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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC13-2312

Lower Tribunal: 5D12-3840
2011-CF-004788

JARED BRETHERICK,
Appellant

v.

STATE OF FLORIDA,
Appellee
_____/

Appeal from the Fifth District Court of Appeal for the State of Florida

APPELLANT'S REPLY BRIEF

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REPLY

The fact that the lower appellate courts have uniformly upheld the procedure in *Dennis* is unremarkable and meaningless to this Court's analysis in the instant case. The lower courts were obligated to follow the procedure to set forth in *Dennis*. The fact they have done so should carry no weight. The issue of the placement of the burden of proof was never directly addressed as a disputed issue in those cases. The first time this issue was addressed by an appellate court, in this case below, the appellate court questioned whether the proper procedure had been created. *Bretherick v. State*, 135 So.3d 337 (Fla. 5th DCA 2013).

The fact that the *Dennis* procedure was adopted in civil cases is likewise unremarkable. No other standard has ever been argued for, resulting for the first time, in the application of the Rules of Criminal Procedure in a civil case, but that issue is not before this Court.

I. *Stare Decisis*

Based on its argument here, one can only presume that the State would also oppose any reconsideration of *Scott v. Sandford*, 60 U.S. 393 (1856)(Dred Scott decision, supporting slavery); *Plessy v. Ferguson*, 163 U.S. 537 (1896)(upholding separate but equal policies); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding detentions of U.S. citizens based on ancestry); *Naim v. Naim*, 87 S. E.

2d 749(Va. 1956)(upholding ban on interracial marriage to preserve "racial integrity" and prevent "corruption of blood" and "mongrel breeds of citizens").

While *stare decisis* is certainly a laudable and important part of our jurisprudence, it is not the *sine qua non* of our justice system. *Payne v. Tennessee,* 501 U.S. 808, 828 (1991)("Stare decisis is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." . . . the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions."). "The doctrine of *stare decisis* . . . merely prohibits a court from lightly ignoring clearly established, precedential decisions." *Folan v. McDonough*, 223 Fed. Appx. 881, 883 (11th Cir. 2007). "Perpetrating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court." *State v. Gray*, 654 So. 2d 552, 554 (Fla.1995)(internal citations and quotes omitted).

Issues decided without the benefit of arguments not made should be reconsidered. "*Stare decisis* bends . . . where there has been an error in legal analysis." *State v. J.P.*,2004 Fla. LEXIS 2101, 15(Fla. 2004)(internal cite omitted) citing *Gray*, 654 So. 2d at 554 (Fla. 1995). The First DCA reiterated these principles, citing Chief Justice Roberts of the U.S. Supreme Court and stating that "an appellate court must be willing to consider the correctness of its prior work

and, above all, willing to admit that it has made a mistake." *Westphal v. City of St. Petersburg*, 122 So. 3d 440, 447(Fla. 1st DCA 2013).

This Court has recognized previously that *stare decisis* is not applicable when the parties in previous cases did not raise the same issues of law. *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126, 137 (Fla. 2000). As noted in the initial brief, and uncontested in the State's Answer, the issue of how to conduct the hearing on immunity and the burden of proof was not directly briefed in *Peterson*, and was taken for granted by the Appellant in *Dennis* who was merely seeking the right to have an evidentiary hearing that he had been denied below.

Should the Court determine that *stare decisis* is applicable, the State has set forth the proper formula for analyzing whether the Court should recede from its prior ruling but has failed to properly consider or analyze the facts in relation to those factors. (State Answer Brief at 12).

The first question is whether the prior decision has proven unworkable in practice. From the State's perspective it has of course proven workable, but the proper question is, has the *Dennis* procedure proven workable in effectuating the plain language and intent of the law.

The intent of the law as stated by the Legislature was to relieve the threat of prosecution in cases of lawful self-defense. Instead, the courts of this state are

conducting multi-day hearings, at the costs of tens of thousands of dollars in attorneys fees for the defendant, for a defendant to prove to a judge that he acted lawfully by a preponderance of the evidence. If instead, the state were required, after a prima facie showing of lawful self-defense, (the same standard necessary to present the issue to a jury) to prove its case by some heightened standard, the court hearing the case would at least know whether the State even had enough to get the case before a jury. If a defense was still required, only then would the defendant be forced to put on a case.

