

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ROBERTO ANTONIO JIMENEZ, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

No. 2D22-1792

January 20, 2023

Petition for Writ of Certiorari to the Circuit Court for Manatee County;
Frederick P. Mercurio, Judge.

Andrea Flynn Mogensen, Sarasota, for Petitioner.

Ashley Moody, Attorney General, Tallahassee, and David Campbell,
Assistant Attorney General, Tampa, for Respondent.

KHOUZAM, Judge.

Roberto Antonio Jimenez, Jr., seeks certiorari review of an order denying his "Stand Your Ground" motion to dismiss as legally insufficient. Because the trial court applied an incorrect legal standard and the motion is sufficient under the correct standard, we grant the petition and quash the order.

Following a charge of attempted manslaughter with a firearm, Mr. Jimenez filed a motion to dismiss under Florida Rule of Criminal Procedure 3.190(b) invoking "Stand Your Ground" immunity under sections 776.032 and 776.012, Florida Statutes (2018). The motion candidly conceded that during the relevant times, Mr. Jimenez was carrying a concealed firearm even though he lacked a license to do so. But the motion also alleged that he was not the aggressor and that when he discharged his firearm, "[h]e had no ability to retreat or to make clear that he wanted to terminate the encounter" where "the entire episode, which started the exchange of gunfire, began[] and ended in seconds."

In response, the State contended that the motion was legally insufficient to establish a prima facie claim of self-defense immunity and thus failed to shift the burden to the State to overcome it. See § 776.032(4). The State asserted that the admission about the concealed firearm was by itself fatal to the motion as a matter of law.

Following a nonevidentiary hearing on the sufficiency of Mr. Jimenez's motion, the trial court agreed with the State. The court issued an order finding that the motion was legally insufficient because it failed to establish that Mr. Jimenez was not engaged in criminal activity when he discharged his firearm. The court struck the motion and dispensed with an evidentiary hearing. This petition followed.

An order summarily denying a motion asserting Stand Your Ground immunity from prosecution is reviewable by certiorari. *Jefferson v. State*, 264 So. 3d 1019, 1023 (Fla. 2d DCA 2018). Certiorari relief is appropriate "when the Stand Your Ground proceeding or the trial court's ruling is flawed by legal error thereby precluding proper determination on the movant's immunity claim." *Garcia v. State*, 286 So. 3d 348, 349 (Fla. 2d DCA 2019) (citing *Jefferson*, 264 So. 3d at 1023).

Section 776.032(1) provides immunity from prosecution to criminal defendants who use force as permitted in certain other statutes, including section 776.012. As relevant here, section 776.012(2) provides:

A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

(Emphasis added.)

Thus, "[a] defendant who is engaged in unlawful activity . . . has a duty to retreat and must use all reasonable means in his power, consistent with his own safety, before his use of deadly force will be justified under the Stand Your Ground law." *Garcia*, 286 So. 3d at 351; *see also Wyche v. State*, 170 So. 3d 898, 905 (Fla. 3d DCA 2015) ("If . . . a person is engaged in unlawful conduct . . . that person has the duty to retreat and/or withdraw from physical contact with the assailant and also clearly indicate that he wishes to withdraw and terminate the use of force before he may rely on the defenses contained in Chapter 776.>").

Here, the trial court expressly found that Mr. Jimenez's motion was legally insufficient to establish a prima facie claim of immunity under section 776.012 simply because it admitted he was engaged in unlawful activity. This court has previously rejected that analysis as a departure from the essential requirements of the law. *See Garcia*, 286 So. 3d at 351 (granting certiorari petition where trial court wrongly "concluded that section 776.012(2) only applies if the person using deadly force is

not engaged in a criminal activity and is in a place where he has a right to be").

Even though Mr. Jimenez's motion admitted that he was engaged in unlawful activity, he also alleged that the circumstances precluded any ability to retreat or otherwise terminate the encounter before resorting to deadly force. That additional allegation, which the trial court did not address, entitled Mr. Jimenez to an evidentiary hearing. See *Jefferson*, 264 So. 3d at 1030 ("[C]ourts are duty bound to carry out the legislative intent by mandating that the State bear the evidentiary burden of overcoming, by bringing forth clear and convincing evidence, an accused's facially sufficient, prima facie claim of self-defense immunity from criminal prosecution at a pretrial hearing."). Accordingly, we grant Mr. Jimenez's petition, quash the order denying his "Stand Your Ground" motion, and direct that an evidentiary hearing be held.

Petition granted.

MORRIS, C.J., and LUCAS, J., Concur.

Opinion subject to revision prior to official publication.