, Parks, along with Quentin Boykin (“Boykin”) and Terrance Odom (“Odom”), drove his BMW to “Andrew’s”, a bar located off Clemson Boulevard in Anderson County. They arrived around 4:30 a.m., but did not enter “Andrew’s” because of a Ten Dollar (\$10) cover charge and the lateness of the hour. Parks and his friends did remain outside “Andrew’s.” Around 4:45 a.m., the bar closed; and its patrons began leaving the premises. A highly intoxicated patron, Antonio “Bo” Paul (“Bo”), his fiancée, Katherine Jones (“Jones”) and her friend, Selena Smith (“Smith”), were leaving the bar when someone made a crude remark about Jones. Parks was walking or standing behind “Bo” at the time. Thinking Parks made the remark, “Bo” turned around and swung at Parks, missing him and falling to the ground. Bo’s cousin, Timothy Pickens² (Victim) apologized, stating that “Bo” was intoxicated and asserting they were not looking for trouble. Thereafter, Jones found her vehicle (a Jeep) while Victim and Elmo Williams (“Elmo”) escorted a belligerent “Bo” to Jones’ vehicle. (First incident)

Jones was inside the Jeep in the driver’s seat; “Bo” was in the back seat; Smith was standing outside the passenger side door, with the front door open. Victim and Elmo were outside, close to the Jeep.

After the confrontation, Parks and his friends went to his vehicle, ostensibly to leave. **Defendant drove from his parking place through the parking lot, heading in the direction of Clemson. Parks stopped his car in the vicinity of the rear of Jones’ Jeep. Parks exited his vehicle, walked a**

² Unknown to Defendant at the time, victim had an extensive criminal record.

distance to Jones' vehicle, opened the rear driver's side door of the Jeep and assaulted "Bo". He did so by attempting to punch "Bo" with his fist but instead missed, hitting the seat near Bo. (Second incident)

By all accounts, Parks had no permission to open Jones' vehicle, either by express or implied invitation. Defendant had no prior knowledge of "Bo" before the first incident referenced above.

Subsequent to Parks' assault, he was immediately chased to his vehicle by Victim. With Victim in fast pursuit, Parks was able to make it into his BMW. However, an altercation immediately erupted between Parks and Victim. By reports, Victim held Parks' driver's side door open while attempting or preparing to punch Parks. It was during this altercation that Parks shot Victim two (2) times with a 40. cal. Glock pistol. Testimony ranged from Parks having the pistol in his glove compartment at the time of the altercation with Victim to his arming himself with the pistol prior to the assault on "Bo". Victim ultimately died from his wounds.

Order, p. 1-3 (emphasis added).


A.

In addressing Section 16-11-440(A)(1)(2), Judge McIntosh concluded it was not covered by the immunity portion of the Act. The conditions precedent for the consideration of the applicability of the Act. § 16-11-440 provides:

- (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
- (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

- (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
- (B) The presumption provided in subsection (A) does not apply if the person:
- (1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder; or

Code 1976 § 16-11-440.

 The facts as found by the trial court simply do not support any condition precedent to its applicability. An appeal, albeit from a decision denying its applicability should not be allowed where the conditions precedent are not even met. As revealed by the attached transcript, there is record support for the conclusions of Judge McIntosh.

In the order, Judge McIntosh similarly found the stand your ground portion inapplicable under the facts where the Appellant started the confrontation by the unlawful act of assaulting the victim in the victim's vehicle. As stated in § 16-11-440 (C):


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 § 16-11-440 (C).

As with the above section, the conditions precedent were not met by the Petitioner's own presentation. Judge McIntosh found this section inapplicable to the defendant's case wherein he concluded:

Because the Legislature intended to create true immunity as opposed to simply an affirmative defense³, the proper procedure to determine whether a person is immune from criminal or civil liability, is for the trial court to conduct a pre-trial hearing on this issue. State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). The defendant has the burden of establishing his immunity from prosecution by a preponderance of the evidence. Id. @411, 665.

Under the Act, Parks must establish the following by a preponderance of the evidence:

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1. That Parks was not at fault in bringing about the confrontation. That is, that he was engaged in lawful activity and/or that he was not using his vehicle to further unlawful activity; and
 2. That victim unlawfully, forcibly either entered Parks' vehicle, was attempting to do so, or was removing Parks from his vehicle against his will or was attempting to do so; and
 3. That Parks was occupying his vehicle at the time of Victim's unlawful, forcible entry or unlawful, forcible attempt to enter.

