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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Spartanburg County

Honorable Robin B. Stilwell, Circuit Court Judge

ANTWON M. BAKER, JR.,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2018-001531

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the PCR court erred in finding defense counsel was not ineffective, where counsel admitted he "screwed up" in not calling petitioner to testify during the "stand your ground" immunity hearing, where petitioner was attacked at a place he had the right to be, the Waffle House, where petitioner fired his gun in fear for his life after he was hit in the back of the head and trapped in the small doorway of the Waffle House, since defense counsel's expectation that a police investigator as the only witness could carry petitioner's burden of proof on immunity, including that petitioner was in fear of losing his life. was objectively unreasonable?

STATEMENT OF THE CASE

Petitioner was indicted at the July 19, 2012, term of the Spartanburg County Grand Jury for the offense of murder. App. 696-697. His case was called to trial on June 3, 2013 before the Honorable J. Derham Cole, and a jury. App. 1. Petitioner was represented by Robert Ianuario and Matt Canady. App. 1. Derrick B. Bulsa and Lindsey Overby were the assistant solicitors. App. 1.

Petitioner was found guilty of voluntary manslaughter on June 6, 2013. App. 539, l. 22 – 540, l. Judge Cole sentenced petitioner to eighteen years imprisonment. App. 546, ll. 2-3.

Petitioner's conviction was affirmed by the Court of Appeals on direct appeal. State v. Antwon Baker, 2015-UP-178 (filed April 8, 2015). App. 585-587.

Petitioner filed an application for post-conviction relief on December 21, 2015. App. 589-604. The state filed a return and motion for a more definite statement dated July 12, 2016. App. 605-611. PCR counsel Susannah Ross filed an Application Addendum alleging ineffective assistance of trial counsel on January 25, 2017.

An evidentiary hearing was held before the Honorable Robin B. Stillwell on March 21, 2017. Susannah Ross represented petitioner. Alicia A. Olive was the assistant attorney general. App. 613.

An order of dismissal dated July 8, 2018 was issued. App. 681-691. PCR counsel Ross filed a motion to alter or amend the judgment arguing, inter alia, that "[t]he Order of Dismissal fails to address the argument that the trial attorney was ineffective for advising the applicant not to testify during the immunity hearing held pursuant to S.C. Code Ann. §16-11-420 (A) . . ." App. 692-693. An order denying Applicant's Motion to Alter or Amend Pursuant to Rule 59 (e) dated August 12, 2018 was issued. App. 694.

Petitioner filed a petition for writ of certiorari with this Court on March 26, 2019. The state filed a return to this petition. Certiorari was granted on issue one in the petition for writ of certiorari on November 2, 2021.

This brief of petitioner follows.

STANDARD OF REVIEW

Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). We review questions of law de novo, with no deference to trial courts. Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018).

ARGUMENT

The PCR court erred in finding defense counsel was not ineffective, where counsel admitted he "screwed up" in not calling petitioner to testify during the "stand your ground" immunity hearing, where petitioner was attacked at a place he had the right to be, the Waffle House, where petitioner fired his gun in fear for his life after he was hit in the back of the head and trapped in the small doorway of the Waffle House, since defense counsel's expectation that a police investigator as the only witness could carry petitioner's burden of proof on immunity, including that petitioner was in fear of losing his life if he did not shoot, was objectively unreasonable.

Introduction

Petitioner went to a Waffle House, where he had a right to be, when he was attacked, and he shot back in self-defense. At his trial for murder, petitioner asserted he was immune from prosecution pursuant to S.C. Code § 16-11-440(c), which provides "a person who is not engaged in an unlawful activity and who is attacked in another place where has the 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 is defined in § 16-1-60." App. 15, l. 17 – 16, l. 19.

Petitioner was convicted of voluntary manslaughter and sentenced to eighteen years imprisonment. App. 539, l. 22 – 540, l. 4; app. 546, ll. 2-3. Petitioner raised on direct appeal the issue that the trial judge erred by ruling that S.C. Code §16-11-440 (C) did not apply because petitioner was not attacked in his vehicle, his residence or his place of business. Petitioner also

argued he was entitled to a directed verdict on the murder charge. App. 548 – 584. The Court of Appeals affirmed in a summary opinion. App 585-587.

