IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2013

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

JARED BRETHERICK,

Appellant,

v. Case No. 5D12-3840

STATE OF FLORIDA,

Appellee.

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Opinion filed November 1, 2013

Appeal from the Circuit Court for Osceola County, Scott Polodna, Judge.

Eric J. Friday, of Fletcher & Phillips, Jacksonville, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Ann M. Phillips, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

Perceiving a threat from another driver completely stopped in the lane ahead of him on a busy highway, Jared Bretherick ["the Defendant"] pointed a firearm at the driver and held him at gunpoint. As a result of this action, he was charged with aggravated assault. After an evidentiary hearing, the trial court denied his pretrial motion to dismiss based on Florida's self-defense immunity statute, commonly called the "Stand Your Ground" law. The issues in this case are, first, whether the Defendant has

the right of review before trial of the denial of his motion by petition for writ of prohibition; second, whether the burden of proof at the evidentiary hearing on the motion to dismiss was properly placed on the Defendant to prove entitlement to immunity; and finally, assuming the Defendant bears the burden of production and persuasion, whether that burden was met in this case.

The standard of review requires that the trial court's findings of fact must be supported by competent, substantial evidence, while the conclusions of law are subject to *de novo* review. *Mederos v. State*, 102 So. 3d 7, 11 (Fla. 1st DCA 2012). Although there was some conflicting testimony presented below, the trial court made specific findings of fact based on credibility determinations that establish the following facts in this case.

On December 29, 2011, the Bretherick family was on vacation in Central Florida, driving toward Downtown Disney, on a heavily travelled, six-lane divided road in Osceola County. Ronald Bretherick, the father, was driving in the middle lane westbound when, in his rearview mirror, he saw a blue truck rapidly approaching them. The truck almost side-swiped them as it passed in the right lane. As the truck passed the Brethericks, the driver, Derek Dunning, "stared at them in a threatening manner," but made no statements or gestures.

Dunning's truck cut in front of the Bretherick vehicle in the middle lane, slammed on the brakes, and came to a complete stop. There was no traffic or other impediment that required this action. Ronald Bretherick also stopped his vehicle, one to two car lengths behind Dunning's truck. Dunning got out of his truck and walked toward the

Bretherick vehicle. He was unarmed. Without exiting, Ronald Bretherick held up a holstered handgun, and Dunning returned to his truck without uttering a word.

After Dunning got back into his truck, the Defendant, Ronald's adult son, got out of the rear passenger's seat. He approached the driver's side of Dunning's truck within a few feet of the driver, while pointing the handgun at Dunning. The Defendant told Dunning to move his truck or he would be shot. Dunning misunderstood, and believed that the Defendant told him that if he moved, he would be shot. This slight but critical misunderstanding explains everyone's subsequent actions.

The Defendant returned to his own vehicle and took up various positions, continuing to point the gun at Dunning. The Brethericks, Dunning, and several passersby all called 911. The Defendant's mother and sister exited their vehicle and took refuge in a ditch on the north side of the road. The Defendant told his family that Dunning said he had a gun, but no one saw Dunning with a weapon, and the trial court found this not to be credible. At some point, Dunning's truck rolled back twelve to eighteen inches toward the Brethericks' vehicle. The police arrived and diffused the volatile encounter.

As a result of this incident, the Defendant was charged with one count of aggravated assault with a firearm in violation of sections 784.021(1)(a) and 775.087(2), Florida Statutes (2011). On April 3, 2012, the Defendant filed a motion to dismiss, alleging immunity from prosecution, pursuant to section 776.032, Florida Statutes (2011). After an evidentiary hearing, the trial court denied the motion to dismiss, and the Defendant sought review.

A threshold issue is whether the denial of this pretrial motion is subject to review at this time. The First, Second, and Fourth District Courts of Appeal have held that a petition for writ of prohibition is the appropriate method for obtaining review before trial of the denial of a motion to dismiss under the self-defense immunity statute. *See Little v. State*, 111 So. 3d 214, 216 (Fla. 2d DCA 2013); *Mederos*, 102 So. 3d 7; *Joseph v. State*, 103 So. 3d 227 (Fla. 4th DCA 2012). Non-final orders in criminal cases that challenge the authority of the trial court's jurisdiction are traditionally subject to review by petition for writ of prohibition. In *Joseph*, the Fourth District determined that a writ of prohibition was the appropriate method for obtaining immediate review of a trial court's denial of a claim of self-defense immunity based on the Florida Supreme Court's decision in *Tsavaris v. Scruggs*, 360 So. 2d 745 (Fla. 1977), which employed this remedy to review the denial of a pretrial claim of immunity from prosecution. In light of the decisions in the First, Second and Fourth District Courts, we agree that the appropriate vehicle to obtain review before trial of the denial of a "Stand Your Ground" motion invoking self-defense immunity is by petition for writ of prohibition.