If able to prove the above factors by a preponderance of the evidence, under § 16-11-440(A), Parks is presumed to have "reasonable fear of imminent peril of death or great bodily injury to himself or another." Therefore, by virtue of § 16-11-440(C), and § 16-11-450(A), Parks would be justified in standing his ground using deadly force, and would be immune from criminal or civil prosecution.

Parks vigorously maintains that three (3) separate and distinct incidents occurred that early morning:

- (1st) The crude remark and swing at Parks by "Bo";

³ The State has the burden of disproving self-defense by proof beyond a reasonable doubt, Staton v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-493 (1998).

- (2nd) The attempted assault and battery by Parks in attempting to punch “Bo”;
- (3rd) The chase and shooting in “self-defense” as Victim forcibly entered or attempted to enter Parks’ vehicle.

Park asserts that each of these events are separate and distinct events which should be individually evaluated. By doing so, Parks seeks to revive his right to claim self-defense after his attempt to assault and batter “Bo”.

The Court disagrees that three (3) separate and distinct incidents occurred. From a totality of the evidence and testimony, the Court finds that there were only two (2) instances.

The first incident involved the crude remark to Jones and the swing and miss by “Bo”. This even occurred and ended with Victim escorting “Bo” to Jones’ vehicle and with Parks leaving for his vehicle with friends in tow.

The second event involved Parks’ unnecessary stop in the vicinity of Jones’ vehicle and his failed assault and battery upon “Bo”. Contrary to Parks’ contention, this second incident did not end with Parks fleeing from Jones’ vehicle. Instead, Parks’ conduct set into motion a fluid and spontaneous set of events which began with his stopping near Jones’ vehicle and ended with Parks shooting Victim.

The general rule is that one that slays another, to be justified or excused on the grounds of self-defense, must be without fault in provoking the difficulty. One who, as an aggressor, provokes an attack upon him or herself, brings or encourages a difficulty or quarrel with the deceased, or produces the occasion which makes it necessary for him or her to take life, cannot assert that he or she acted in self-defense and thus excuse or justify the homicide which he or she has committed. . . .

40 Am.Jur.2d **Homicide** § 145; State v. Bruno, 322 S.C. 534, 473 S.E.2d 450 (1996).

Clearly, Parks was at fault in bringing out the “second” incident. The first event was over and the parties had separated

and gone their separate ways. Parks and friends were able to peacefully walk to Parks' vehicle, get in and to commence their drive to Clemson. It was after this initial break that Parks re-engaged the situation by pulling near or behind Jones' vehicle and attempting to punch "Bo" (who was essentially disabled in the back seat).

Under the facts presented, the crucial question in determining whether Parks is immune is whether, after provoking the second event, his flight from Jones' vehicle and entry into his own vehicle was sufficient to revive Parks' right of self-defense.

Even though the accused provokes the situation, his or her right to self-defense revives, and his or her actions will be held justifiable upon the ground of self-defense when he or she has withdrawn from the fray or difficulty in good faith as far as possible, and clearly and fairly announced his or her desire for peace. In such cases, if the accused is pursued by the other party, who again brings on the difficulty, the defendant's right of self-defense, though once lost, revives, and may be successfully pleaded by him or her. Conversely, if the attacker withdraws and the other party pursues more than is necessary to insure his or her own safety, the pursuing party can take on the status of attacker and lose his or her right to self-defense. The aggressor must communicate his or her intention to abandon the difficulty clearly and in such a way that his or her adversary understands it.

40 Am.Jury.2d **Homicide** § 149; State v. Santiago, 370 S.C. 153, 161, 634 S.E.2d 23, 27-28 (Ct.App. 2006).

Parks has failed to establish by a preponderance of the evidence (1) that he withdrew from the situation, (2) that his withdrawal was in good faith as far as possible or (3) that he clearly and fairly announced his desire for peace

(A) Withdrawal From the Situation

"If, after commencing the assault, the aggressor withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire, he is restored to his right of self-defense. One's rights to self-defense is

restored, after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act.”

State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999).