Determining a person's guilt should never be based on what is more expedient or easier for the prosecution but only upon what is constitutional, just, and legislatively mandated. Shifting the burden to the prosecution will test the validity of the State's case early on. This is especially important for low- and middle- income defendants who cannot afford the thousands upon thousands of dollars in trial fees and costs to defend their innocence, as well as the costs to the Public Defenders Offices statewide. Placing the burden on the State to genuinely test the validity of their case from the outset will cause the State to be more selective and careful in the type of charges that they bring against an individual, if at all, in keeping with the Legislative intent of the Stand Your Ground law.

The second question is whether a reversal would cause an injustice or disruption in the stability of the law. The simple answer is, No. In those cases already decided by jury, the defendant has been proven guilty beyond a reasonable doubt and no amount of change in procedure can unwind that finding. At most it might cause a new hearing on immunity to occur in some number of cases, if a defendant is awaiting trial and requests a hearing under the new standard.

Third, is whether the factual premises on which the original decision was based have changed so drastically as to leave the prior holding without justification. Mr. Bretherick would submit that while the underlying factual premises have not changed, the *Dennis* decision did not consider the proper underlying principles, because the issue was not briefed or presented to the Court as it is in this case.

II. Proper Procedure

In its defense of the current procedure, the State appeals to the precedent of Colorado, which has a very dissimilar immunity law. The most important difference is the word "charged". Under Florida's law a person is not even to be charged if they are immune, (Sec. 776.302, Fla. Stat.) yet the procedure established by this Court immediately subjects the citizen to the rigors of proving

their entitlement to the protection from being charged, after the right established by the plain language of the statute has already been violated.

The State argues that, based on other immunities that have no analogy to Stand Your Ground, it is only logical that the party that filed the petition, the party seeking affirmative relief, bear the burden of proving their entitlement to said relief. (State's Answer Brief at 21). The same could be said of the State's decision to charge a person claiming the protections of Stand Your Ground. Given the plain language of the statute, it is the State that is seeking affirmative relief from the statute, in the form of being able to charge a person who has claimed the legislatively granted immunity.

The State seeks to rely on legislative inaction, and even claims that the Legislature has explicitly rejected the Appellant's argument, because a bill that would have shifted the burden died in legislative committee. (State's Answer Brief at 15). It has long been held that only legislative action, not inaction, can show legislative intent. *State Dep't of Public Welfare v. Melser*, 69 So. 2d 347, 356 (Fla. 1954)(Matthews, J., dissenting) citing *United States v. Allen*, 179 F. 13 (8th Cir. 1910).[1]

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[1]With all of the known legislative tricks it is impossible to determine the intention of the Legislature by the killing of a bill in committee, by having it placed on the Calendar where it may die for insufficient time to reach it, or where it may meet its

Most bills in a given session fail. The failed bill the State seeks to rely on addressed numerous other issues as well. The State seeks to argue that the issue here was the sole reason the bill failed rather than a lack of support for other issues in the bill, but fails to offer any support for its position, in the form of legislative analysis or debate. Absent some authoritative legislative history there is no way the State can reasonably argue that the bill was explicitly rejected based on the language related to the issue here, rather than other language in the bill which failed to gain a majority of committee members.

As examples, the bill also dealt with guidelines for neighborhood watch programs, attempted to add additional language that would have required additional provocation by an assailant to justify the use of deadly force, and impose a duty to retreat in cases of mutual combat even where one individual used non-proportional force. Fla. CS for CS for SB 130, Sec. 3 (2014).

If anything, the bill cited by the State, shows that at least one legislator has concerns with how the courts have applied Stand Your Ground, but of course this is not a basis for a ruling either way. See *Zuber v. Allen,* 396 US 168 (1969). (holding that Legislative intent cannot be divined from the statement of an

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death without being voted upon by each branch of the Legislature. *State Dep't of Public Welfare* at 356. (Matthews, J., dissenting).

individual legislator. "[F]loor debates reflect at best the understanding of individual Congressmen."). The bill that did pass was solely related to the threatened use of force, and in no way implicated the immunity statute at issue here. Ch. 2014-195, Sec. 6, Laws of Fla.

Only Sec. 1983 immunity comes close to being analogous to Stand Your Ground. The State attempts to relate Stand Your Ground immunity to other immunities. None of the other immunities the State cites, protect a citizen's right to take an action, and none are related to protection for a person's use of force in defense of themselves.