Next, the Defendant argues that the trial court improperly placed the burden of proof on him to prove his entitlement to immunity. He acknowledges that the Florida Supreme Court's decision in *Dennis v. State*, 51 So. 3d 456 (Fla. 2010), supports the State's contention that he bears the burden of proving his entitlement to self-defense immunity by the preponderance of evidence.

In *Dennis*, the Florida Supreme Court held that where a criminal defendant files a motion to dismiss, on the basis of the "Stand Your Ground" statute, which relates to justified use of force, the trial court should conduct a pretrial evidentiary hearing and

decide the factual question of the applicability of the statutory immunity. In reaching this conclusion, the Court rejected the State's argument that a motion to dismiss based on statutory immunity is properly denied when there are disputed issues of material fact. Significantly, the *Dennis* court expressly approved the procedure set forth in *Peterson v. State*, 983 So. 2d 27 (Fla. 1st DCA 2008), for ruling on motions to dismiss, filed pursuant to section 776.032. *Dennis*, 51 So. 3d at 463 ("In summary, we conclude that the procedure set out by the First District in *Peterson* best effectuates the intent of the Legislature . . . ."). The approved procedure placed the burden of proof at the pretrial evidentiary hearing on the defendant:

> "[W]e hold that 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."

Dennis, 51 So. 3d at 460 (quoting *Peterson*, 983 So. 2d at 29). (Emphasis added).

Nevertheless, the Defendant argues that this ruling fails to appropriately apply the plain meaning of the statute. "Placing the burden on a person who acted in self defense, after they have been charged makes the immunity granted largely illusory, and fails to give effect to each word in the statute." We are bound by *Dennis* and, accordingly, we reject this argument and find that the trial court properly placed the burden of proof on the Defendant.

At the hearing below, the Defendant contended that he was justified in using force to defend himself and his family against Dunning's imminent use of unlawful force, which he alleged to be the forcible felony of false imprisonment. However, based on the

trial court's findings of fact, which are supported by competent, substantial evidence, we conclude that the motion to dismiss was properly denied.

A person is justified in using deadly force when he or she reasonably believes such force is necessary to prevent imminent death or great bodily harm to him or herself or another, or to prevent the imminent commission of a forcible felony. § 776.012, Fla. Stat. (2011). False imprisonment is defined as "forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against her or his will." § 787.02(1)(a), Fla. Stat. (2011).

The trial court correctly found that Dunning's actions did not rise to the level of false imprisonment, aggravated assault, or any other forcible felony, and therefore, the Defendant could not justify his use of force on this basis. No one saw Dunning with a gun. Dunning retreated to his vehicle when Ronald Bretherick held up a holstered weapon. The trial court also properly determined that there was no longer an imminent threat and that the Defendant's subjective fear at that point was objectively unreasonable.

There was at least one car length between Dunning's vehicle and the Brethericks' vehicle. When Dunning's truck rolled back not more than eighteen inches, that action standing alone did not constitute the act of false imprisonment as the Defendant contends. Notably, the Defendant's mother and sister exited the vehicle and took refuge nearby. Several other cars passed by in the two lanes on either side of the middle lane where the Dunning and Bretherick vehicles sat. It was not reasonable for the Defendant to believe that it was necessary for him to approach Dunning's truck with a gun drawn in order to defend himself or his family.

As noted by the trial court, there was conflicting testimony presented at the hearing on the motion to dismiss. The issue of who bears the burden of proof may well be significant where the case is an extremely close one, or where only limited evidence is presented for the trial court's consideration. Because, as observed in Judge Schumann's thoughtful concurring opinion, the burden of proof issue was not the primary focus of the *Dennis* opinion, we certify the following question for consideration by the Florida Supreme Court:

> ONCE THE DEFENSE SATISFIES THE INITIAL BURDEN OF RAISING THE ISSUE, DOES THE STATE HAVE THE BURDEN OF DISPROVING A DEFENDANT'S ENTITLEMENT TO SELF-DEFENSE IMMUNITY AT A PRETRIAL HEARING AS IT DOES AT TRIAL?

AFFIRMED.

QUESTION CERTIFIED.

SAWAYA and EVANDER, JJ., concur.
SCHUMANN, B.B., Associate Judge, concurs and concurs specially, with opinion.