Parks has failed to establish by a preponderance of the evidence that he intended to withdraw, in good faith or otherwise, from the situation he had created. Clearly, Parks ran after attempting to punch “Bo”. It is unclear whether Parks ran because he was being chased by the Victim or whether he was running to his vehicle to arm himself⁴ or to enlist the assistance of his friends. The testimony that threatening shouts were heard after Parks’ assault on “Bo” to the effect that they had guns and that Parks was “going to get it”. Quentin Boykin testified that he yelled for Parks to leave because he was scared the “others” had guns. When Parks fled, he did not verbally indicate his desire to withdraw from the situation. He asserts that his act of fleeing alone was sufficient. **While Parks’ conduct can be seen as intending to withdraw, it can also be viewed as an attempt to arm himself, or to seek the assistance of his friends. This evidence alone is insufficient to establish by a preponderance that Parks announced his intention to withdraw from the situation.**

(B) Parks Acted in Good Faith

There was no evidence presented that Parks’ “withdrawal” was in good faith. The evidence revealed that he spontaneously ran after his failed assault and battery on “Bo”, with Victim in hot pursuit. Unlike a separate and distinct “third” event urged by Parks, these were fluid and contemporaneous events - beginning before the assault and ending with the shooting. There was insufficient break in events to establish Parks’ withdrawal or a good faith attempt to withdraw.

(C) Fairly and Clearly Announce Desire for Peace

For the reasons stated above, the Court finds that Parks has failed to establish by a preponderance of the evidence, that his conduct of immediately fleeing was sufficient to either fairly or clearly announce his desire for peace.

⁴ Terrance Odom testified that Parks had armed himself before getting out of his vehicle and assaulting “Bo”.

In addition to the reasons above, the Court is doubtful that it would be a proper application of the intent of this legislation under the facts presented.

Conclusion

The Court finds that Parks has failed to establish by a preponderance of the evidence that he is immune from prosecution under the 'Act'. Accordingly, Defendant shall be required to stand trial or to otherwise plead to the charges.

Order, p. 6-10.

Respondent admits that Duncan suggests that there is automatic appealability of an order denying a motion to dismiss. Respondent further note that this Court has done so in other similar actions, including State v. Jerome Miller.

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However, in this order, it is evident that the conditions precedent have not been satisfied to even raise the issue of the applicability of consideration of the act. Under this setting, the effect should not be an automatic stay of a trial until an full pre-trial appeal is completed. Respondent submits that this Court should find this matter lacked any evidentiary basis for consideration under the Act and thus should not be appealable at this time.

However, if the intent of Duncan was to allow appeals even in situations where the conditions precedent are found by the hearing court to be lacking, then the notice of appeal may be allowed.

WHEREFORE, Respondent has made a Memorandum in opposition to appealability.

Respectfully submitted,
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA

Senior Assistant Deputy Attorney General
S.C. Bar No. 5758

ATTORNEYS FOR RESPONDENT

By:  _____

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

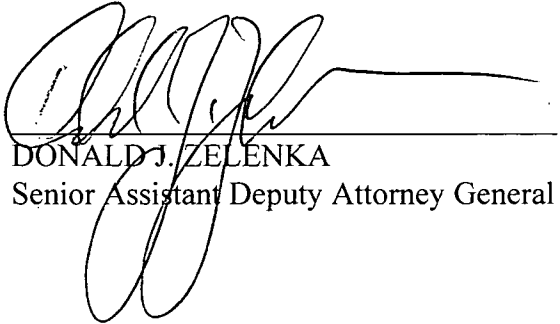
May 13, 2013

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the **Respondent's Memorandum of Law on Appealability** in the foregoing action by depositing copy in the United States mail, postage prepaid, to the following:

William N. Epps, III, Esquire
P. O. Box 2167
Anderson, SC 29622

This 13th day of May, 2013.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General



ALAN WILSON
ATTORNEY GENERAL

May 13, 2013

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RECEIVED

MAY 13 2013

Re: The State v. Raphael Parks
Appellate Case No. 2012-213658

SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of *Respondent's Memorandum of Law on Appealability of March 21, 2012 Order Denying Immunity from Prosecution* in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Thank you for your consideration.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

lbb
Enclosures

cc: William N. Epps, III, Esquire
Sandi Wofford, Victims Assistance