IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, STATE OF FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,
Plaintiff,

v.

Case No.: CRC-1400216FAES

Division: 1 (J. Barthle)

CURTIS J. REEVES,
Defendant.
_____ /

REPLY TO STATE'S RESPONSE TO DEFENDANT'S MOTION REQUESTING (I) A PRETRIAL IMMUNITY HEARING PURSUANT TO §776.032, FLA. STAT. (2017), (II) TO HOLD THIS PROCEEDING IN ABEYANCE PENDING RESOLUTION OF *LOVE V. STATE* (SC18-747) AND *STATE V. TYMOTHY RAY MARTIN* (SC18-789), AND (III) FOR OTHER RELIEF

COMES NOW, the Defendant, CURTIS J. REEVES, by and through undersigned counsels, submits the following Reply to the State of Florida's Response to Defendant's motion requesting (I) a pretrial immunity hearing pursuant to section 776.032(4), Fla. Stat. (2017), (II) to hold this proceeding in abeyance pending resolution of *Tashara Love v. State* (SC18-747) and *State v. Tymothy Ray Martin* (SC18-789), and (III) for other relief, and states as follows:

INTRODUCTION

In its Response, the State of Florida asks this Court to ignore the applicable law, deny Defendant a de novo pretrial immunity hearing pursuant to section 732.032(4), Fla. Stat. (2017), and to maintain the February 25, 2019 trial date. Notwithstanding the Second District Court of Appeal's rulings in *State v. Tymothy Ray Martin*[1], *Catalano v. State*, *Sullivan v. State*, and *Aldrich v. State*, the prosecution asks this Court to turn a blind eye to the undeniable legal conclusion that

1 __ So. 3d __, 2018 WL 2074171, 43 Fla. L. Weekly D1016 (Fla. 2d DCA May 4, 2018), *review pending*, No. SC18-789.

Mr. Reeves is currently entitled to a de novo pretrial immunity hearing. Ultimately, the State requests that this Court abdicate its professional and legal obligation to follow and apply the law neutrally to all of the men and women that come before it.

First - the case law is clear that *Martin* is indeed binding precedent and must be followed by this Court unless and until the Florida Supreme Court - or the Second District sitting en banc - rules otherwise. In its *Response*, the State posited that *Martin* was not binding precedent, a conclusion that can only be reached by ignoring the detailed analysis of *Martin* within Defendant's *Motion*, at 8-18, the case law concerning a trial court's obligation to follow appellate case law under the doctrine of stare decisis, *Id.*, at 14-18 (*citing, e.g., Wood v. Fraser*, 677 So. 2d 15, 18-19 (Fla. 2d DCA 1996)), and the Second District's case law after the issuance of *Martin*. *Sullivan; Catalano*; *Aldrich*.

Undersigned counsels will not exhaustively repeat the nuances of the 10-pages of legal arguments contained within the *Motion*, at 8-18 - which explain in intricate detail as to why *Martin* is binding law. Needless to say, the State failed to address those arguments at all in its *Response*.

Undersigned counsels do note that the Second District Court of Appeal, which issued the *Martin* decision, believes that *Martin* is binding law. The evidence for that assertion is that the Second District has cited to and applied the *Martin* decision on multiple occasions.

After the May 4, 2018 release of the *Martin* decision, in an unpublished disposition the Second District ruled in *Malik A. Aldrich v. State*, Slip Copy, 2018 WL 3629436 (Fla. 2d DCA May 29, 2018) (Table) that the defendant's Stand Your Ground hearing was determined under the incorrect, pre-June 2017 standard. The Second District ruled that Aldrich "may renew his motion to dismiss based on stand your ground immunity and seek a new hearing in accordance with our decision in *Martin v. State* [citation omitted]." *Id.*

Then, as noted in Defendant's *Motion*, at 17-18, the Second District in *Catalano v. State* __ So.3d __, 2018 WL 3447247 (Mem), 43 Fla. L. Weekly D1622, reversed Catalano's conviction and imposed a remand for "the trial court to conduct a new 'Stand Your Ground' hearing" on behalf of the defendant - "for the reasons explained in *Martin*." (emphasis added). The Second District unambiguously and affirmatively applied the holding of *Martin* to Mr. Catalano's case. *Id.*

Thereafter, on August 1, 2018 the Second District once again applied the binding precedent of *Martin* to the case of *Gabryl Mark Sullivan v. State*, __ So. 3d __, 2018 WL 3636749 (Mem). In that case, the Second District ruled that "as we did in *Martin*, we reverse Sullivan's judgment and sentence and remand for a new immunity hearing under the 2017 statute." *Id.*

In three different cases, the Second District applied *Martin* because it is, in fact, binding precedent. No level or amount of obfuscation can overcome this conclusion.

Second - the State's argument that *Martin* is not binding precedent is predicated on a misapprehension as to the meaning of an "unpublished disposition." As former First District Court of Appeal Judge and author of the Florida Appellate Practice treatise Philip J. Padovano explained:

> An appellate court may dispose of a case with a speaking order or a memorandum style opinion that is available on Westlaw but not published in the official reports. These kinds of decisions are usually written to explain the case to the parties and not to create a precedent for future cases. While there is no governing court rule on this subject, the Florida courts have held that an unpublished disposition has no precedential value.

Philip J. Padovano, *Florida Appellate Practice* §20:7 (2018) (citing *Gawker Media v, LLC v. Bollea*, 170 So. 3d 125, 133 (Fla. 2d DCA 2015)).