Relevant facts

Trial Counsel Ianuario would later admit at the PCR hearing that not calling petitioner as a witness at the "stand your ground" hearing was "one of the screw ups I've made in this case and I'm not denying I screwed up some things in this case but I'm gonna (sic) leave it to His Honor [to] determine whether or not that amounts to ineffective assistance." App. 644, l. 15 – 645, l. 3. Counsel also said this at the PCR hearing that this case was his first murder trial: "I freely admit that I should have put Antwon on the stand and leave it to Your Honor's , uh, or not [whether] that was ineffective, I at the time thought I could get all the necessary [of immunity] established through Detective Foster's testimony without havin' (sic) to expose Antwon to any cross-examination and expose the case to anything that was beyond the knowledge that was already inside discovery." App. 657, ll. 9-20.

During the immunity hearing, Ianuario asked the trial judge, Judge Cole: "Can you take the police reports without the witness being present, or the witness statements?" Judge Cole responded, "Well, I mean, I think you've got the burden of proof." Ianuario then asked for permission to speak "to the prosecutor." App. 17, l. 16 – 18, l. 8.

Defense counsel then called Investigator Richie Foster as a witness at trial. App. 24, ll. 17-21. Counsel asked Foster, "Would you provide a brief summary for the court of the events that took place on the night of June 3, the early morning hours?" Investigator Foster answered that he understood petitioner stopped to get something to eat and noticed a crowd in the parking lot. The trial judge interjected at this point: "He's not going to be able just to testify as to what everybody else told him." App. 25, ll. 4-12.

The following then occurred between defense counsel and the judge:

> Mr. Ianuario: Shouldn't he be allowed to testify on the information he gathered at the location in the course of his investigation, not the authenticity of it but what he was told?
>
> The Court: Well, he can testify what everybody told him if you don't want me to consider it as evidence that would support a grant of immunity.
>
> Mr. Ianuario: Understood, Your Honor.
>
> The Court: I mean, this hearing is not different than the trial. I mean, you have a burden to establish that he's entitled to immunity, and you do that through competent evidence, not just hearsay testimony.
>
> Mr. Ianuario: Understood, Your Honor.

App. 25, ll. 13-25.

Investigator Foster then said that during his investigation, he was unable to determine whether anyone else at the Waffle House that early morning had a firearm. App. 26, ll. 2-5. Foster offered that he understood there was "a crowd of folks outside. Mr. Baker came up, noticed that he had problems with one fellow in the past. He retrieved his firearm from his dash of his car, walked in and ordered. Apparently some words were exchanged between one or two or three of the group and him. And he came outside onetime, *started to come back in. He was hit in the back of the head and at that time turned around and started shooting* and, per the witnesses, chased the victim around in the parking lot and stood over him and kicked him." App. 26, l. 24 – 27, l. 11. (emphasis added).

Foster described the area petitioner was attacked in, which also was described as the front doorway of the Waffle House as "not much bigger than that desk you're in front of -- behind." App. 28, ll. 9-18. Foster acknowledged he did not have any indication that petitioner started the

altercation or difficulties. "He kept telling the individuals . . . to "leave it alone." App. 29, ll. 20-24. "Leave it alone," was said on more than one occasion by petitioner to the agitators at the Waffle House before he was attacked.

Foster recalled, "I believe one of the females did say or was trying to also keep them [the men who wanted to fight petitioner] calmed down. Without reading through them again, I can't be exactly sure." Petitioner told Foster that the men said they were going to rob him. App. 30, ll. 1-10.

Foster testified that petitioner did refuse to fight, and according to statements and his investigation, petitioner came into the restaurant to escape the difficulties. However, the investigator refused to admit that petitioner could not have avoided the difficulty, "given that we never found another weapon . . ." App. 31, ll. 3-21.

