

IN THE SUPREME COURT OF FLORIDA

CLARENCE DENNIS,)
)
 Appellant,)
)
 vs.)
)
STATE OF FLORIDA,)
)
 Appellee.)
_____)

CASE NO. SC09-941
L.T. CASE NO. 4D07-3945
2006-CF-625A

PETITIONER’S SUPPLEMENTAL INITIAL BRIEF

On Review from the District Court of Appeal
Fourth District, State of Florida

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TABLE OF CONTENTS

CONTENTS	PAGE
TABLE OF CONTENTS.....	i
AUTHORITIES CITED.....	ii
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE AND FACTS.....	2
SUMMARY OF THE ARGUMENT.....	3

ARGUMENT

EVEN THOUGH PETITIONER WAS CONVICTED OF FELONY BATTERY AFTER A JURY TRIAL, HE IS STILL ENTITLED TO AN EVIDENTIARY HEARING BEFORE A JUDGE ON HIS CLAIM THAT HE WAS ENTITLED TO IMMUNITY, AND TO DISMISSAL OF THE CHARGE.....	4
CERTIFICATE OF SERVICE	8
CERTIFICATE OF COMPLIANCE	8

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE(S)</u>
<i>Fitzpatrick v. State</i> , 900 So. 2d 495 (Fla. 2005)	6
<i>Kaminski et al. v. State</i> , 72 So. 2d 400 (Fla. 1954)	6
<i>McDaniel v. State</i> , 24 So. 3d 654 (Fla. 2d DCA 2009).....	5, 7
<i>Mitchell v. Forsyth</i> , 472 U.D. 511 (1985)	5
<i>Peterson v. State</i> , 983 So. 2d 27 (Fla. 1st DCA 2008)	4
<i>Scott v. Harris</i> , 550 U.S. 372 (2007)	5

FLORIDA STATUTES

Section 776.032	4
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FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.190(b).....	5
Rule 3.190(c)(4)	5

PRELIMINARY STATEMENT

Petitioner is the defendant and Respondent is the prosecution. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this honorable Court, except that Respondent may also be referred to as the State.

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts as set forth in
Petitioner's Initial Brief.

SUMMARY OF THE ARGUMENT

In *McDaniel v. State*, 24 So. 3d 654 (Fla. 2d DCA 2009), a case with the same procedural posture as this case, the court reversed the conviction and remanded the case with instructions to the trial court to conduct an evidentiary hearing on the issue of McDaniel's entitlement to immunity, applying the appropriate standard, as set forth in *Peterson*. If the trial court concluded that McDaniel was entitled to immunity, the information would be dismissed with prejudice. If the court concluded that McDaniel was not entitled to immunity, his conviction would be reinstated.

This remedy is in accordance with this Court's decision in *Kaminski et al. v. State*, 72 So. 2d 400 (Fla. 1954), that the effect of a reversal is to restore the accused to the point where that error was committed.

Petitioner urges this Court to approve the remedy set forth in *McDaniel*; to reverse Petitioner's conviction and remand this case with directions to the trial court to conduct an evidentiary hearing on Petitioner's entitlement to immunity. If Petitioner proves by a preponderance of the evidence that he is entitled to immunity, the information should be dismissed with prejudice. If Petitioner does not prove his entitlement to immunity, his conviction should be reinstated.

ARGUMENT

EVEN THOUGH PETITIONER WAS CONVICTED OF FELONY BATTERY AFTER A JURY TRIAL, HE IS STILL ENTITLED TO AN EVIDENTIARY HEARING BEFORE A JUDGE ON HIS CLAIM THAT HE WAS ENTITLED TO IMMUNITY, AND TO DISMISSAL OF THE CHARGE.

A. Background

As outlined in Petitioner’s Initial Brief, Petitioner moved to dismiss the charge filed against him on the ground that he was entitled to immunity from prosecution under section 776.032, Fla. Stat. The State filed a traverse and demurrer, and the trial court denied the motion without an evidentiary hearing, finding that the disputed facts were a question for the jury. Petitioner was tried and convicted of the lesser offense of felony battery, and was sentenced to five years in the Department of Corrections. Petitioner’s conviction was affirmed, but the Fourth District Court of Appeal certified conflict with *Peterson v. State*, 983 So. 2d 27 (Fla. 1st DCA 2008), on the issue of the proper procedure for resolving claims of immunity under section 776.032, Fla. Stat.