In *Gawker*, the Respondent, Terry Bollea a/k/a Hulk Hogan, claimed (1) *Dolan v. Bank of Am.*, 63 So.3d 761 (Fla. 2d DCA 2011) (table decision), (2) *Jay Properties Beach Condo LLC v. Wells Fargo Bank, N.A.*, 146 So.3d 34 (Fla. 2d DCA 2013) (table decision), and (3) *R.J. Reynolds*

Tobacco Co. v. Anderson, 90 So.3d 289 (Fla. 2d DCA 2012) (table decision) were binding precedent that supported his position. 170 So. 3d at 133. The Second District held, however, that "*Dolan*, *Jay Properties*, and *Anderson* all were unpublished dispositions" and that they "have no precedential value." *Gawker*, at 133. The Second District noted that those three cases have "disposition orders [that] are discoverable online, but they were not meant to be printed in the official reporter of this court's decisions." *Gawker*, at 133. Rather, they "appear merely as entries among the table decisions" and their "associated 'opinions' are not reproduced." *Id.* The Second District concluded that given all of this, "[t]hey do not enunciate the law of this district" because they are "unpublished dispositions." *Id.*

The WestLaw printouts for *Dolan*, *Jay Properties*, and *Anderson* are also attached to this Motion. The captions to each of those cases clearly establish their status as "unpublished dispositions." On *Dolan*, the caption states "Unpublished Disposition" and "Only the Westlaw citation is currently available." On *Jay Properties*, the caption reads "Unpublished Disposition" and "This unpublished disposition is referenced in the Southern Reporter." Further, on *Anderson* the caption announces "Unpublished Disposition" and "The decision of the Florida District Court of Appeal is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.'"

On the other hand, the WestLaw printouts of *Martin*, *Catalano*, and *Sullivan* opinions are not labeled as "unpublished disposition" (see attached). Rather, all three opinions have a banner stating: "NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL." While undersigned counsels struggled to interpret the State's argument – as noted, its position flies in the face of overwhelming evidence to the contrary – *perhaps* the

prosecution meant that this referenced banner means that (1) *Martin*, *Catalano*, and *Sullivan* are unpublished dispositions and (2) have no precedential value. This argument, assuming it was even made by the State, is also patently erroneous.

The first obvious reason is that if *Martin*, *Catalano*, and *Sullivan* were "unpublished dispositions" then they would be labeled as such. Clearly none of the three are labeled or otherwise designated "unpublished disposition."

Moreover, opinions are understandably not released for publication in the public law reports when the time for rehearing has not expired because of a pending post-opinion motion (e.g. a motion for rehearing) or due to the Supreme Court's pending review (as with this case, where *Love v. State* is being reviewed under SC18-747). The Southern Reporter likely does not want to designate a volume and page number to a decision and have print and electronic copies of the decision distributed throughout the country, only to find that the decision was amended or quashed. Publication is delayed because, as the Second District noted in *Pitzer*, "adjustments in the opinion might still be undertaken." 95 So. 3d at 1006.

Given all of this, the State cannot legitimately claim that *Martin*, *Catalano*, and *Sullivan* are "unpublished dispositions" merely because they have not been designated a Southern Reporter citation number or because the time for rehearing has not expired. *Motion*, at 16-17. The State has not, and cannot, rebut Defendant's claim that he is entitled to a de novo pretrial immunity hearing under *Martin v. State*. Accordingly, it is respectfully requested that Defendant's Motion be granted.

WHEREFORE, the Defendant, Curtis Reeves, respectfully requests that this Motion be granted, that the trial date be stricken from the calendar, the Court rule that Mr. Reeves is entitled to a de novo pretrial immunity hearing pursuant to section 776.032(4), but that this case be held in abeyance pending resolution of *State v. Martin* and *Love v. State* by the Florida Supreme Court, and for such other, further and different relief as necessary and appropriate.

Date: August 23, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of this has been furnished by United States Postal Service to: the Office of the State Attorney for the Sixth Judicial Circuit, P.O. Box 5028, Clearwater, Florida 33758, this 23rd day of August, 2018.

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Tymothy Ray Martin v. State of Florida

--- So.3d ----, 2018 WL 2074171

43 Fla. L. Weekly D1016

2018 WL 2074171

District Court of Appeal of Florida, Second District.

Tymothy Ray MARTIN, Appellant,

v.

STATE of Florida, Appellee.

Case No. 2D16–4468

|

Opinion filed May 4, 2018

Synopsis

Background: Defendant was convicted in the Circuit Court, Hillsborough County, Chet A. Tharpe, J., of felony battery. Defendant appealed.

Holdings: The District Court of Appeal, Lucas, J., held that:

[1] statutory amendment to "Stand Your Ground" law changing burden of proof at self-defense immunity hearings was procedural;

[2] defendant's battery case was pending when procedural statutory amendment took effect, and thus amendment applied retroactively; and

[3] enactment of retroactive statutory amendment warranted remand for new evidentiary immunity hearing.

Reversed and remanded with instructions; question certified.

West Headnotes (13)

[1] Criminal Law
Special pleas in bar in general
110 Criminal Law
110XV Pleas
110k286 Special pleas in bar in general
The State bears the burden at a "Stand Your Ground" hearing of disproving, by clear and convincing evidence, a facially sufficient claim of self-defense immunity in a criminal prosecution. Fla. Stat. Ann. § 776.032(4).

3 Cases that cite this headnote

[2] Statutes
Amendatory statutes
361 Statutes
361IX Retroactivity
361k1569 Amendatory statutes
Statutory amendments may take one of three forms: substantive, which are usually applied prospectively, or procedural or remedial, either of which may apply retroactively to pending proceedings.