Foster was told that petitioner was hit on the back of the head when he came into the Waffle House. App. 33, ll. 4-8. Foster also related his understanding that petitioner felt trapped by the men at the time he fired his gun. App. 34, ll. 20-23.

On cross-examination by Assistant Solicitor Bulsa, Foster said he understood six or seven shots were fired. App. 36, l. 10 – 37, l. 1. Foster related in petitioner's first statement to the police he said, "The boys didn't say nothing at first, so I went on in and ordered my food." App. 38, l. 16 – 39, l. 5. When petitioner came back outside the Waffle House, "He walked outside to a crowd of people, I think." App. 40, ll. 11-24. Foster said that he did not think petitioner had a concealed weapons permit, but that only one victim was shot when petitioner fired his gun that morning. App. 42, l. 4 – 43, l. 20.

On redirect examination, Foster offered that, "I don't think I would have pulled into the parking lot if I had a problem with somebody that was there." App. 44, ll. 12-16. When asked

whether he thought petitioner had a duty to avoid the men and not go to the Waffle House, Foster answered, "I didn't get to go to law school that long." App. 44, ll. 17-21.

After Foster's testimony, defense counsel told the judge he had no further witnesses. Counsel then argued that the "stand your ground law applies." He argued petitioner was not engaged in unlawful activity. He noted there was no indication petitioner was at fault and that petitioner "even attempted to walk away." "Once you enter into the Waffle House, the only way he would have any sort of cover that would have stopped a bullet would have been to jump over the counter. . . . Also I believe there is evidence that there was another firearm present." App. 51, l. 2 – 52, l. 20.

Counsel asserted, "Based on that I don't see that there's enough to disprove that Antwon Baker was within his rights to defend himself as he was being jumped by numerous men. And at least one of them was flashing a firearm toward Mr. Baker. And the testimony -- the independent statement from the Waffle House manager also confirms that." The judge told defense counsel, "Well, I don't have that statement." App. 51, l. 2 – 52, l. 20.

Assistant solicitor Bulsa argued that "by stepping out of the car and arming himself he was not engaged in unlawful activity (sic) -- he was engaged in unlawful activity. He had no right to possess that firearm. . . . He is therefore not entitled to immunity under this statute, nor can he reasonably believe it was necessary to fire that gun that many times." App. 52, l. 25 – 53, l. 24. The assistant solicitor argued that self-defense was a jury issue or decision.

The judge then ruled, "I'm not satisfied that this statute applies to these circumstances." The judge said that the General Assembly intended to include occupied vehicles and a person's place of business (but apparently not a business where Petitioner was a customer). App. 55, ll. 4-19.

Defense counsel then argued under subsection (C), that the statute applied because petitioner was acting lawfully in a place that he had a right to be. The judge asked the solicitor and defense counsel then if they were aware of any case under S.C. Code § 16-11-440 and 450 that did not involve a person's home, vehicle, or place of business. The attorneys said they could not think of or find such a case. App. 55, ll. 4-19.

The judge then ruled that the statute was not applicable to these circumstances and that even if it was, petitioner had failed to prove by a preponderance of the evidence that he was entitled to immunity. The judge therefore denied the immunity motion. App. 55, l. 20 – 56, l. 6.

During the PCR hearing, petitioner testified that he wanted to testify at the immunity hearing and if he had testified he would have told the judge he feared for his life after he was attacked in the Waffle House. "I was outnumbered and there [were] multiple people out there with guns, I was by myself and they try to hurt me." Petitioner named Brandon Glover, Justin Davis, and Anthony Young as the people who were trying to hurt him. Anthony Young was the person shot. Petitioner admitted there was an altercation about two months before the altercation at the Waffle House. Petitioner always carried a gun for his own protection because he worried he would be attacked. App. 620, l. 16 – 622, l. 6.

Petitioner said when he first pulled up at the Waffle House he did not notice the troublemakers. When he went inside, he heard one of them say, "That's him," and petitioner said he knew these men carried guns. Nonetheless, "I was tryin' to diffuse the situation and try not to have no problem that night 'cause it [had] been too much 'cause I thought he let it go and I was tryin' tell him let it go." Petitioner said he would have testified consistently with his PCR testimony if he had been called as a witness during his immunity hearing. App. 622, l. 1 – 623, l. 25.

