

IN THE SUPREME COURT OF FLORIDA

CLARENCE DENNIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC09-941

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS.....ii

STATEMENT OF THE CASE AND FACTS.....1

SUMMARY OF THE ARGUMENT.....2

ARGUMENT.....3

SUPPLEMENTAL ISSUE

IN THE EVENT IT IS DECIDED THE PROPER PROCEDURE FOR
A DETERMINATION OF IMMUNITY UNDER SECTION 776.032,
FLORIDA STATUTES, REQUIRES A FULL EVIDENTIARY
HEARING BEYOND THAT PROVIDED BY FLORIDA RULE OF
CRIMINAL PROCEDURE 3.190(C)(4), WHAT, IF ANY,
REMEDY IS AVAILABLE TO A DEFENDANT THAT PROCEEDED
TO TRIAL WITHOUT TAKING UP A PETITION FOR WRIT OF
CERTIORARI CHALLENGING THE TRIAL COURT'S PRE-TRIAL
DENIAL OF IMMUNITY BASED UPON THE CLAIM NOW
ASSERTED ON APPEAL? (RESTATED).....3

CONCLUSION.....9

CERTIFICATE OF SERVICE.....9

CERTIFICATE OF FONT COMPLIANCE.....10

TABLE OF CITATIONS

PAGE NO.

Gray v. state,
13 So.3d 114 (Fla. 5th DCA 2009)6,7

Horn v. State,
17 So.3d 836 (Fla. 2d DCA 2009)6,7

Kaminski v. State,
72 So. 2d 400 (Fla. 1954)4

Montanez v. State,
24 So.3d 799 (Fla. 2d DCA 2010)7

People v. Guenther,
749 P.2d 971 (Colo. 1987)6

Peterson v. State,
983 So. 2d 27 (Fla. 1st DCA 2008)6

Scott v. Harris,
550 U.S. 372 (2007)7

State v. Yaqubie,
___ So.3d ___, 2010 WL 2382583 (Fla. 3d DCA 2010)6,7

OTHER AUTHORITIES

§776.032 , Florida Statutes (2007).....5,6,8

Fla. R. App. P. 9.210(a)(2).....10

Fla. R. Crim.P. 3.190(C)(4).....3

STATEMENT OF THE CASE AND FACTS

Respondent relies, for purposes of this supplemental briefing, upon the Statement of the Case and Facts as set forth in Respondent's Answer Brief.

SUMMARY OF THE ARGUMENT

Petitioner is barred from seeking relief from this Honorable Court; Petitioner failed to file any form of action seeking review of the trial court's determination under Section 776.032, Florida Statutes (2007), until after a full determination of guilt by a jury, after a presentation of an affirmative defense of self-defense at trial. Any requirement that the factual assertions of self-defense be determined by a trial judge, pre-trial, under a preponderance of the evidence standard is fully succumbed by a determination of those same factual assertions under a beyond a reasonable doubt standard of a jury at trial. Public policy and judicial economy cannot permit such relief. In point of fact, Petitioner has already received the relief he seeks; his claim of self-defense has been determined by a higher standard of proof by the jury than would have been applied by the trial judge in a pre-trial posture. It would be illogical to believe that after a jury has convicted a defendant of a crime, having considered an affirmative defense of self-defense, that a trial court, acting in a pre-trial posture would make a finding to the contrary based upon a presentation by that same defendant of the same facts considered by the jury and find, by a preponderance of the evidence, the defendant is entitled to immunity under 776.032, Florida Statutes. No relief is available to Petitioner in the instant review.