Cases that cite this headnote

[3] Statutes
Amendatory statutes
361 Statutes
361IX Retroactivity
361k1569 Amendatory statutes
Whether a statutory amendment is characterized as substantive versus procedural in nature becomes a critical determination for purposes of an amendment's temporal application.

Cases that cite this headnote

[4] Statutes
Amendatory statutes
361 Statutes
361IX Retroactivity
361k1569 Amendatory statutes
In spite of a presumption against retrospective application of statutory amendments, even substantive amendments can occasionally be applied retroactively.

Cases that cite this headnote

[5] **Statutes**
Amendatory statutes
361 Statutes
361IX Retroactivity
361k1569 Amendatory statutes
To rebut the presumption against retroactive application of statutory amendments, such legislation is generally subjected to the following two interrelated inquiries: whether there is clear evidence of legislative intent to apply the statute retroactively, and if the legislation clearly expresses an intent that it apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible.

Cases that cite this headnote

[6] **Statutes**
Amendatory statutes
361 Statutes
361IX Retroactivity
361k1569 Amendatory statutes
Broadly speaking, for purposes of rule that procedural statutory amendment can be applied retroactively, "substantive law" is that which prescribes duties and rights, while "procedural law" concerns the means and methods to apply and enforce those duties and rights.

Cases that cite this headnote

[7] **Statutes**
Amendatory statutes
361 Statutes
361IX Retroactivity
361k1569 Amendatory statutes
Statutory amendments are procedural in nature, as would support retroactive application, if they do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing.

Cases that cite this headnote

[8] **Criminal Law**
Amendment, revision, and codification
110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k14 Amendment, revision, and codification
In the context of criminal cases specifically, "substantive law," for purposes of rule that procedural statutory amendment can be applied retroactively, is that which declares what acts are crimes and prescribes the punishment therefor, while "procedural law" is that which provides or regulates the steps by which one who violates a criminal statute is punished.

Cases that cite this headnote

[9] **Criminal Law**
Amendment, revision, and codification
110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k14 Amendment, revision, and codification
Amendment to "Stand Your Ground" law changing burden of proof at self-defense immunity hearings was procedural, not substantive, and thus applied retroactively to pending cases; burden of proof was procedural issue, and neither substantive rights of a successful claim of immunity nor necessary elements of proof to establish claim of immunity were altered by amendment. Fla. Stat. Ann. § 776.032(4).

3 Cases that cite this headnote

[10] **Statutes**
Procedural Statutes
361 Statutes
361IX Retroactivity
361k1564 Procedural Statutes
361k1565 In general
Statutory changes to the burden of proof are deemed procedural in nature for purposes of retroactive application.

Cases that cite this headnote

[11] **Criminal Law**

Amendment, revision, and codification

Criminal Law

Repeal

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k14 Amendment, revision, and codification
110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k15 Repeal

Constitutional provision which provides that repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed relates to the offense itself, or the punishment thereof, and not to the remedy or procedure which the legislature may enact for the prosecution and punishment of offenses, unless the change in the remedy should affect in some way the substantial rights of defense. Fla. Const. art. 10, § 9.

Cases that cite this headnote

[12] **Criminal Law**

Amendment, revision, and codification

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k14 Amendment, revision, and codification

Defendant's battery case was "pending" when procedural statutory amendment to "Stand Your Ground" law changing burden of proof at self-defense immunity hearings took effect, and thus amendment applied retroactively to defendant's case, where defendant's appeal of his battery conviction was pending before District Court of Appeal when amendment took effect. Fla. Stat. Ann. § 776.032.

5 Cases that cite this headnote

[13] **Criminal Law**

Remand for Determination or Reconsideration of Particular Matters

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(3.1) In general

Enactment of retroactive statutory amendment that changed burden of proof at "Stand Your Ground" hearings on self-defense immunity during pendency of defendant's appeal of his battery conviction warranted remand for new evidentiary immunity hearing; at original immunity hearing at which defendant had burden of proof, defendant waived his Fifth Amendment right to remain silent and testified in his own defense, defendant no longer bore burden of establishing his entitlement to immunity by preponderance of the evidence, and new determination of statutory immunity could not be gleaned from prior hearing. U.S. Const. Amend. 5; Fla. Stat. Ann. § 776.032.

2 Cases that cite this headnote

Appeal from the Circuit Court for Hillsborough County; Chet A. Tharpe, Judge.

Attorneys and Law Firms

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Pamela Jo Bondi, Attorney General, Tallahassee and Jonathan A. Hurley, Assistant Attorney General, Tampa, for Appellee.

Opinion

LUCAS, Judge.

*1 Tymothy Martin appeals his judgment and sentence for one count of felony battery. Mr. Martin raises several issues on appeal. Because we hold that section 776.032, Florida Statutes (2016), applies retroactively to his case, we reverse and remand for the circuit court to convene a new "Stand Your Ground" hearing under the statute

as amended. Mr. Martin's remaining issues are without merit.

I.

One evening in February of 2016, Mr. Martin and his girlfriend, Kathryn Lawson, went out for a night on the town that ended in an altercation in a McDonald's parking lot over who should drive to their next destination. According to Ms. Lawson, Mr. Martin punched her twice in the face after she refused to get into the vehicle. According to Mr. Martin, it was he who refused to get in the car, which prompted Ms. Lawson to threaten him with a firearm; he attempted to disarm her, and in the ensuing scuffle, elbowed her in the face (and, at some point, somehow got himself shot in the arm).

