

Rel: September 11, 2020

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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-19-0643

Rance Daniel Freeman Gordon

v.

State of Alabama

Appeal from Montgomery Circuit Court
(CC-19-235)

PER CURIAM.

Pursuant to a negotiated plea agreement, the appellant, Rance Daniel Freeman Gordon, pleaded guilty to assault in the third degree, a violation of § 13A-6-22, Ala. Code 1975. The circuit court sentenced Gordon to time served.

The record indicates that Gordon was indicted by a Montgomery County grand jury for assault in the second degree. Gordon filed a motion to dismiss and a request for pretrial immunity under § 13A-3-23, Ala. Code 1975. In his motion, Gordon alleged that he stabbed the victim in self-defense. On September 23, 2019, the circuit court conducted an immunity hearing and on February 5, 2020, the court entered an order in which it denied Gordon's request for pretrial immunity, finding that Gordon was engaged in an unlawful activity at the time of the stabbing. On February 11, 2020, Gordon filed a motion to reconsider the denial of immunity; the circuit court denied that motion. Thereafter, the State amended the indictment to charge assault in the third degree and at the hearing held on February 13, 2020, Gordon pleaded guilty to the amended charge.¹ Before Gordon entered his plea, he reserved for appeal the circuit court's denial of his motion for pretrial immunity. This appeal followed.

The sole issue raised by Gordon on appeal is whether the circuit court erred when it denied his request for pretrial

¹The record indicates that Gordon also pleaded guilty to theft of property in the first degree at the February 13, 2020, hearing. Gordon, however, does not challenge this conviction on appeal.

immunity. The State contends that Gordon's challenge to the circuit court's denial of pretrial immunity is moot because Gordon did not first challenge the ruling in a petition for a writ of mandamus. The State relies on this Court's decision in Smith v. State, 279 So. 3d 1119, 1203 (Ala. Crim. App. 2018), in which we held that "[o]nce a pretrial hearing on the issue of immunity has been conducted and the circuit court has ruled on that issue, but the defendant elects to proceed to trial instead of challenging that ruling by a petition for a writ of mandamus, any claim of immunity from prosecution is moot." Gordon acknowledges the rule established in Smith and concedes that he did not file a petition for a writ of mandamus but argues that he "did not elect to proceed to trial, but in the alternative, on the advice of trial counsel, Gordon entered a plea and reserved his right to appeal." (Gordon's brief, p. 13.) "As such, Gordon avers that he did not waive his right to appeal the denial of immunity." (Gordon's brief, pp. 13-14.)

In Smith v. State, supra, this Court held that the proper method for challenging a pretrial ruling denying a motion for immunity under § 13A-3-23 is to file a petition for a writ of mandamus:

"In Wood v. People, 255 P.3d 1136 (Colo. 2011), the Colorado Supreme Court held that the proper method of challenging a pretrial ruling denying a motion for immunity is to file an extraordinary writ before trial. In arriving at its holding, that Court stated:

"'A pretrial determination of "make-my-day" [use of deadly physical force against an intruder] immunity is also similar to a preliminary hearing in that the issues raised in such proceedings are resolved by the fact finder at trial under a higher burden of proof. We have held that the issue of whether the prosecution established probable cause at the preliminary hearing to bind a defendant over for trial becomes moot once the defendant has been found guilty beyond a reasonable doubt. See People v. Nichelson, 219 P.3d 1064, 1067 (Colo. 2009). Similarly, the issue of whether a defendant established the existence of the statutory conditions of "make-my-day" immunity by a preponderance of the evidence becomes moot once a jury concludes the prosecution proved beyond a reasonable doubt that the same statutory conditions did not exist. In short, the jury's verdict subsumes the trial court's pretrial ruling regarding "make-my-day" immunity under section 18-1-704.5.'

"Wood, 255 P.3d at 1141."