SCHUMANN, B.B., Associate Judge, concurring specially. 5D12-3840

If I were writing on a clean slate, I would find that the trial court erred in placing the burden of proof at the pretrial hearing on the Defendant.

Section 776.032(1), Florida Statutes (2011), provides that when a person uses force as permitted by statute, he or she is "immune from criminal prosecution and civil action for the use of such force" unless the person is a law enforcement officer acting in the performance of his or her duties. "As used in this subsection, the term 'criminal prosecution' includes arresting, detaining in custody, and charging or prosecuting the defendant."

In *Dennis*, the issue was whether the trial court should conduct an evidentiary hearing when a defendant claims self-defense immunity, or instead, whether the State could simply file a traverse disputing a material fact, and avoid a pretrial evidentiary hearing. The Supreme Court disapproved the Fourth District's reasoning in *Dennis v. State*, 17 So. 3d 305 (Fla. 4th DCA 2009), which followed the 3.190(c)(4) procedure, and instead approved the approach advanced by the First District in *Peterson v. State*, 983 So. 2d 27 (Fla. 1st DCA 2008).

In *Peterson*, the First District reviewed the self-defense immunity statute, and addressed the absence of procedures for implementation. For guidance, the *Peterson* court turned to a decision from Colorado, *People v. Guenther*, 740 P.2d 971 (Colo. 1987). In that case, the court decided that a Colorado statute providing immunity from prosecution for burglary of a dwelling was an extraordinary protection, and so it was reasonable to require the defendant to prove his entitlement to immunity from prosecution. The court noted that a criminal defendant usually bears the burden of

establishing his or her entitlement to dismissal of criminal charges at the pretrial stage, and so it was appropriate to impose the same burden when the defendant claimed self-defense immunity. Relying on *Guenther*, the *Peterson* court held that it was the defendant's burden to demonstrate how immunity attaches by a preponderance of evidence.

There are significant differences between Colorado's statute and the self-defense immunity provided by section 776.032(1). Section 18-1-704.5(3) of the Colorado statute provides: "Any occupant of a dwelling using physical force, including deadly force, in accordance with the provisions of subsection (2) of this section shall be immune from criminal prosecution for the use of such force." Colo. Rev. Stat. § 18-1-704.5(3). The Colorado statute applies only to home invasion burglaries and does not define immunity from criminal prosecution as beginning at arrest. It would appear that this is a far more limited immunity than is granted by section 776.032.

In approving the procedural holding of *Peterson*, the Florida Supreme Court determined that a pretrial evidentiary hearing was necessary to test whether the defendant's use of force was legally justified and therefore immune from prosecution. The Court observed that a non-adversarial probable cause determination by a judge was already required once a criminal defendant was taken into custody, and so a probable cause standard argued by the State would render the self-defense immunity statute meaningless. "Accordingly, the grant of immunity from 'criminal prosecution' in section 776.032 must be interpreted in a manner that provides the defendant with more protection from prosecution for a justified use of force than the probable cause determination previously provided to the defendant by rule." *Dennis,* 51 So. 3d at 463.

Rejecting a probable cause standard in favor of a preponderance standard still does not answer the question of who bears the burden of production and persuasion. I agree that *Dennis* approved the procedure in *Peterson*, which placed the burden on the defendant, and that decision is binding in this case. However, the issue directly addressed in *Dennis* was whether an evidentiary hearing was required at all, not who bore the burden. The burden of proof issue is squarely raised here.

At least two other states with self-defense immunity laws which duplicated Florida's statute have determined that the burden of proof should lie with the State in a pretrial evidentiary hearing. *Rodgers v. Commonwealth*, 285 S.W.3d 740 (Ky. 2009); *State v. Ultreras*, 295 P.3d 1020 (Kan. 2013). If this Court were reviewing this issue without the benefit of the *Dennis* decision, I would find more persuasive these decisions from supreme courts in states other than Colorado, reviewing statutes nearly identical to Florida's "Stand Your Ground" statute.[1]

In *Rodgers,* the Kentucky Supreme Court determined that their legislature had clearly stated its intent to create an immunity from defending against criminal charges by defining "criminal prosecution" to include "charging or prosecuting" a defendant. 285 S.W.3d at 754; Ky. Rev. Stat. Ann. § 503.085(1).[2] This meant that courts would be

[1] The issues raised in these decisions were not fully formed when the opinion issued in *Gray v. State*, 42 So. 3d 341 (Fla. 5th DCA 2010). In that case, on direct appeal after conviction, the defendant renewed the issue raised previously on a petition for writ of certiorari in *Gray v. State*, 13 So. 3d 114 (Fla. 5th DCA 2009). This Court held that the proper procedure was addressed in *Peterson*, which was ultimately affirmed by the Florida Supreme Court in *Dennis*, and which we follow here.