The State charged Mr. Martin with one count of felony battery causing great bodily harm, permanent disability, or permanent disfigurement under section 784.041(1), Florida Statutes (2016). Mr. Martin filed a motion to establish immunity under section 776.032. The trial court held a hearing on the motion and ultimately denied it, ruling that "[a]fter hearing the testimony of the witnesses, the review of the evidence that has been offered as exhibits, the court finds that *the defense has not met their* burden and I'll deny the motion." (Emphasis added.) Mr. Martin's case proceeded to a jury trial, and he was convicted as charged.

Mr. Martin filed the present appeal, but while this appeal was pending, the Florida Legislature amended section 776.032 to modify which party bears the burden of proof in a self-defense immunity hearing. See ch. 2017–72, § 1, at 898–99, Laws of Fla. (2017).[1] The Florida Legislature's amendment to section 776.032 added the following provision:

> (4) In a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution provided in subsection (1).

[1] Thus, as it now stands, the State bears the burden of disproving, by clear and convincing evidence, a facially sufficient claim of self-defense immunity in a criminal prosecution. On appeal, Mr. Martin argues that this amendment is retroactive in its application, that it applies to his case, and that he is entitled to a new immunity hearing. We agree.

II.

A.

*2 [2] [3] [4] [5] [6] [7] [8] We begin with some basic postulates about the application of statutory amendments. Statutory amendments may take one of three forms: substantive, which are usually applied prospectively, or procedural or remedial, either of which may apply retroactively to pending proceedings. See Orlando v. Desjardins, 493 So.2d 1027, 1028 (Fla. 1986). Whether a statutory amendment is characterized as substantive versus procedural in nature becomes a critical determination for purposes of an amendment's temporal application.[2] See R.A.M. of S. Fla., Inc. v. WCI Cmtys., Inc., 869 So.2d 1210, 1216 (Fla. 2d DCA 2004) (describing rule of statutory construction "which establishes a presumption against the retroactive application of substantive law—as distinct from procedural or remedial law—in the absence of a clear expression of legislative intent that the statute be given retroactive effect"); Merrill Lynch Tr. Co. v. Alzheimer's Lifeliners Ass'n, 832 So.2d 948, 952 (Fla. 2d DCA 2002) ("It is well-settled that statutory provisions that are substantive in nature may not be applied retroactively, while procedural provisions may be applied retroactively."); Webb v. Webb, 765 So.2d 220, 221 (Fla. 2d DCA 2000) ("The general rule [of statutory construction] is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but that a procedural or remedial statute is to operate retrospectively." (alteration in original) (quoting State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So.2d 55, 61 (Fla. 1995))); Basel v. McFarland & Sons, Inc., 815 So.2d 687, 692 (Fla. 5th DCA 2002) ("In the absence of clear legislative intent, a law affecting substantive rights is presumed to apply prospectively only while procedural or remedial statutes are presumed to operate retrospectively." (citing Young v. Altenhaus, 472

So.2d 1152 (Fla. 1985))). Broadly speaking, substantive law is that which "prescribes duties and rights," while "procedural law concerns the means and methods to apply and enforce those duties and rights." Alamo Rent-A-Car, Inc. v. Mancusi, 632 So.2d 1352, 1358 (Fla. 1994). Amendments are procedural in nature if they "do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing." Smiley v. State, 966 So.2d 330, 334 (Fla. 2007) (quoting City of Lakeland v. Catinella, 129 So.2d 133, 136 (Fla. 1961)). In the context of criminal cases specifically, "substantive law is that which declares what acts are crimes and prescribes the punishment therefor, while procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished." State v. Garcia, 229 So.2d 236, 238 (Fla. 1969). Discerning the precise contours between these distinctions can occasionally pose a challenge. Cf. Hanna v. Plumer, 380 U.S. 460, 471, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes."). But this amendment does not appear to be one of those occasions.

[9] [10] [11] In Florida, statutory changes to the burden of proof---the change at issue here---are invariably deemed procedural in nature for purposes of retroactive application.[3] See, e.g., Shaps v. Provident Life & Acc. Ins. Co., 826 So.2d 250, 254 (Fla. 2002) ("[G]enerally in Florida the burden of proof is a procedural issue."); Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239, 243 (Fla. 1977) ("Burden of proof requirements are procedural in nature.... [and] could be abrogated retroactively because 'no one has a vested right in any given mode of procedure.' " (citations omitted) (quoting Ex parte Collett, 337 U.S. 55, 71, 69 S.Ct. 944, 93 L.Ed. 1207 (1949))); Kenz v. Miami-Dade County, 116 So.3d 461, 464 (Fla. 3d DCA 2013) ("Indeed, under Florida case law, issues relating to a party's burden of proof are generally procedural matters."); see also Ziccardi v. Strother, 570 So.2d 1319, 1321 (Fla. 2d DCA 1990) (determining that reenactment of civil RICO statute, which altered the burden of proof and removed punitive damages as an element of compensation, could be applied retroactively; "[u]nder these circumstances, we do not agree ... that modification of the burden of proof in this statute amounted to a substantive change in the law").[4] In light of Florida's precedents on this point, we need not belabor the analysis. Subsection (4) now ascribes to the State what had, under common law precedent, been the defendant's burden of proof. That is not a substantive change. Neither the substantive rights of a successful claim of immunity nor the necessary elements of proof to establish a claim of immunity were altered by the June 9, 2017, amendment. Cf. Metro. Dade County v. Chase Fed. Hous. Corp., 737 So.2d 494, 499 (Fla. 1999) ("A retroactive statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute." (quoting Charles B. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 692 (1960))). As such, under Florida law, it is a procedural amendment that the legislature wrought, one which can be applied retrospectively.[5]