B. Argument

Admittedly, the summary denial of Petitioner’s motion for immunity rendered the issue of immunity moot for Petitioner when he was forced to stand trial. This is because immunity is “an entitlement not to stand trial or face the burdens of litigation”, and is “effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v.*

Forsyth, 472 U.D. 511, 526 (1985). See also *Scott v. Harris*, 550 U.S. 372 (2007).

But if this Court determines that the trial court erred by denying Petitioner an evidentiary hearing on the issue of his entitlement to immunity, Petitioner is still entitled to a hearing, notwithstanding that he has been tried and convicted.

In *McDaniel v. State*, 24 So. 3d 654 (Fla. 2d DCA 2009), the Second District was presented with a case with the same procedural posture as the instant case. There McDaniel filed a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(b), claiming that he was immune from prosecution pursuant to section 776.032, Fla. Stat. The State filed a traverse alleging disputed facts, to which McDaniel responded that his motion to dismiss was not based on Rule 3.190(c)(4), but rather on immunity from prosecution pursuant to 776.032. The trial court denied McDaniel's motion and gave no reason for its decision. McDaniel subsequently went to trial and was convicted.

The Second District reversed, finding that it was unclear from the record whether the trial court applied the preponderance of evidence standard, or whether the court denied the motion because of the existence of factual disputes:

[W]e reverse McDaniel's conviction and remand for a new hearing on McDaniel's motion to dismiss at which the trial court shall apply the appropriate standard. If the trial court concludes after a new hearing that McDaniel is entitled to immunity under section 776.032, it shall enter an order to that effect and dismiss the information with prejudice. If the trial court concludes that McDaniel is not entitled to

immunity, the trial court shall enter an order to that effect and reinstate McDaniel's conviction.

The remedy set forth in McDaniel is in accordance with this Court's decision in *Kaminski et al. v. State*, 72 So. 2d 400 (Fla. 1954), that a reversal, in effect, restores the accused to the point where the error was committed. Following the logic of *Kaminski*, should this Court determine that the trial court erred by denying Petitioner an evidentiary hearing, and that this error requires reversal, the point of error to which Petitioner should be restored is the pre-trial determination of his entitlement to immunity. At no other stage in the proceedings did the trial court rule on the same issue as that presented in the pre-trial determination of immunity. For example, in ruling on Petitioner's motion for judgment of acquittal, the trial court had to determine whether there was competent, substantial evidence to support a conviction. *Fitzpatrick v. State*, 900 So. 2d 495, 507 (Fla. 2005). But that issue is unlike a pre-trial determination of immunity, where, as the trier of fact, the trial court determines not only the sufficiency of the evidence, but the credibility of witnesses, as well. Having denied Petitioner the opportunity to prove his entitlement to immunity, there was no possible way to rectify the trial court's error during the course of the trial. It would follow, therefore, that the correct remedy in this case, the remedy that would restore Petitioner to the point of error, is the remedy applied in *McDaniel*: to reverse Petitioner's conviction and remand this case with directions to the trial court to conduct

an evidentiary hearing on Petitioner's entitlement to immunity. If Petitioner proves by a preponderance of the evidence that he is entitled to immunity, the information should be dismissed with prejudice. If Petitioner does not prove his entitlement to immunity, his conviction should be reinstated.

D. Conclusion

Petitioner urges this Court to approve the remedy set forth in *McDaniel v. State*, 24 So. 3d 654 (Fla. 2d DCA 2009). Petitioner's conviction should be reversed and his case should be remanded for an evidentiary hearing to determine whether Petitioner can prove, by a preponderance of the evidence, that he is entitled to immunity. If Petitioner can meet this burden, the information should be dismissed with prejudice. If Petitioner cannot prove his entitlement to immunity, his conviction should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Supplemental Initial Brief has been furnished to Diana Kay Bock, Assistant Attorney General, Office of the Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013, by First-Class U.S. Mail, this 26th day of May, 2010.

BARBARA J. WOLFE
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared in compliance with the font standards required by Fla. R. App. P. 9.210(a)(2). The font is Time New Roman, 14 point.

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