At the PCR hearing, petitioner also explained how he was trapped in a small doorway inside the Waffle House and that he could not push or pull his way out of being trapped. App. 630, l. 3 – 632, l. 7. Glover was the man who punched petitioner in the back of his head. Again, petitioner thought one of the men was armed. Petitioner finally said he did not even remember defense counsel discussing with him whether he thought petitioner would make a good witness at the immunity hearing or before the jury. App. 632, l. 2 – 634, l. 4.

Petitioner testified he was trapped by the men inside the Waffle House doorway, that he was in fear of his life, and that is why he pulled the gun out and shot in self-defense. App. 637, l. 3 – 638, l. 19. Petitioner said if he did not shoot that evening that "I'd end up dead." App 638, ll. 22-24.

Again, defense counsel Ianuario said that looking back, "It's one of the screw ups I've made in this case and I'm not denying I screwed up some things in this case but I'm gonna leave it to His Honor to determine whether or not that amounts to ineffective assistance" in not calling petitioner as a witness during the immunity hearing. App. 644, l. 15 – 645, l. 2. Counsel also added, "I freely admit I should have put Antwon on the stand and leave it to Your Honor's, uh . . . [whether] or not that was ineffective, I at the time thought I could get all the necessary elements established through Detective Foster's testimony without havin' to expose Antwon to any cross-examination and expose the case to anything that was beyond the knowledge that was already inside discovery." App. 656, l. 15 – 657, l. 20.

The order of dismissal did not address the issue of defense counsel's ineffectiveness for admitting committing an error by not advising petitioner not to testify, and not calling petitioner as a witness during the immunity hearing. Thus, PCR counsel filed a Rule 59 (e) SCRCP, motion to alter or amend on this issue which was denied. App. 692-694.

Discussion

Defense counsel in this case did not even understand the burden of proof prior to the immunity hearing. Respectfully, it does not get any more basic than that. Further, petitioner's only prior record was a driving under suspension and a disorderly conduct conviction so it would strain the limits of credulity to even suggest that could have been a factor in petitioner testifying before *the jury, much less at the immunity hearing* since the judge at that in camera hearing was not going to be concerned at all with this petty prior criminal record even if either seemingly summary court level crime was somehow admissible for impeachment purposes under Rule 609 (a)(1), SCRE. App. 620, ll. 13-15. Petitioner also did not testify before the jury in his self-defense case after immunity was denied which was also strange since it seems intuitive that only the person under attack could actually testify whether he or she was in fear of losing their life or suffering great bodily harm to satisfy those two elements of self-defense. See State v. Light, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) (the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life).

In State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), this Court similarly dealt with a stand-your-ground case under S.C. Code §16-11-440 (C). This Court found that Whitley Jones' residence that she shared with her decedent boyfriend and the adjoining parking lot qualified as

"another place" where she had a right to be under the immunity statute. Subsection (C) states, "A person who is (1) not engaged in an unlawful activity and (2) who is attacked in another place where he as a right to be, including, but not limited to, his place of business, (3) has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, (4) 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." State v. Jones, 416 S.C. 283, 297, 786 S.E.2d 132, 139 (2016).

Here, respectfully, the trial judge erred by finding that S.C. Code § 16-11-440(C), did not apply to petitioner being attacked in a Waffle House, since it was a place he had a right to be even though it was not *his business.*[1] Petitioner submits that the position continuously urged by the state that "a place where he has a right to be" is strictly limited to a "home," "[the defendant's] business" or "vehicle" and that it cannot apply to any "public place" should be rejected. The state acknowledges other jurisdictions do not so limit the "stand your ground" immunity provisions in such a narrow fashion. Return to Petition for Writ of Certiorari at 11-12. Here, defense counsel correctly made a motion to obtain immunity from prosecution for petitioner. However, his preparation and legal reasoning were fatally flawed. Counsel belatedly realized that he could not establish the elements of self-defense necessary for immunity, and