*3 **[12]** We must next determine whether Mr. Martin's case was "pending" at the time of the June 9, 2017, amendment. Our court has observed that "procedural or remedial changes [to statutes] may be immediately applied to pending cases, including in some instances cases pending on direct appeal." Heilmann v. State, 310 So.2d 376, 377 (Fla. 2d DCA 1975) (footnote omitted); see also Rothermel v. Fla. Parole & Prob. Comm'n, 441 So.2d 663, 665 (Fla. 1st DCA 1983) ("Although we have found no Florida case squarely on point with respect to the applicability of the principles of law enunciated above to cases pending on appeal, it appears that the prevailing rule is that cases pending on appeal and not yet determined are affected by legislative acts which pertain only to remedy or procedure."); Turner v. United States, 410 F.2d 837, 842 (5th Cir. 1969) ("[C]hanges in statute law relating only to procedure or remedy are usually held immediately applicable to pending cases, including those on appeal from a lower court."); Bowles v. Strickland, 151 F.2d 419, 420 (5th Cir. 1945) ("A suit in process of appeal ... is a pending suit."). So, too, we conclude that Mr. Martin's case was still pending when the legislature amended section 776.032 by virtue of his appeal pending before this court.

Adhering to stare decisis, we must hold that the June 9, 2017, amendment to section 776.032 changing the burden of proof was procedural in nature. Because his appeal remained pending before us at the time the amendment took effect, the amendment should be applied to Mr. Martin's case. How to now apply it is the only issue left to decide. We address the scope of remand below.

B.

[13] "Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application." Lavine v. Milne, 424 U.S. 577, 585, 96 S.Ct. 1010, 47 L.Ed.2d 249 (1976). If the burden of proof is indeed procedural in nature, it is an aspect of procedure that carries a profound influence over the tenor, tone, and tactics in a legal proceeding. Mr. Martin's case is reflective of this. At the original immunity hearing, when the burden of proof was Mr. Martin's, he waived his Fifth Amendment right to remain silent and testified in his own defense, while the State argued that Mr. Martin failed to meet his burden through the presentation of Ms. Lawson's and the investigating detectives' testimony. Now, with the retroactive procedural amendment, it is the State that must marshal the evidence to prove by clear and convincing evidence that immunity does not apply to the facts presented at the hearing, a significantly different position than it found itself in before. Mr. Martin will also find himself in a markedly different stance under the amended statute's hearing provision, as he no longer bears the burden of establishing his entitlement to immunity by a preponderance of the evidence.

Under these circumstances, we do not believe that a new determination of statutory immunity can be meaningfully gleaned from Mr. Martin's prior Stand Your Ground hearing, not when a potentially dispositive component of adjudication such as the burden of proof has been fundamentally altered. Cf. McDaniel v. State, 24 So.3d 654, 656–58 (Fla. 2d DCA 2009) (remanding for a new hearing on defendant's motion to dismiss based on Stand Your Ground immunity where the original order was silent regarding the evidentiary standard that applied); Glaze v. Worley, 157 So.3d 552, 558 (Fla. 1st DCA 2015) (Makar, J., concurring) ("Our Court would be in an equal position to the trial judge if the parties had been operating under the correct law with all of the evidence, and presented their cases accordingly, but that did not happen. A redo under these circumstances better serves all interests."). We therefore hold that Mr. Martin is entitled to a new evidentiary hearing on remand.

C.

Because we are reversing and remanding for a new immunity hearing under section 776.032, Mr. Martin's conviction must be reversed as well. And here we must pause to acknowledge that since Mr. Martin asserted a justifiable use of force affirmative defense in his trial, the jury's verdict would seem to have addressed many, if not all, of the issues underlying Mr. Martin's immunity claim. But section 776.032 is an immunity statute. Cf. Little v. State, 111 So.3d 214, 217–18 (Fla. 2d DCA 2013) ("The Stand Your Ground law ... grants criminal immunity to persons using force as permitted in sections 776.012, 776.013, or 776.031."); Rosario v. State, 165 So.3d 852, 854 (Fla. 1st DCA 2015) ("Florida's Stand Your Ground law is intended to establish a true immunity from charges and does not exist as merely an affirmative defense."); see also Dennis v. State, 51 So.3d 456, 462 (Fla. 2010) ("[S]ection 776.032 contemplates that a defendant who establishes entitlement to the statutory immunity will not be subjected to trial."). Having raised a facially sufficient claim, Mr. Martin was entitled to an immunity hearing —which, now that the statute has been amended, means one where the State bears the burden of proof—before a jury could have been empaneled to decide whether Mr. Martin was justified in his use of force against Ms. Lawson. See Dennis, 51 So.3d at 462. Because of this amendment's relatively recent passage, that hearing has not yet occurred. We are confident that the circuit judge who presides over Mr. Martin's immunity hearing on remand will not rely upon the prior jury's determination that we are vacating but will convene a new evidentiary hearing in an appropriate fashion, consistent with this court's opinion and the statute's amended burden of proof.

*4 If, after the conclusion of that hearing, the circuit court concludes that Mr. Martin is entitled to statutory immunity, it shall enter an order to that effect and dismiss the information with prejudice. See McDaniel, 24 So.3d at 657. If, on the other hand, the circuit court determines that Mr. Martin is not entitled to immunity, the court shall enter an order reflecting its findings and reinstate Mr. Martin's conviction. Id.

III.