III. Application of Immunity in this Case

The State argues that the Court need not address whether the findings of fact below are supported by competent substantial evidence, or the application of the law to those facts because this argument is outside the scope of the certified question. Unsurprisingly, the State cites no authority for this proposition because it is directly contradicted by well established precedent. *Feller v. State*, 637 So. 2d 911 (Fla. 1994); *State v. Gray*, 654 So. 2d 552 (Fla. 1995)(finding that "[b]ecause we have jurisdiction based on the certified question, we also have jurisdiction over this issue", and receding from prior precedent).

A. Dunning falsely imprisoned Ronald.

The evidence shows that Ronald remained confined in his vehicle even after his wife and daughter fled to seek safety elsewhere. The evidence also shows that Ronald could not leave the cab of his vehicle and gave his gun to Jared for fear that they were in imminent danger of physical harm or death by Dunning. The focus of the false imprisonment issue has been only on Deborah and Anna's physical ability to escape Dunning. The State and the lower courts have continued to ignore the fact that a disabled Vietnam veteran and father was falsely imprisoned by a violent convicted felon, based on association and not an independent analysis of his situation. This is important because there is no established finding of fact by either court below, and no contrary evidence to dispute that Ronald was imprisoned by Dunning's actions.

The State argues that the failure to even address this argument is a basis to ignore the favorable facts that support Jared's actions to protect himself and his family. Logically, if the only recourse that Deborah and Anna had to seek safety was to leave their vehicle, then Ronald was falsely imprisoned because he could not escape or move his vehicle.

In a recent case before the Fifth DCA, the same State Attorney's Office that is prosecuting this case made an argument that supports Jared's use of non-deadly force. The State argued that it was lawful for a husband to use non-deadly force in

defense of his wife's cat (not of his wife, not of his cat, but of his wife's cat), in a second degree attempted murder case. *Mann v. Florida*, 135 So. 3d 450 (Fla. 5th DCA 2014).

The victim, Wills, "immediately responded with physical confrontation" to rescue his wife's cat after seeing the defendant hammer fist the cat and pin it to the ground. In fact, Wills's injuries came after he jumped the defendant and not before. The State correctly argued, however, that Wills's "use of non-deadly force" was justified even though he had not been the target of a physical or a verbal threat by the defendant.[2]

The State, however, does not seem to believe that Jared had the same right to protect his family from what the Brethericks perceived as a real and imminent threat. Jared witnessed all of Dunning's threatening actions before he ever left the back seat of his family's vehicle or had possession of his father's gun. If a man can use non-deadly force to protect the life of an animal that belongs to someone else, certainly Jared should be afforded the same right to protect the life of his family.

B. Dunning possessed several weapons against the Bretherick's

[2]The Court found fault with the modified jury instruction, not the argument that Wills was justified in his use of force.

Dunning's first weapon was his 3,000 pound truck, which he used to falsely imprison Ronald and threaten the Brethericks. Dunning's second weapon was his fists, which Ronald believed that he intended to use against his family when he first blocked them in traffic and then got out of his vehicle. Dunning's other weapons included the psychological effects of fear and surprise, which he used to keep the Brethericks' fearful of his next move.

Ronald's fear was also compounded by his physical disability, which made it impossible for him to physically defend his family against Dunning, a man nearly half his age and physically menacing. It was apparent to Ronald that it was only his gun that successfully deterred Dunning from committing a battery upon the Bretherick family, which included a minor child.

C. Dunning never retreated.

The trial court found that "[a]t some point, Dunning's backup lights came on and his truck rolled back approximately one to 1.5 feet toward the Bretherick's vehicle." Dunning returned to his truck, not in retreat, but to use it as a weapon to narrow the gap between him and the Brethericks. There are no facts contradicting the Brethericks that Dunning backed up his truck after he saw Ronald's gun while Jared, Deborah and Anna were still in the Bretherick vehicle.

To negate Dunning's actions, however, both the State and the trial court have erroneously viewed Dunning's return to his truck as a "retreat:" but, the word retreat mis-characterizes and contradicts Dunning's behavior. A common understanding of the word "retreat" means to remove or withdraw oneself from the conflict or situation, not come closer. After seeing Ronald's gun, Dunning returned to his truck and, instead of leaving as he was free to do, he backed up his truck toward the Brethericks, narrowing the gap between himself and the family.

