DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2009

HAROLD GOVONI,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

No. 4D09-2371

[August 19, 2009]

PER CURIAM.

Harold Govoni petitions for a writ of prohibition from a denial of a motion to dismiss asserting statutory immunity under section 776.032, Florida Statutes (2008). We deny the petition.

Govoni is a retiree with no criminal past who lives in a residential community in Boca Raton. He is the president and authorized agent of the community association.

Govoni has been charged with five counts of aggravated assault with a firearm and improper exhibition of a dangerous weapon. The charges arose out of Govoni's encounter with five young men. Govoni says he held his "unloaded gun in his hand" to protect himself from "dope smoking trespassers." Relying on the statements of the victims, the state's version casts Govoni in a different light.

Govoni filed a rule 3.190(c)(4) motion to dismiss based on section 776.032. The state filed a traverse and argued that there were disputed factual issues as to whether there could be a reasonable belief that Govoni's use of force was necessary under the circumstances. *See* § 776.031, Fla. Stat. (2008).

The circuit judge noted that Govoni's motion was not sworn to as required by Rule 3.190(c). Also, the judge observed that he was bound by our decision in *Velasquez v. State*, 9 So. 3d 22, 24 (Fla. 4th DCA 2009), which held that "[w]hen rule 3.190(c)(4) is used as the vehicle to raise the immunity issue under section 776.032, that rule provides the

procedural framework by which the court makes its determination." Therefore, the court was required to deny the motion, because the state's traverse placed essential material facts in dispute.

Govoni recognizes that *Velasquez* required the denial of his motion. He requests this court to certify conflict with *Peterson v. State*, 983 So. 2d 27 (Fla. 1st DCA 2008), as we did in *Velasquez*. Accordingly, the petition for writ of prohibition is denied and we certify conflict with *Peterson*.

HAZOURI and DAMOORGIAN, JJ., concur.
GROSS, C.J., concurs specially with opinion.

GROSS, C.J., concurring specially.

The denial of the petition is required by our decisions in *Velasquez v. State*, 9 So. 3d 22 (Fla. 4th DCA 2009) and *Dennis v. State*, No. 34 Fla. L. Weekly D537 (Fla. 4th DCA Mar. 11, 2009) (holding that "a motion to dismiss based on statutory immunity is properly denied when there are disputed issues of material fact").

I write to note that the current version of Rule 3.190 allows the procedure contemplated in *Peterson v. State*, 983 So. 2d 27 (Fla. 1st DCA 2008).

In 2005, the Florida Legislature passed a statute granting immunity under certain conditions of self-defense. The law reads, "[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 immune from criminal prosecution and civil action for the use of such force." § 776.032, Fla. Stat. (2006). The preamble to the legislation declares, "it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers *without fear of prosecution or civil action*." Ch. 2005-27, at 200, Laws of Fla. (emphasis added). As the first district wrote, "[t]he wording selected by our Legislature makes clear that it intended to establish a true immunity and not merely an affirmative defense." *Peterson*, 983 So. 2d at 29. The essence of true immunity means that a person entitled to it should not have to face prosecution at all. Where it applies, this type of immunity means that a defendant has a right *not* to stand trial.

A motion to dismiss under rule 3.190(c)(4) is not well-suited to resolve a claim of "true immunity" from prosecution. In most cases, where a prosecutor has elected to file charges, there will be a factual dispute

about whether section 776.032 immunity applies. Rule 3.190(c)(4) is structured to avoid a judge's resolution of factual disputes, leaving those matters to the finder of fact at a trial. A rule 3.190(c)(4)motion to dismiss is similar to a motion for summary judgment in a civil case, and as such "[b]oth should be granted sparingly." *State v. Bonebright*, 742 So. 2d 290, 291 (Fla. 1st DCA 1998); *see State v. Kalogeropolous*, 758 So. 2d 110, 111 (Fla. 2000). Yet, forcing disputed immunity claims to trial undercuts the concept of immunity adopted by the legislature.

Rule 3.190 allows for contested hearings on motions to dismiss. The rule does not limit the grounds upon which a motion to dismiss may be filed. Rule 3.190(b) states that

> *all* defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information, whether the same shall relate to matters of form, substance, former acquittal, former jeopardy, *or any other defense*.

(Emphasis added). The rule uses the terms "defenses" and "defense" broadly, so that it encompasses a claim to section 776.032 immunity. The four grounds specified in rule 3.190(c)(1)-(4)—that the defendant has been pardoned, previously been placed in jeopardy, previously been granted immunity, or that the undisputed facts do not establish a prima facie case of guilt—are not the exclusive grounds allowed under the rule. Rather, the rule states that those four grounds "may at any time [be] entertain[ed]" by the court. Rule 3.190(d) expressly contemplates hearings to resolve disputed issues of fact when it says, "[t]he court may receive evidence on any issue of fact necessary to the decision on the motion."

For these reasons, I do not believe that we were correct in *Velasquez* when we said that *Peterson* created "a process sanctioned neither by statute nor existing rule." *Velasquez*, 9 So. 3d at 24. *Peterson* rejected the proposition that rule 3.190(c)(4) should exclusively control the determination of a section 776.032 immunity claim. 983 So. 2d at 29. The first district held that "when immunity under this law is properly raised by a defendant," the trial court "may not deny a motion [to dismiss] simply because factual disputes exist." *Id.* Faced with a factual conflict, a court must hold a hearing to confront and weigh the factual disputes, so that it can "determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches." *Id.* *Peterson*'s procedure for a contested evidentiary hearing fits within the framework of rule 3.190.

Holding a hearing on a section 776.032 immunity claim is not a oddity in the criminal law. A court performs a similar function when it resolves a claim involving a different type of immunity under rule 3.190(c)(3), a claim that prosecution is barred because the defendant has transactional immunity. *See, e.g.*, *State v. Toogood*, 349 So. 2d 1203 (Fla. 2d DCA 1977) (involving statutory transactional immunity under section 914.04, Florida Statutes (1975)). When a defendant moves to dismiss under rule 3.190(c)(3), he must offer evidence to support his motion. *See State v. Montgomery*, 310 So. 2d 440 (Fla. 3d DCA 1975). Also, courts resolve disputed fact issues when considering motions to suppress under subsections 3.190(h) and (i). The existing rule can thus embrace the procedure established by the first district in *Peterson*.

Finally, I agree with *Peterson*'s requirement that a defendant establish entitlement to statutory immunity by the preponderance of the evidence at a motion to dismiss hearing on a section 776.032 immunity claim. The well reasoned explanation of *People v. Guenther*, 740 P.2d 971, 980 (Col. 1987), for requiring this standard is equally applicable under Florida law.

* * *

Petition for writ of prohibition to the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jonathan D. Gerber, Judge; L.T. Case No. 2008CF005204.

Paul Morris of Law Offices of Paul Morris, P.A., Miami, and William D. Matthewman of Seiden, Alder, Matthewman & Bloch, P.A., Coral Springs, for petitioner.

No appearance required for respondent.

Not final until disposition of timely filed motion for rehearing.