[2] Section 776.032(1), Florida Statutes, provides:

> A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is

called upon to determine whether a defendant was entitled to self-defense immunity. The Kentucky Supreme Court concluded that a defendant should be able to invoke the immunity provision at the earliest stage of the proceeding because it was "designed to relieve a defendant from the burdens of litigation." *Rodgers*, 285 S.W.3d at 755. The court held that once a defendant raises the issue of immunity, the State has the burden of proof to establish probable cause to proceed, which requires a determination that the use of force was not justified. *Id*. The State may satisfy this burden by "directing the court's attention to the evidence of record including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record." *Id.*

> immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

Kentucky's statute section 503.085(1) states:

> A person who uses force as permitted in KRS 503.050, 503.055, 503.070, and 503.080 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom the force was used is a peace officer, as defined in KRS 446.010, who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law, or the person using force knew or reasonably should have known that the person was a peace officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

The Kansas Supreme Court reached the same conclusion in *Ultreras* when it reviewed a statute that mirrors Florida's statute. 295 P.3d at 1031; Kan. Stat. Ann. § 21-5231.[3] They reasoned that granting immunity imposes a burden on law enforcement before arrest and on the prosecution before filing charges that indicates a legislative intent to put the burden of proof on the State. By placing that burden on the defense, as a practical matter, a defendant could never obtain the benefit of immunity from arrest or initiation of charges.

> Further, requiring the State to maintain the burden of production is consistent with the burden of production that applies when the issue of justified force is raised as a defense at trial. . . . Evidence of justification simply becomes a consideration in deciding whether the State has met that burden. To impose the burden on the defendant would carve one portion of the proceeding from the general requirement that the State carry the burden of production and that carving would result in a confusing situation of shifting burdens and is not justified by the provisions of the statute. Accordingly, we find that placing the burden with the State to negate a claim of immunity in establishing probable cause is the most reasonable interpretation.

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[3] The Kansas statute, previously section 21-3219 and currently section 21-5231 provides:

> A person who uses force which, subject to the provisions of K.S.A. 21-5226, and amendments thereto, is justified pursuant to K.S.A. 21-5222, 21-5223 or 21-5225, and amendments thereto, is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer who was acting in the performance of such officer's official duties and the officer identified the officer's self in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, "criminal prosecution" includes arrest, detention in custody and charging or prosecution of the defendant.

Ultreras, 295 P.3d at 1031.

Placing the burden of proof on the State at the pretrial hearing on a motion to dismiss based on self-defense immunity gives meaning to the grant of immunity at the earliest stages of criminal proceedings, defined to include arrest, detention, filing of charges, and prosecution. This interpretation recognizes the distinction between an assertion of a broad grant of immunity from criminal prosecution and more prosaic pretrial pleadings. It avoids a confusing shift of the burden of proof from the defense in a pretrial hearing to the State at trial. If the State is unable to sustain its lesser burden of proof at a pretrial hearing, then it would be unable to prove its case beyond a reasonable doubt at trial.

In a close case, who bears the burden of proof by a preponderance standard may be dispositive. The victim here drove recklessly, nearly side-swiping the Brethericks' vehicle. Then the victim slammed on the brakes and came to a complete stop directly in front of the Brethericks in the middle of a busy six-lane divided highway. The victim got out of his vehicle and walked back toward the Brethericks' truck, then returned to his vehicle, folded the side mirrors in, and at one point, rolled back towards the Brethericks. The Defendant had a subjective fear of imminent death or great bodily harm to himself or his family. It may be that had the burden of proof been placed on the State instead of Bretherick, the result in this case may have been different.

Kentucky and Kansas, states with statutes that were modeled directly on our "Stand Your Ground" law, have found that the burden of proof properly rests with the State at the pretrial stage to demonstrate that the use of force in self-defense was unjustified. This construction creates a better procedural vehicle to test the State's case

at the earliest possible stage of a criminal proceeding. Self-defense immunity statutes are designed to relieve a defendant from the burdens of criminal prosecution from arrest through trial. Placing the burden of proof on the State throughout each phase of criminal prosecution best fulfills the legislative intent to create a broad grant of immunity. Although I agree that we are bound by *Dennis*, in light of the reasoning and result reached in *Rodgers* and *Ultreras*, I fully concur in certifying the question to the Florida Supreme Court for resolution.