In fact, the Second DCA found that under certain circumstances, the "act of backing" a car in another person's direction constitutes "a threat of violence," for purposes of an aggravated assault. *Pinkney v. Florida*, 74 So. 3d 572, 577 (Fla. 2nd DCA 2011); Sec. 784.011(1), Fla. Stat. According to the *Pinkney* case it would not have mattered what Dunning's intent was, but whether Dunning's action created or escalated the Brethericks' fear once they saw Dunning's back up lights come on and his truck move closer to them. *Pinkney* at 576.

Florida courts have found that vehicles "used to aid in the commission of the felony of aggravated assault" are considered an "instrument of the threatened harm." *City of Orlando v. Lorenzo*, 489 So.2d 172, 174 (Fla. 5th DCA 1986) and *Marks v. State*, 416 So. 2d 872 (Fla. 5th DCA 1982). To Jared and his family, Dunning's truck was a weapon which Dunning had control over and could use to

ram them or store other weapons or firearms. Nothing stopped Dunning from driving away at any point. Dunning driving off would have been a retreat, but returning to his truck and backing up it toward the very people he had just threatened was not.

The trial court noted Jared's fear of Dunning, including the psychological effects of fear and surprise, but ignored the reality of the situation:

> [Jared] tried to justify his fear by relying on the theory of the fear of the unknown. He testified that he did not know if there were other occupants in Mr. Dunning's vehicle, whether [Dunning] possessed a gun, or whether [Dunning] was planning a surprise attack.

Based on Dunning's first "surprise" attack and in fear of what Dunning was planning on doing next, Jared's fear was objectively reasonable. This is a legal conclusion subject to a de novo review. *Infra.*

The trial court also overlooks another critical fact in relation to Jared's fear: Jared had just witnessed his father hold up a gun in self-defense to deter what he perceived as an immediate and deadly threat against his family. Ronald's actions did not occur in a vacuum, but were witnessed by Jared during a continuous string of unexpected and threatening actions by Dunning occurring without interruption, just as in the *Mobley* case. *See, Mobley v. State*, 132 So. 3d 1160 (Fla. 3d DCA 2014) review denied by, *State v. Mobley*, 2014 Fla. LEXIS 2142 (Fla. 2014).

Moreover, Jared's excited utterance[3] on the Bretherick 911 call demonstrates his belief that Dunning had "a gun too," which is one of the most reliable exceptions to hearsay, which the trial court found self-serving and unreliable. It also places Jared at the Bretherick vehicle and not at Dunning's window supporting the Bretherick's version of events and further showing that the findings of fact below are not supported by competent substantial evidence.

Even the State argues in its Brief that it is the totality of the facts that need to be considered. Totality of facts means ***all*** of the facts. In essence, both the State and the trial court believe that Jared should have forgotten all that he had just seen, heard and felt -- events that were interconnected and in quick succession. This is contrary to the law of assault and battery as well as the *Mobley* case. *Mobley v. State*, 132 So. 3d 1160 (Fla. 3d DCA 2014).

D. De Novo Review

While the findings of fact by the Court below should be given great deference, except where they are not supported by the evidence. The determination of whether Jared's actions were reasonable under the circumstances is subject to a de novo review by this Court. *Id.* at 1162.

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[3] By definition a statement made without the opportunity for reflection. See *Lopez v. State*, 888 So. 2d 693 (Fla. 1st DCA 2004).

CONCLUSION

The State's appeal to *stare decisis*, its claim this Court lacks jurisdiction to consider the facts and law of the decisions below, and its continued prosecution of Jared Bretherick do not change the most important fact of this case. Jared Bretherick, a young man with no criminal history, and his family, were attacked by a convicted felon, with a history of violence, and forced to defend themselves. This is the very type of arrest, charge and prosecution the Legislature sought to prevent with the Stand Your Ground law.

The State already bore a high burden to put a person in jail, the Legislature sought to create a higher burden in self-defense cases before arrest, as well as an earlier determination of the validity of the prosecution. Nothing in the Stand Your Ground law authorized this Court to shift the burden at any point in these cases.

Jared Bretherick offered more than sufficient evidence, even under this Court's prior precedent, that he and his family were in fear. Any reasonable person in such a position would have been in fear. That situation was created solely by Derek Dunning. Jared's measured response, and defensive display of his firearm, protected his family while sparing any bloodshed: an ideal result validated by the Legislature with the enactment of Ch. 2014-195, Sec. 6, Laws of Fla., during the debate of which the facts of this case were repeatedly raised.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by e -service and US Mail this 19th day of September 2014 to the following.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the formatting requirements of Rule 9.210, Fla R. App. P. The font is Times New Roman 14 point type.

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