We hold that the 2017 amendment to section 776.032, the Stand Your Ground law, is procedural in nature and, therefore, retroactive in application; that, as such, it applies to pending cases, including those on appeal;

and that Mr. Martin is entitled to a new immunity hearing under the amended procedure of the statute. Accordingly, we must reverse the circuit court's judgment and conviction.

Having so held, we recognize that courts of other jurisdictions have reached contrary conclusions as to whether a statutory amendment to a burden of proof is procedural or substantive in nature. See supra n.4. We are also mindful of the fact that applying section 776.032's amendment retroactively, as we have now held it must be applied, could impact a significant number of criminal proceedings. Therefore, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), we certify the following question of great public importance to the Florida Supreme Court:

> IS THE 2017 AMENDMENT TO SECTION 776.032 OF THE FLORIDA STATUTES PROCEDURAL IN NATURE SUCH THAT THE AMENDMENT SHOULD BE APPLIED RETROACTIVELY TO CASES THAT WERE PENDING IN FLORIDA COURTS AT THE TIME OF THE AMENDMENT'S ENACTMENT?

We would answer the question in the affirmative.

Reversed and remanded with instructions; question certified.

CASANUEVA and SLEET, JJ., Concur.

All Citations

--- So.3d ----, 2018 WL 2074171, 43 Fla. L. Weekly D1016

Footnotes

1 When section 776.032 was enacted in October 2005, there was no prescribed procedure that a trial court should employ when a defendant claimed immunity under the statute. The Florida Supreme Court crafted a procedure in two opinions. First, in Dennis v. State, 51 So.3d 456, 463 (Fla. 2010), the supreme court held that immunity under section 776.032 should be determined at a pretrial evidentiary hearing. Then, in Bretherick v. State, 170 So. 3d 766, 779 (Fla. 2015), the supreme court clarified that the defendant bears the burden of proving entitlement to immunity by a preponderance of the evidence.

2 In spite of a presumption against retrospective application, even substantive amendments can occasionally be applied retroactively. As the Florida Supreme Court explained in Smiley v. State, 966 So.2d 330, 336 (Fla. 2007), "[t]o rebut this presumption against retroactive application, such legislation is generally subjected to the following two interrelated inquiries ... 'whether there is clear evidence of *legislative intent* to apply the statute [retroactively] [and] [i]f the legislation clearly expresses an intent that it apply retroactively, then the second inquiry is whether retroactive application is *constitutionally permissible*.' " (second alteration in original) (quoting Metro. Dade County v. Chase Fed. Hous. Corp., 737 So.2d 494, 499 (Fla. 1999)).

3 The term "burden of proof" is often criticized for its imprecision; whether it is meant as a burden to initially present evidence or a burden to ultimately persuade a finder of fact. See Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 56, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005) ("The term 'burden of proof' is one of the 'slipperiest member[s] of the family of legal terms.' " (quoting 2 J. Strong, McCormick on Evidence § 342, p. 433 (5th ed.1999))); Fla. Dep't of Transp. v. J.W.C. Co., 396 So.2d 778, 787 (Fla. 1st DCA 1981) ("The term 'burden of proof' has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case." (quoting In re Estate of Ziy, 223 So.2d 42, 43 (Fla. 1969))). We read this amendment's use of "burden of proof" in keeping with its more common usage, as referring to the burden of persuasion, because the evidentiary threshold of "clear and convincing evidence" is a measurement of that type of burden. Cf. Allstate Ins. Co. v. Vanater, 297 So.2d 293, 295 (Fla. 1974) (defining the "three basic standards by which the sufficiency of evidence is weighed by fact-finders" as: preponderance of the evidence, proof beyond and to the exclusion of a reasonable doubt, and clear, convincing, and satisfactory evidence).

4 But see Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20–21, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000) ("Given its importance to the outcome of cases, we have long held the burden of proof to be a 'substantive' aspect of a claim."); Cent. Vt. Ry. Co. v. White, 238 U.S. 507, 512, 35 S.Ct. 865, 59 L.Ed. 1433 (1915) ("But it is a misnomer to say that the question

as to the burden of proof as to contributory negligence is a mere matter of state procedure. For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case."); State v. Fletcher, 149 Ariz. 187, 717 P.2d 866, 871 (1986) ("The burden of proof is considered substantive." (citing Dick v. N.Y. Life Ins. Co., 359 U.S. 437, 446, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959))); Dunlap v. Kentucky, 435 S.W.3d 537, 573 (Ky. 2013) (collecting cases and observing, "[a]s in Pennsylvania, courts in Kentucky have variously described burdens of proof as procedural or substantive"); Commonwealth v. Sargent, 349 Pa.Super. 289, 503 A.2d 3, 6 (1986) ("A statute establishing a burden of proof is difficult to classify as either a procedural rule or a rule affecting substantive rights and seems to contain elements of each."); see also Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So.2d 563, 567 (Fla. 2004) (Pariente, J., concurring) (explaining one of the reasons why the court omitted a burden of proof in its adoption of Florida Rule of Criminal Procedure 3.203: "[b]ecause of concerns about whether the burden of proof is a substantive or procedural requirement ... it is preferable to omit the burden of proof enunciated by the legislature from our rule of procedure regarding mental retardation"). Interestingly, evidentiary presumptions, which affect the burden of proof, have at times been characterized as substantive in nature. See Pub. Health Tr. of Dade Cty. v. Valcin, 507 So.2d 596, 601 (Fla. 1987) ("Rebuttable presumptions which shift the burden of proof are 'expressions of social policy,' rather than mere procedural devices employed 'to facilitate the determination of the particular action.' " (first quoting Caldwell v. Div. of Ret., Fla. Dep't of Admin., 372 So.2d 438, 440 (Fla. 1979); then quoting § 90.303, Fla. Stat. (1985))). The amendment at issue before us does not purport to create or modify an evidentiary presumption, however.

