IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

PETER PERAZA,
Respondent.

Case No. SC17-1978

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellant, and Respondent was the Appellee in the Fourth District Court of Appeal ("Fourth District").

The parties will be referenced as they appear before this Court. The Petitioner may also be referenced as the "State", and the Respondent may also be referenced as "Peraza".

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of Case and Facts contained in Petitioner's initial brief on the merits.

SUMMARY OF THE ARGUMENT

Petitioner again submits that the Fourth District Court of Appeal improperly affirmed the trial court order granting immunity to the Respondent, a police officer, pursuant to section 776.012 and section 776.032. As a matter of law, the Respondent was not permitted to claim immunity pursuant to section 776.012 and section 776.032. Rather, because the Respondent, acting in his official capacity, was engaged in efforts to make a lawful arrest, he was required to proceed pursuant to section 776.05, which allows him to assert a pre-trial claim of immunity. However, based upon the facts of this case, even under section 776.05(1), the Respondent is not entitled to pre-trial immunity. Rather, because the trial court found that the material facts surrounding the shooting are in dispute, this cause must be remanded for trial. At trial, the Respondent may raise section 776.05(1) as an affirmative defense.

ARGUMENT

THE TRIAL COURT IMPROPERLY GRANTED IMMUNITY AS A MATTER OF LAW.

A. Reply to Answer Brief.

First the Respondent argues that he is entitled to absolute immunity pursuant to section 776.032, irrespective of the fact that section 776.05 explicitly applies to law enforcement, because "[t]here exists a presumption that laws are passed with knowledge of all prior laws already on the books, as well as a presumption that the legislature neither intended to keep contradictory enactments in force nor to repeal a prior law without an express intention to do so". Floyd v. Bentley, 496 So.2d 862, 863 (Fla. 2d DCA 1986). However, in Floyd, the Second District Court of Appeal reasoned, with this presumption in mind, that the specific statute is considered to be **an exception** to the general terms of the more comprehensive statute, and thus the specific statute is the controlling law. Floyd, 496 So.2d at 864 (Fla. 2d DCA 1986), review denied, 504 So.2d 767 (Fla.1987); see also Adams v. Culver, 111 So.2d 665, 667 (Fla.1959); State v. Billie, 497 So.2d 889, 894 (Fla. 2d DCA 1986), review denied, 506 So.2d 1040 (Fla.1987); Stoletz v. State, 875 So.2d 572, 575 (Fla.2004); Rochester v. State, 95 So. 3d 407, 409 (Fla. 4th DCA 2012).

Thus, as found by the Court in State v. Caamano, 105 So.3d 18 (Fla. 2d DCA 2012), where the actions of a law enforcement officer using force in the line of duty

are concerned, the **specific** language of section 776.05 must apply. The Respondent has not provided any legal reason, nor has he cited any legal authority that would allow a police officer to pick and choose under which statute to proceed.

Secondly, the Respondent argues that officers, as a job requirement, take an oath to place themselves in mortal danger, and if they retreat from danger or deadly force it would be considered a dereliction of duty. The Respondent contends that because the legislature, in enacting section 776.032 in 2005, eliminated the duty of the average citizen to retreat, the police and average citizens now face the same dangers, thus they should be entitled to the same immunity. This contention is simply wrong.

The illogical nature of this argument lies in the fact that the two concepts are completely different. Under the "Stand your Ground Law", the duty to retreat was abrogated, and the average citizen was given a choice to retreat or to stand their ground in self-defense. Whereas an on-duty officer has never had such a choice, rather the officer is required to protect themselves and others. Thus, it is unreasonable to contend, when the actions of an on-duty officer are called into question, he becomes the same as the average citizen.

The Respondent offers no legal support for such an assumption. Instead, he justifies this illogical assumption by leaping to the conclusion that officers are

somehow being deprived the right to self-defense immunity afforded the average citizen. This is simply wrong as section 776.05 provides pre-trial immunity to an officer.

In order to support his claim that on-duty officers and average citizens must be treated the same and are entitled to claim immunity pursuant to section 776.032, the Respondent must argue that section 776.05 is not an immunity rather it is an affirmative defense. However, the Respondent ignores the fact that caselaw dictates, that section 776.05(1) is an immunity, which should be raised pretrial, which if established would provide an avenue for the Respondent to **avoid prosecution**. See Generally Brescher v. Pirez, 696 So. 2d 370 (Fla. 4th DCA 1997); Hunter v. Bryant, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) ("[Qualified] [i]mmunity ordinarily should be decided by the court long before trial."). If immunity is denied, then the Respondent can again raise section 776.05 at trial as an affirmative defense. Lozano v. State, 584 So. 2d 19, 24 (Fla. 3d DCA 1991).

The fact that officers have a duty to protect the average citizen is exactly why on-duty officers must be viewed differently than the average citizen. The Courts and the legislature have long recognized this difference, as an on-duty officer has never been required to retreat in the face of danger, and has long been permitted to raise a claim of immunity pre-trial. F.S. section 776.05(1974); Brownlee v. State,

116 So. 618, 622 (Fla. 1928); Sanford v. State, 106 So. 406, 407 (Fla. 1925). Whereas the average citizen was required to retreat until the enactment of section 776.032 in 2005.

Therefore, it is clear that section 776.05(1) and section 776.032, concern **different actors** and the statutes were enacted based upon **different policy rationales**. The enactment of section 776.05 codified the common law rule that an officer has never had a duty to retreat. However, the enactment of section 776.032 granted the average citizen the right to stand his or her ground. It thus makes no sense to apply the more recently enacted section 776.032 to officers who have always had the right to stand their ground under section 776.05. Thus, permitting an officer, to elect the immunity provided for in section 776.032 over the immunity codified by section 776.05(1) bypasses the statute specifically designed for on-duty officers, and renders section 776.05(1) meaningless.

