

**IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN AND
FOR BREVARD COUNTY, FLORIDA.**

CASE NO. 05-2015-CF-039550-AXXX-XX

STATE OF FLORIDA,

Plaintiff,

vs.

JOHN FRANKLIN DEROSSETT,

Defendant.

**ORDER DENYING DEFENDANT'S MOTION FOR DECLARATION OF IMMUNITY
AND DISMISSAL**

This cause came on before the Court upon the Defendant's Motion for Declaration of Immunity and Dismissal filed pursuant to section 776.032, Florida Statutes filed on August 6, 2018. The hearing on this Motion took place from August 27-31, 2018. Having considered the Motion, testimony, evidence presented, arguments of counsel and being otherwise fully advised in the premises, the Court finds the following:

The Defendant has been charged with one count of Attempted First Degree Premeditated Murder of a Law Enforcement Officer while Inflicting Great Bodily harm and two counts of Attempted First Degree Premeditated Murder of a Law Enforcement Officer while Discharging a Firearm. The charges are based upon events occurring on August 20, 2015. The Defendant argues that he is entitled to immunity based upon section 776.032, Florida Statutes, colloquially known as the Stand Your Ground Law.

STATUTES

Section 776.032(1), Florida Statutes, Immunity from criminal prosecution and civil action for justifiable use or threatened use of force, provides:

A person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution and civil action for the use or threatened use of such force by the person, personal representative, or heirs of the person against whom the force was used or threatened, unless the person against whom force was used or threatened is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using or threatening to use force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.

Section 776.012, Florida Statutes, Use or threatened use of force in defense of person, provides:

(1) A person is justified in using or threatening to use force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. A person who uses or threatens to use force in accordance with this subsection does not have a duty to retreat before using or threatening to use such force.

(2) A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

Section 776.012, Florida Statutes, Home protection; use or threatened use of deadly force; presumption of fear of death or great bodily harm, provides:

(1) A person who is in a dwelling or residence in which the person has a right to be has no duty to retreat and has the right to stand his or her ground and use or threaten to use:

(a) Nondeadly force against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force; or

(b) Deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.

(2) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using or threatening to use defensive force that is intended or likely to cause death or great bodily harm to another if:

(a) The person against whom the defensive force was used or threatened was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and

(b) The person who uses or threatens to use defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

(3) The presumption set forth in subsection (2) does not apply if:

(a) The person against whom the defensive force is used or threatened has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not an injunction for protection from domestic violence or a written pretrial supervision order of no contact against that person; or

(b) The person or persons sought to be removed is a child or grandchild, or is otherwise in the lawful custody or under the lawful guardianship of, the person against whom the defensive force is used or threatened; or

(c) The person who uses or threatens to use defensive force is engaged in a criminal activity or is using the dwelling, residence, or occupied vehicle to further a criminal activity; or

(d) The person against whom the defensive force is used or threatened is a law enforcement officer, as defined in s. 943.10(14), who enters or attempts to enter a dwelling, residence, or vehicle in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using or threatening to use force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer.

(4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

(5) As used in this section, the term:

(a) "Dwelling" means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent,

mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.

(b) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.

(c) "Vehicle" means a conveyance of any kind, whether or not motorized, which is designed to transport people or property.

BURDEN OF PROOF

At the time of the incident, the "defendant [bore] the burden of proof, by a preponderance of the evidence, to demonstrate entitlement to Stand Your Ground immunity at the pretrial evidentiary hearing." *Bretherick v. State*, 170 So. 3d 766, 775 (Fla. 2015). The Legislature amended section 776.032, Florida Statutes effective June 9, 2017 to shift the burden of proof to the State. The statute, as it now reads, requires the Defendant to state a "prima facie claim of self-defense immunity." Once the Defendant states a prima facie claim, it is the State's burden to establish by clear and convincing evidence to prove that the defendant is not entitled to immunity.

The issue of whether the amended statute applies retroactively is currently before the Florida Supreme Court. There is a split of authority regarding the retroactive nature of the statutory amendment within the District Courts of Appeal and the Fifth District Court of Appeal has not yet rendered an opinion on the issue. The Court agrees with the opinions rendered in *Hight v. State*, ___ So. 3d ___, 43 Fla. L. Weekly D1800a, 2018 WL 3769191 (Fla. 4th DCA Aug. 8, 2018) and *Love v. State*, 247 So. 3d 609 (Fla. 3d DCA 2018) review granted SC18-747, 2018 WL 3147946 (Fla. June 26, 2018) and finds that the statutory amendment does not apply retroactively. However, in an abundance of caution, the Court will evaluate the Defendant's Motion pursuant to both versions of the statute.

FACTS

On August 20, 2015, the Brevard County Sheriff's Office was conducting a prostitution "sting" focused on individuals utilizing "Back Page" to offer and accept services. One of the individuals subject to this sting was the Defendant's niece, Mary Ellis. After several rounds of texts, Ms. Ellis agreed to entertain an unknown male (Agent Stead) at her home where she resided with the Defendant. Agent Stead arrived at the Defendant's home and texted Ms. Ellis to let her know that he had arrived. Agents Smith and Roberts arrived separately and were present to take Ms. Ellis into custody.