5 In its answer brief, the State posits that retroactive application of the 2017 amendment would violate article X, section 9 of the Florida Constitution, which provides that "[r]epeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." Being bound to conclude that the amendment was procedural in nature, we are also bound to reject the State's argument. As the Florida Supreme Court explained long ago, this constitutional provision "relates to the offense itself, or the punishment thereof, and not to the remedy or procedure which the legislature may enact for the prosecution and punishment of offenses, unless the change in the remedy should affect in some way the substantial rights of defense." Mathis v. State, 31 Fla. 291, 12 So. 681, 687 (1893); see also Grice v. State, 967 So.2d 957, 960 (Fla. 1st DCA 2007). Because the issue has not been argued, we do not address the separate constitutional question of whether the amendment could constitute a violation of article V, section 2(a) of the Florida Constitution. Cf. Rodriguez v. State, 43 Fla. L. Weekly D304, —— So.3d ——, 2018 WL 735244 (Fla. 3d DCA Feb. 7, 2018) (declining to exercise jurisdiction over petition for writ of prohibition where trial court had ruled that the amendment, being procedural, was an unconstitutional violation of the separation of powers).

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Anthony Dominic Catalano v.

State of Florida

--- So.3d ----, 2018 WL 3447247 (Mem)

43 Fla. L. Weekly D1622

2018 WL 3447247

District Court of Appeal of Florida, Second District.

Anthony Dominic CATALANO, Appellant,

v.

STATE of Florida, Appellee.

Case No. 2D16-3307

Opinion filed July 18, 2018

Appeal from the Circuit Court for Hillsborough County; Samantha L. Ward, Judge.

Attorneys and Law Firms

Rachael E. Reese of O'Brien Hatfield, P.A., Tampa, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Brandon R. Christian, Assistant Attorney General, Tampa, for Appellee.

Opinion

VILLANTI, Judge.

*1 Prior to trial, Anthony Dominic Catalano filed a motion to dismiss the information charging him with manslaughter with a weapon based on section 776.032, Florida Statutes (2014), Florida's "Stand Your Ground" law. After an evidentiary hearing, the trial court denied the motion after applying the statutory burden of proof in effect at that time. However, this court recently held that the 2017 amendment to the "Stand Your Ground" law applies retroactively to cases that were pending when the amendment was enacted. See Martin v. State, 43 Fla. L. Weekly D1016 (Fla. 2d DCA May 4, 2018). Therefore, for the reasons explained in Martin, we reverse Catalano's conviction and remand for the trial court to conduct a new "Stand Your Ground" hearing in this case. As in Martin, if the trial court concludes after the new hearing that Catalano is entitled to Stand Your Ground immunity, "it shall enter an order to that effect and dismiss the information with prejudice." Id. at D1018 (citing McDaniel v. State, 24 So.3d 654, 657 (Fla. 2d DCA 2009)). If, on the other hand, the trial court determines after the hearing that Catalano is not entitled to immunity, it shall enter an order containing its findings and reinstate Catalano's conviction. [1]

Finally, we note that the Third District recently reached the opposite conclusion concerning the retroactivity of section 776.032, and it certified conflict with our decision in Martin. See Love v. State, 43 Fla. L. Weekly D1065, D1065 n.3 (Fla. 3d DCA May 11, 2018). Therefore, we certify conflict with Love.

Reversed and remanded with directions; conflict certified.

MORRIS and ATKINSON, JJ., Concur.

All Citations

--- So.3d ----, 2018 WL 3447247 (Mem), 43 Fla. L. Weekly D1622

Footnotes

1 Catalano raised four additional claims in this appeal. As to his claim that the trial court abused its discretion by restricting his questioning of a defense witness, we agree that the court abused its discretion but we find the error harmless in light of the record as a whole. Catalano's remaining claims on appeal are without merit, and we decline to address them further.

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Gabryl Mark Sullivan v. State of Florida

---So.3d---

2018 WL 3636749 (Mem)

2018 WL 3636749
Only the Westlaw citation is currently available.

District Court of Appeal of Florida, Second District.

Gabryl Mark SULLIVAN, Appellant,
v.
STATE of Florida, Appellee.

Case No. 2D16-5065
|
Opinion filed August 1, 2018

Appeal from the Circuit Court for Hillsborough County; Thomas P. Barber, Judge.

Attorneys and Law Firms

Howard L. Dimmig, II, Public Defender, and Stephen M. Grogoza, Special Assistant Public Defender, Bartow, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Susan M. Shanahan, Assistant Attorney General, Tampa, for Appellee.

Opinion

PER CURIAM.

*1 Gabryl Sullivan challenges his judgment and sentence for aggravated battery causing great bodily harm with a deadly weapon. See §§ 775.087(1), 784.045(1)(a), Fla. Stat. (2016). Sullivan was convicted following a jury trial and sentenced to seven years in prison. On appeal, Sullivan argues in part that the 2017 amendment to section 776.032, Florida Statutes, creating subsection (4), should apply retroactively to his case and that his motion to dismiss based on immunity from prosecution should be reconsidered under the statute as amended. This court's recent opinion concluding that the 2017 amendment to section 776.032, Florida's Stand Your Ground law, is procedural in nature and thus should be applied retroactively to pending cases necessarily controls our decision here. See Martin v. State, No. 2D16-4468, --- So.3d ---, ---, 2018 WL 2074171, *4 (Fla. 2d DCA May 4, 2018), review pending, No. SC18-789.