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[1] Petitioner sought certiorari from the state Supreme Court after this Court affirmed his conviction and rejected his claim of immunity in State v. Antwon M. Baker, 2015-UP-178 (filed April 8, 2015). See State v. Antwon Michele Baker, Jr., Appellate Case No. 2015-001332 (filed October 8, 2015). This denial of certiorari order by our Supreme Court obviously had no precedential meaning, and it could have simply been based on the lack of a trial record supporting immunity regardless of the trial judge's legal reasoning on the applicability of the S.C. Code §16-11-440 (C) to the Waffle House shooting immunity claim.

most specifically that petitioner was in fear of great bodily harm or death, without petitioner's testimony. See State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013).[2]

Not surprisingly, Investigator Foster would testify he thought petitioner could have escaped the danger without shooting when defense counsel pressed him on the subject. Further, Foster's reasoning that petitioner could have avoided that Waffle House on that night misses the point on his right to stand his ground once he was attacked since (1) he was not engaged in an unlawful activity and (2) he was attacked in another place where he as a right to be (3) he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, and (4) his PCR testimony revealed he reasonably believed it was necessary to prevent death or great bodily injury to himself. . . S.C. Code §16-11-440(C).

Petitioner's PCR testimony clearly shows he would have testified that he was in fear of great bodily harm, and, indeed, death, if he did not act as he did when he was attacked and trapped at the Waffle House. Petitioner being in possession of a gun without a concealed weapons permit has not been interpreted as him not having a right to act in self-defense. See State v. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018) (Scott did not own a gun and "borrowed" his roommate's gun to return fire. This Court found Scott was entitled to immunity under the statute). This Court in the self-defense-accident context in State v. Burriss, 334 S.C. 256, 262,

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2 The fact that Curry was not decided until six months after the immunity hearing in this case does not add to the analysis. This Court in Curry wrote that "In *Duncan,* [State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011)] we set forth the pretrial procedure, burden of proof and appellate standard of review under the Act. Because Appellant misapprehends the reach of the Act, we take this opportunity to interpret what we believe to be the legislative intent regarding a trial court's authority to weigh the underlying claim of self-defense in determining an accused's entitlement to immunity." This Court then explained that the defendant in Curry misunderstood the Immunity Act, in particular to the extent that he alleged the court had to accept his testimony as true. State v. Curry, 406 S.C. 364, 371-72, 752 S.E.2d 263,266-67 (2013). Thus, Curry explained misconceptions – it did not lay out the fundamental law of immunity for the first time. No one was requiring defense counsel to be clairvoyant in this case. Rather, counsel simply bungled his handling of the immunity hearing in this case, and he admitted it at the PCR hearing.

513 S.E.2d 104, 108 (1999) that the defendant being unlawfully in possession of a gun did not disqualify him from his right to act in self-defense.[3]

It is evident from the record that defense counsel did not understand that he had the burden of proof at the immunity hearing – and, as seen supra, he even spoke of the state *disproving self-defense* at the immunity hearing -- which showed counsel did not understand the difference between a jury charge on self-defense, and the immunity hearing burden of proof that was on the defendant by a preponderance of the evidence. State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011). Counsel should have realized that the only way he could satisfy the burden of establishing self-defense, or having the judge understand at the immunity hearing that petitioner was scared for his life was by having petitioner testify. If petitioner had testified at the immunity hearing, as he did at the PCR hearing, and had defense counsel understood the burden of proof at the immunity hearing so he could also have made a competent argument entitling petitioner to immunity, there was a reasonable likelihood petitioner would have been granted immunity from prosecution at the trial level or prevailed on appeal with a proper trial level immunity record in existence. See Strickland v. Washington, 466 U.S. 690 (1984).

[3] Burriss involved a defendant acting in self-defense and a claim of an accident defense.

CONCLUSION

Based on the foregoing arguments the ruling of the PCR court should be reversed and this case should be remanded to the Spartanburg County Court of General Sessions for a new immunity hearing.

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This 7th day of March, 2022.