Agent Stead approached the Defendant's home, knocked on the door and Ms. Ellis opened the door and invited him into the home. As Ms. Ellis turned to go back into the house, Agent Stead took her arm, turned her to face him, showed her his badge and informed Ms. Ellis that she was under arrest. As Agent Stead held her tight, Ms. Ellis immediately began screaming for her uncle, the Defendant. Agents Smith and Roberts went to the front porch and attempted to secure Ms. Ellis and place her under arrest. Agent Roberts called her by name¹ and told her to calm down.

Hearing his niece screaming, the Defendant grabbed a firearm and charged out of his room toward the front door. Agent Smith, who had a clear view into the Defendant's home, shouted "Gun, Gun, Gun" and the agents who had been holding Ms. Ellis, shoved her toward the Defendant and fled the porch. According to the Defendant, in his recorded statement taken the following day, the individuals² had "scattered" from the porch and his niece was inside his home

¹ Agent Roberts had previously interacted with Ms. Ellis although she denied recognizing him that night.

² The Defendant has maintained that he was unaware that the individuals were law enforcement officials. For the purposes of this hearing, the Court will take this statement at face value.

before he reached the door. After observing this, the Defendant went out onto his front porch and fired a “warning shot” into the air. Thereafter, the agents returned fire.

FINDINGS

By firing a warning shot into the air, the Defendant exercised deadly force. *Hosnedl v. State*, 126 So. 3d 400 (Fla. 4th DCA, 2013). In order for the current charges arising from the chaos that ensued after the Defendant fired the warning shot to be dismissed, the Court must find that the Defendant is entitled to immunity from prosecution pursuant to section 776.032, Florida Statutes. As the Defendant has claimed immunity based upon defense of a person and protection of his home, both sections 776.012 and 776.013, Florida Statutes apply.

Based upon the Defendant’s utilization of deadly force, immunity pursuant to section 776.012(2), Florida Statutes, is available if the Defendant “reasonably believe[d] that using or threatening to use such force [was] necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.” As the Defendant stated that he did not fire his gun until **after** the individuals had “scattered” into the yard, and his niece was clearly inside his house, it was not reasonable for the Defendant to believe that there was an **imminent** threat from the individuals. As there was no imminent threat to the Defendant, the firing of the Defendant’s gun was completely unprovoked per the statute and therefore unjustified. This act by the Defendant precipitated the agents’ gunfire. The Defendant’s claim of immunity fails whether the Court requires a showing by the preponderance of the evidence by the Defendant or the stating of a *prima facie* case. The Defendant used deadly force in response to a non-existent threat.

The Defendant’s claim of immunity pursuant to section 776.013(1)(b), Florida Statutes fails for the reasons set forth above. Further, the Defendant is not entitled to the presumption of

“a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another” as set forth in section 776.013(2), Florida Statutes as the agents had not entered his home, nor were they in the process of doing so. Further, the agents had not removed Ms. Ellis from her home nor were they in the process of attempting to do so when the Defendant entered the picture with his firearm.

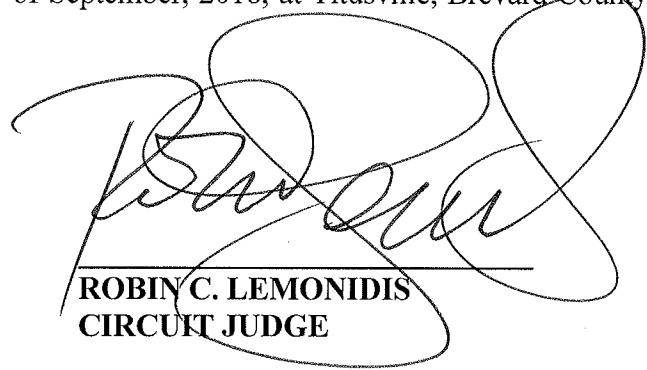
As it relates to this hearing, the Court finds it unnecessary to address the State’s arguments that the Defendant was not entitled to the presumption set forth in section 776.013(2), Florida Statutes, pursuant to section 776.013(3)(c,d), Florida Statutes.

Based upon the foregoing, it is

ORDERED AND ADJUDGED:

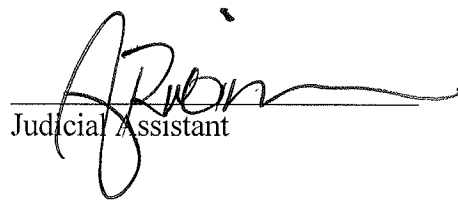
Defendant’s Motion for Declaration of Immunity and Dismissal is hereby **DENIED**.

DONE AND ORDERED this 12th day of September, 2018, at Titusville, Brevard County, Florida.


ROBIN C. LEMONIDIS
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I do certify that copies hereof have been furnished by email to the **Office of the State Attorney** and **Michael Panella, Esquire**, this 13th day of September, 2018.


Judicial Assistant