Furthermore, the immunity contemplated by section 776.05 is akin to the qualified immunity[1] and/or sovereign immunity from suit provided to a law enforcement officer, sued for a civil rights violation. In such cases, the proper

[1] This simply means that a condition precedent to claiming immunity is that the person, must qualify to raise it. In this circumstance, because the Respondent was an on-duty officer, he is qualified to raise the immunity contemplated by section 776.05.

procedure is for an officer to file a summary judgment motion under state or federal rules of procedure, and such a motion must be denied if there are material factual disputes. Murray v. Rosati, 929 So.2d 1090, 1092 (Fla. 4th DCA 2006) (although state officers may enjoy an immunity defense, they cannot prevail pretrial if the defense is based on disputed material facts). Florida Courts have found that Fla. Rule Crim. P. 3.190(c)(4) is analogous to a motion for summary judgment. See State v. Paredes, 191 So. 3d 936, 940 (Fla. 4th DCA 2016); Dorelus v. State, 747 So. 2d 368, 373(Fla. 1999).

However, a pretrial evidentiary hearing is not required here because the trial court has already determined that the material facts are in dispute, therefore the case must be submitted to a jury (R. 564-566). Thus, this Court should follow the sound reasoning of Caamano, and reverse the trial court order because where the actions of a law enforcement officer using force in the line of duty are concerned, the specific language of section 776.05 should apply, not the general language of section 776.032.

Furthermore, with respect to the certified question, this Court must require an on-duty officer, who is engaged in efforts to make a lawful arrest, to proceed pursuant to section 776.05. Finally, the facts surrounding the shooting are in dispute, therefore the question of whether qualified immunity pursuant to section 776.05

applies, is for the jury not the judge and the order granting immunity must be reversed and this case remanded for a jury trial.

B. Reply to Amicus.

I. Amicus first asserts that the "Stand Your Ground" statute does not distinguish between police officers and "person", and therefore, law enforcement officers must be considered persons. Amicus also argues, as did the respondent that that section 776.05 does not provide for a qualified immunity, rather it is simply an affirmative defense that may be raised at trial. Undersigned relies upon the previous arguments presented here and in the initial brief.

Furthermore, undersigned recognizes that in construing a statute, a court's purpose "is to give effect to legislative intent, which is the polestar that guides the court in statutory construction." Larimore v. State, 2 So.3d 101, 106 (Fla.2008). In order to determine legislative intent, one must first look to the actual wording of the statute and give it its appropriate meaning. See id. Then, the doctrine of in pari materia applies. Id. This doctrine "is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent." Fla. Dep't of State, Div. of Elections v. Martin, 916 So.2d 763, 768 (Fla.2005).

Consequently, "related statutory provisions must be read together to achieve

a consistent whole," and "'[w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.'" Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So.2d 891, 898 (Fla.2002) (alteration in original) (quoting Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 455 (Fla.1992)). When construing multiple statutes addressing **similar subjects, the specific statute controls over the general**. In Mendenhall v. State, 48 So.3d 740, 748 (Fla.2010), the Florida Supreme Court identified that;

> It is a well settled rule of statutory construction ... that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. In this situation the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any.

(Quoting McDonald v. State, 957 So.2d 605, 610 (Fla.2007)) (internal quotation marks omitted). To hold otherwise would render the specific language meaningless. See Mendenhall, 48 So.3d at 749.

Here, because sections 776.05 and 776.032 address the use of justifiable force in the context of a criminal prosecution, the doctrine of in pari materia requires that they be read together and harmonized. It is evident, as previously argued, that if Peraza is entitled to any immunity, such protection must flow from section

776.05(1). The specific language of section 776.05, which specifically addresses the actions of on-duty law enforcement, must apply to Peraza, rather than the general language of section 776.032, which applies generally to the public at large, otherwise, section 776.05(1) is rendered meaningless.

II. Amicus next argues that a uniform rule regarding the procedural rights of all persons, including law enforcement is important and that an officer should get the benefit of a pre-trial evidentiary hearing even if he or she is not engaged in efforts to make an arrest. It is important to note that section 776.05 does not require that an officer is actually making an arrest, rather the statute requires that the officers be **engaged in efforts** to make an arrest, such efforts may include the investigation, and/or as in this case multiple commands to stop and drop a weapon.[2]

Furthermore, as previously argued, under section 776.05, generally an officer is in fact permitted to raise this immunity pre-trial as a motion to dismiss pursuant to Fla. R. Crim. P. 3.190(c)(4). Thus, because there is already an appropriate procedure by which an officer may claim immunity pursuant to section 776.05, this Court must find that the specific language of section 776.05, applies to on duty law enforcement rather than the general language of section 776.032, which applies

[2] To the extent that Amicus is arguing that his status as an officer is an unfair distinction and that he should be treated like the average citizen, the proper remedy is to go to the legislature to change the law.

generally to the public at large, otherwise, section 776.05(1) is rendered meaningless.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests that this Court reverse the opinion of the Fourth District Court of Appeal, answer the certified question in the affirmative, affirm the holding of Caamano, and remand this case for trial.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically Eric Schwartzreich, Esq, counsel for the Respondent on June 4, 2018: admin@floridalawyerdefenseteam.com;eschwartzreich@floridalawyerdefenseteam.com, and to Counsel for Amicus Robert C. Buschel & Eugene G. Gibbons at Buschel@BGlaw-pa.com.

/s/ Melanie Dale Surber
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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 14-point Times New Roman Type.

/s/ Melanie Dale Surber
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