ARGUMENT
SUPPLEMENTAL ISSUE

IN THE EVENT IT IS DECIDED THE PROPER PROCEDURE FOR A DETERMINATION OF IMMUNITY UNDER SECTION 776.032, FLORIDA STATUTES, REQUIRES A FULL EVIDENTIARY HEARING BEYOND THAT PROVIDED BY FLORIDA RULE OF CRIMINAL PROCEDURE 3.190(C)(4), WHAT, IF ANY, REMEDY IS AVAILABLE TO A DEFENDANT THAT PROCEEDED TO TRIAL WITHOUT TAKING UP A PETITION FOR WRIT OF CERTIORARI CHALLENGING THE TRIAL COURT'S PRE-TRIAL DENIAL OF IMMUNITY BASED UPON THE CLAIM NOW ASSERTED ON APPEAL? (RESTATED)

Although initially acknowledging the issue of remedy in the instant case was moot,¹ Petitioner now seeks relief in the form of a reversal of his conviction, remanding the case back to the trial court with directions that a full evidentiary hearing be held pursuant to section 776.032, Florida Statutes. This would require the trial judge, at the conclusion of that hearing, to make a "pre-trial" determination as to whether or not Petitioner is entitled to immunity from trial. Should the trial court determine Petitioner is entitled to immunity the trial judge is then to enter an order finding such entitlement and dismiss the information with

¹The issue on review, as taken upon conflict jurisdiction by this Honorable Court, was limited to consideration of whether a "C-4" procedure or a "full evidentiary" procedure is the proper mechanism for review of a defendant seeking pre-trial immunity under Section 776.032, Florida Statutes. Respondent's prior objection to expansion of the issue before this Court was premised upon recognition of the limitation of the question upon which review was granted.

prejudice. However, should the trial court determine Petitioner is not entitled to pre-trial immunity, then, Petitioner's conviction is to be reinstated. Respondent, aware of the existing case law finding this type of remedy to be appropriate, respectfully disagrees with those holdings, arguing this remedy creates a beyond absurd result and so adversely impacts limited and stretched judicial resources it is against public policy, depriving the people of the State of Florida access to courts to timely present meritorious claims.

Petitioner's reliance upon *Kaminski v. State*, 72 So.2d 400 (Fla. 1954), is misplaced and can easily be distinguished. The Court in *Kaminski* held that error was committed at trial; therefore, the legal proceeding itself was found to have failed to provide the defendant with a fair trial. Such is the not the case now presented for consideration to this Honorable Court. There is no challenge to the trial itself, no challenge to the introduction of evidence or procedural aspects of the trial in any way; rather, Petitioner seeks to undo a legally sufficient trial proceeding for the express purpose of having an issue already fully litigated, and considered to verdict by a jury, reheard by a trial judge applying a preponderance of evidence standard to the identical issue of fact. Petitioner's argument fails because in *Kaminski* the defendant was entitled to a fair trial, without reversal to overcome what the Court deemed an error in a full and fair trial proceeding, it was

necessary to provide the defendant with a fair trial. However, that is not the issue here, Petitioner has had his fair trial and a jury determined, beyond a reasonable doubt, he did not act in self-defense. Simply, this means the jury already considered the exact same question of fact and necessarily established, by their verdict of guilt, that his actions did not entitle him to immunity from prosecution under the reviewable standard of Section 776.032, Florida Statutes, which would be inextricably succumbed within the jury's determination of guilt upon the same facts beyond a reasonable doubt.

The label applied is determinative only of the timing of the claim; not its legal nature; i.e., a defendant's claim he acted in self-defense. Pre-trial a defendant claims his actions were perpetrated in self-defense and he is immune from criminal prosecution, at trial defendant claims his actions were perpetrated in self-defense and he should be found not guilty. The evidence remains the same; the question remains the same, based exclusively upon the actions of a particular defendant. How then can a logical remedy be to reverse an unchallenged verdict of guilt reached upon consideration of a defendant's claim of self-defense, obviously rejected by the jury at trial, and remand the case to the trial judge for the purpose of hearing the same self-defense evidence, requiring a defendant to present, by a preponderance of the evidence, his claim he is entitled, under the same facts already

considered by the jury, to immunity from the trial which has already been conducted?