Smith, 279 So. 3d at 1202 (emphasis in original). As this Court explained in Harrison v. State, 203 So. 2d 126 (Ala. Crim. App. 2015):

"'Immune' is defined as '[h]aving immunity; exempt from a duty or liability.' Black's Law Dictionary (10th ed. 2014). 'Criminal prosecution' is defined as '[a] criminal proceeding in which an accused person is tried.' Id. Thus, by using the phrase 'immune from criminal prosecution' in § 13A-3-23(d), the legislature intended to exempt from trial an accused who uses force as justified in § 13A-3-23, unless the accused's conduct is 'determined to be unlawful.' When read together, those phrases lead to the conclusion that a determination must be made, prior to the commencement of trial, as to whether a defendant's conduct was justified or whether it was unlawful. The only available mechanism for such a determination is a pretrial hearing.

"Submitting the question of immunity to a jury, as the State suggested, would render a defendant's right to immunity illusory. As noted in Ex parte Auburn University, [6 So. 3d 478 (Ala. 2008)], the right to immunity 'is effectively lost if a case is erroneously permitted to go to trial.' Additionally, Alabama law has always allowed a defendant to argue self-defense at trial. Thus, treating the right to immunity under § 13A-3-23(d) as an affirmative defense would make that subsection redundant. We must presume that the legislature did not, in enacting § 13A-3-23(d), create a meaningless provision. See Ex parte Wilson, 854 So. 2d 1106, 1110 (Ala. 2002), quoting Ex parte Welch, 519 So. 2d 517, 519 (Ala. 1987) ('"A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."')."

Harrison, 203 So. 3d at 129-30.

The legal basis for requiring a defendant to file a petition for a writ of mandamus to challenge the denial of pretrial immunity does not change simply because a defendant pleads guilty. As this Court observed in Harrison, 203 So. 3d at 130, immunity "is effectively lost" once the case is permitted to go to trial. Likewise, a claim of immunity is effectively lost when a defendant elects to plead guilty. Whether the defendant elects to proceed to trial or to enter a guilty plea, the defendant is subjected to criminal prosecution. This criminal prosecution -- whether in the form of a trial or guilty-plea proceeding -- is what the legislature intended to prevent when it created an exemption under § 13A-3-23(d) for those who are found to be justified in using force. Indeed, this Court recognized the importance of this exemption from criminal prosecution in Harrison when it held that a defendant was entitled to a pretrial hearing on the matter of immunity based on self-defense under § 13A-3-23(d).

In Malone v. State, 221 So. 3d 1153 (Ala. Crim. App. 2016), this Court considered an immunity issue in the context of a guilty plea. In that case, Malone moved to dismiss the

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indictment on the basis that he was entitled to immunity under § 13A-3-23, and he argued that he was entitled to an evidentiary hearing before the circuit court regarding his immunity claim. The circuit court denied the motion, citing a lack of authority to decide the question of immunity at a pretrial hearing, and Malone reserved the issue of the denial of his motion to dismiss for appeal. On appeal, Malone reiterated his argument that he was entitled to a pretrial determination of immunity and asked this Court to reverse his guilty-plea conviction and to remand the matter for a hearing on the immunity claim. While Malone's appeal was pending, this Court decided Harrison, supra, and, based on our holding in Harrison, held that Malone was entitled to a pretrial evidentiary hearing on his claim of immunity.

In this case, unlike Malone, the circuit court conducted an evidentiary hearing on the issue of pretrial immunity in keeping with this Court's decision in Harrison. After the circuit court denied Gordon's request for pretrial immunity, Gordon waived his right to a trial and pleaded guilty. Gordon did not file a petition for a writ of mandamus challenging the circuit court's denial of his motion to dismiss and request

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for pretrial immunity. Therefore, under our holding in Smith, supra, the issue of Gordon's immunity is moot.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

McCool, Cole, and Minor, JJ., concur. Kellum, J., concurs specially, with opinion. Windom, P.J., concurs in the result.

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KELLUM, Judge, concurring specially.

I concur with the conclusion reached by this Court that Rance Daniel Freeman Gordon waived his right to challenge the Montgomery Circuit Court's adverse ruling on his motion for immunity because Gordon did not challenge this ruling before he pleaded guilty by filing a petition for a writ of mandamus with this Court. I write specially to invite the legislature to consider amending § 13A-3-23(d), Ala. Code 1975, to include a right to appeal a circuit court's pretrial ruling on an immunity defense. See Smith v. State, 279 So. 3d 1199 (Ala. Crim. App. 2018) (Kellum, J., concurring specially).