Accordingly, as we did in Martin, we reverse Sullivan's judgment and sentence and remand for a new immunity hearing under the 2017 statute with instructions that if the trial court determines that Sullivan is not entitled to immunity, the court shall deny his motion and reinstate Sullivan's conviction and sentence. We recognize that the Third District Court of Appeal has recently held that the 2017 amendment to section 776.032 imposes a new legal burden on the State such that it should be treated as a substantive change in the law which does not apply retroactively; we therefore certify conflict with Love v. State, No. 3D17-2112, --- So.3d ---, --- - ---, 2018 WL 2169980, *3-*4 (Fla. 3d DCA May 11, 2018), review pending, No. SC18-747, 2018 WL 3147946.

Reversed and remanded with instructions; conflict certified.

KHOUZAM, MORRIS, and BLACK, JJ., Concur.

All Citations

--- So.3d ----, 2018 WL 3636749 (Mem)

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Malik A. Aldrich v. State of Florida

Slip Copy, 2018 WL 3629436 (Table)

2018 WL 3629436
Unpublished Disposition
Only the Westlaw citation is currently available.
NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DETERMINED.
District Court of Appeal of Florida, Second District.

Malik A. ALDRICH, Appellant/Petitioner(s),
v.
STATE of Florida, Appellee/Respondent(s).

CASE NO.: 2D18-0693
|
May 29, 2018

L.T. No.: 17-CF-7947

Opinion

BY ORDER OF THE COURT:

*1 Petitioner seeks to prohibit his continued prosecution in the underlying matter following the trial court's denial of his motion to dismiss based upon the statutory immunity provided by Florida's Stand Your Ground Law, section 776.032, Florida Statutes (2016). Petitioner argues that when ruling on his motion, the trial court erred in failing to apply the 2017 amendment to the statute, which requires the State to disprove a facially sufficient claim of self-defense immunity by clear and convincing evidence. He also argues that the trial court erred in determining that he is not entitled to immunity based upon the facts established at his pretrial immunity hearing. Because the issue of petitioner's entitlement to immunity has not been resolved using the correct burden of proof, we deny the petition without prejudice. Petitioner may renew his motion to dismiss based on stand your ground immunity and seek a new hearing in accordance with our decision in Martin v. State, No. 2D16-4468, 2018 WL 2074171 (Fla. 2d DCA May 4, 2018).

Denied.

KELLY, CRENSHAW, and ROTHSTEIN-YOUAKIM, JJ., Concur.

All Citations

Slip Copy, 2018 WL 3629436 (Table)

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Dolan v. Bank of America

63 So. 3d 761 (Table)

2011 WL 2565556

63 So.3d 761 (Table)
Unpublished Disposition
Only the Westlaw citation is currently available.
NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DETERMINED.
District Court of Appeal of Florida,
Second District.

Lisa A. DOLAN, Appellant / Petitioner(s),

v.

BANK OF AMERICA, Appellee / Respondent(s).

No. 2D11–2507.

May 25, 2011.

Opinion

BY ORDER OF THE COURT.

**1 The petition for writ of mandamus is denied. *Cf. Sundale, Ltd. v. Williams Paving Co., Inc.*, 913 So.2d 740 (Fla. 3d DCA 2005).

NORTHCUTT, SILBERMAN, and VILLANTI, JJ., Concur.

All Citations

63 So.3d 761 (Table), 2011 WL 2565556

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Jay Properties Beach Condo v. Wells Fargo Bank, N.A.

146 So. 3d 34 (Table)

2013 WL 6905332

146 So.3d 34 (Table)
Unpublished Disposition
(This unpublished disposition is referenced in the Southern Reporter.)
District Court of Appeal of Florida, Second District.

JAY PROPERTIES BEACH CONDO LLC, Appellant/Petitioner(s),
v.
WELLS FARGO BANK, N.A. et al., Appellee/Respondent(s).

No. 2D13–5343.

Nov. 14, 2013.

Opinion

BY ORDER OF THE COURT.

***1** The emergency petition for writ of certiorari is dismissed for lack of jurisdiction. *See Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So.2d 646, 648–49 (Fla. 2d DCA 1995). A claim that the trial court erred by scheduling the case for trial before the case is at issue is reviewable on appeal and not by petition for writ of certiorari. *See Sundale, Ltd. v. Williams Paving Co., Inc.*, 913 So.2d 740 (Fla. 3d DCA 2005).

SILBERMAN, KELLY, and WALLACE, JJ., Concur.

All Citations

146 So.3d 34 (Table), 2013 WL 6905332

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R.J. Reynolds Tobacco Co. v. Anderson

90 So.3d 289 (Table)

2012 WL 2428282

90 So.3d 289 (Table)
Unpublished Disposition
(The decision of the Florida District Court of Appeal is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')
District Court of Appeal of Florida, Second District.

R.J. REYNOLDS TOBACCO COMPANY, Appellant/Petitioner(s),
v.
Kathleen ANDERSON, Estate Of Daniel P. Begley, Appellee/Respondent(s).

No. 2D12–2527.

May 23, 2012.

Opinion

BY ORDER OF THE COURT.

*1 We grant the petition for writ of mandamus, quash the order denying petitioner's motion for continuance, and remand this case for further proceedings in compliance with Florida Rule of Civil Procedure 1.440. Because we are confident that the circuit court will promptly comply with the ruling of this court, we withhold formal issuance of the writ.

LaROSE, MORRIS, and BLACK, JJ., Concur.

All Citations

90 So.3d 289 (Table), 2012 WL 2428282

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