Although Petitioner's position is supported by several district court opinions below, Respondent respectfully argues this is not the remedy to be afforded to Petitioner under the circumstances presented in the case *sub judice*. Petitioner did not file any type of motion for review with the circuit court upon the ruling on immunity, nor did he seek review by writ in the district court upon that ruling. Rather, Petitioner proceeded to trial, presented his affirmative defense of self-defense to a jury, was found guilty beyond a reasonable doubt and now attempts to circumvent that conviction by seeking a "do over" before the trial court at a lower standard of proof. Not only is Petitioner's request illogical, he is procedurally barred from doing so.

Petitioner failed to file a Petition for Writ of Certiorari to raise for review his claim that the trial court should have held a full evidentiary hearing to make a determination of pre-trial immunity under Section 776.032, Florida Statutes. However, post-trial, after conviction by a jury, Petitioner now seeks to have his conviction reversed for a determination by a lower standard of proof whether or not he was entitled to pre-trial immunity.² Logic

²A preponderance of the evidence standard has been approved by district courts dealing with this issue; however, the statute provides no guidance on this point. *Peterson v. State*, 983 So.2d 27 (Fla. 1st DCA 2008), relying on *People v. Guenther*, 749 P.2d 971

fails. Because Petitioner went on to trial, raising as an affirmative defense his claim of self-defense, the very issue Petitioner seeks to have determined at a lower standard of review; preponderance of the evidence, has already been decided by a jury at the highest standard of beyond a reasonable doubt. As such this issue has been determined and should not be revisited.

In order to timely seek the remedy now requested by Petitioner, he should have filed a Petition for Writ of Certiorari with the district court alleging, as have others,³ that the trial court erred in not conducting a full evidentiary hearing. See also *Scott v. Harris*, 550 U.S. 372 (2007)(Order denying qualifying immunity is immediately appealable even if it is interlocutory). However, Petitioner did not do this; rather, he went on to trial, all evidence was presented and submitted to the jury; applying a beyond a reasonable doubt standard, the jury returned a verdict of guilty. Petitioner is procedurally barred from claiming relief.

It is important to remember the only difference between a defendant's argument raised, and proof presented, under a pre-trial claim of immunity and raising an affirmative defense of self-defense at trial is the timing of same. In other words, even if

(Colo. 1987); *Gray v. state*, 13 So.3d 114 (Fla. 5th DCA 2009); *Horn v. State*, 17 So.3d 836 (Fla. 2d DCA 2009); *State v. Yaqubie*, ___ So.3d ___, 2010 WL 2382583 (Fla. 3d DCA 2010).

³*Montanez v. State*, 24 So.3d 799 (Fla. 2d DCA 2010); *Horn, supra*; *Yaqubie, supra*; *Gray, supra*.

Petitioner was deemed to have been entitled to a pre-trial ruling after a full evidentiary hearing in which the trial judge would apply - to the Petitioner's burden - a preponderance of the evidence standard, upon denial the identical claim would be presented to the trier of fact, the jury, couched as an affirmative defense of self-defense and the State would be required to overcome that defense beyond a reasonable doubt to obtain a conviction.

To allow Petitioner to come behind the jury's verdict on the very same issue; couched as a claim of self-defense, would open the courts below up to the classic ambush scenario. Any defendant who moved for pre-trial immunity under Section 776.032 and claimed the trial court made an improper ruling; i.e., did not conduct a proper evidentiary hearing or did not apply the correct standard of review, would simply wait until the end of trial and, if convicted, have a built in appellate issue, wholly unrelated to the conduct of the trial itself, challenging the pre-trial ruling. This scenario is against the most basic public policy of judicial economy and finality of verdicts.

CONCLUSION

Respondent respectfully requests that this Honorable Court uphold the ruling of the Fourth District Court of Appeal and affirm Petitioner's conviction.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Barbara J. Wolfe, Assistant Public Defender, Office of the Public Defender, The Criminal Justice Building, 421 3rd Street, 6th Floor, West Palm Beach, Florida 33401, this 6th day of July 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR RESPONDENT