IN THE CIRCUIT COURT, 9TH JUDICIAL CIRCUIT, IN AND FOR OSCEOLA COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

v.

ELVIS PAUL TILLETT,

Defendant.

CASE NO. 2016-CF-002022

DIVISION 201

Filed in open Court this 11th day of Dec. A.D. 2017.
ARMANDO RAMÍREZ, CLERK
By TB D.C.

ORDER ON STATUTORY IMMUNITY UNDER F.S. 776.032(4)(2017)

THIS CAUSE having come on before this Court based upon the request of the State of Florida and the Defendant for this Court to rule pre-hearing on the following issues relative to the Amendment to F.S. 776.032(4)(2017) which became effective June 9, 2017:

A. Does the Amendment apply to pending cases? Yes.
B. Is the Amendment violative of Article X, Section 9 of the Florida Constitution? No.

DISCUSSION

In 2005 F.S. 776.032 was passed. It is commonly known as "Stand Your Ground Law". The relevant portion provides:

(1) 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** ... As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant. (Emphasis added)

The relevant part of F.S. 776.012 (2)(2014) provides:

> (2) A person is justified in using .... deadly force if he or she reasonably believes that using ... 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 ... 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 ... the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

There are many forms of immunity recognized in the law. In the criminal law context, the two most cited forms are use immunity and transactional immunity. Use immunity grants a witness compelled to testify in the face of 5th Amendment concerns, the right not to have that testimony used against him/her in a future prosecution. Transactional immunity goes a step further by also prohibiting any future prosecution against the witness for the offense to which the use immunity testimony applies. Accordingly, it would logically follow that use immunity is subsumed within a grant of transactional immunity. *See, F.S. 914.04, Zile v. State,* 710 So.2d 729, 732 (Fla. 4th DCA 1998) and *Mordenti v. State,* 894 So.2d 161, 177 (Fla. 2004).

The new legislation did not speak to a rule or procedure for invoking this newly created right and since it did not squarely fit into any existing procedural rule, trial courts grappled with a proper process.

It was not until April 2008 when the first guidance came from an appellate court. *See, Peterson v. State,* 983 So.2d 27 (Fla. 2008). Noting that the Legislature made it clear that it intended to establish a true grant of immunity and not simply an affirmative defense, the court looked to another state with a similar statute in trying to establish a proper procedure. *Peterson* rejected that rule 3.190(c)(4) was the controlling procedural vehicle. It established that a factual determination should be made by the trial court in a pre-trial hearing and went further by declaring that the defendant should bear the burden of establishing entitlement to immunity by a preponderance of the evidence.

In March 2009, the 4th District in *Dennis v. State*, 17 So.3d 305 (Fla. 4th DCA 2009) denied a claim of immunity under rule 3.190(c)(4) and refused to rule on the factual issues in dispute. *Dennis* had filed 2 motions to dismiss under the new statute, one under 3.190(c)(4) and another under 3.190(c)(3). As to the c4 motion, the State filed a Traverse. Taking no apparent direction from *Peterson* the *Dennis* court denied the c4 motion citing material facts at issue and stated it was unsure that it had jurisdiction to proceed under 3.190(c)(3) to rule upon the factual dispute.

The Supreme Court accepted jurisdiction in *Dennis v. State,* 51 So.2d 456, 462 (Fla. 2010) based on the certified conflict as to whether the trial court should conduct a pretrial evidentiary hearing and resolve disputed issues of material fact in an immunity claim. In a unanimous decision, the Supreme Court concluded that the "...procedure set out ... in *Peterson* best effectuates the intent of the Legislature and that the trial court errered in denying *Dennis* an evidentiary hearing on his claim of statutory immunity." The Supreme Court also concluded that the immunity motions should be treated as having been filed under Rule 3.190(b). Justice Canady writing for the majority stopped short of adopting the burden or quantum of proof established in *Peterson.*

Since the Supreme Court did not explicitly adopt the *Peterson* burden and quantum of proof as part of the "procedure" it was called to rule upon (nor did it explicitly reject it) trial courts now grappled with who had the burden and the quantum thereof at statutory pre-trial hearings. Many trial courts interpreted *Dennis* as implicitly adopting the *Peterson* burden and quantum as part of the "procedure" mentioned. Trial courts also grappled with application of rule 3.190(b) since in reading the entire rule, it would seem the motion would have to be filed prior to or at arraignment.

In November 2013, the 5th District Court of Appeal in the case of *Bretherick v. State,* 135 So.3d 337 (Fla 5th DCA 2013) certified the question of the burden and quantum of proof. In so doing, it pointed to Judge Schumann's dissenting opinion wherein it was noted that the *Dennis* court did not explicitly rule upon a burden/quantum of proof. Judge Schumann's dissent went on to point to two other statute statutes which were modeled after Florida's Stand Your Ground Law. She noted these jurisdictions placed the burden of proof upon the State pre-trial to establish the force used in self-defense was not justified. In a detailed

analysis she concluded that placing the burden on the State at the pre-trial hearing gave meaning to the legislative grant of immunity.

In July 2015, the Florida Supreme Court in *Bretherick v. State,* 170 So.3d 766 (Fla. 2015) for the first time reviewed the question of the burden and quantum of immunity proceedings. Writing for the majority, Justice Pariente concluded that "...the defendant bears the burden of proof, by a preponderance of the evidence, to demonstrate entitlement to Stand Your Ground immunity at the pretrial evidentiary hearing." At page 779 of the *Bretherick* opinion the Court specifically noted that while it recognized the legislative intent was a grant of immunity as opposed to simply an affirmative defense, that that immunity was not a "blanket immunity" and therefore, must be subject to pre-trial proof. Further, the Court noted to require the State to prove at pre-trial hearing beyond a reasonable doubt that the defendant's use of force was not justified was inconsistent with precedent and established pre-trial procedure. Justice Canady's dissent posited that the by placing the burden on the defendant, the benefit of the Stand Your Ground legislation was substantially curtailed.

On June 9, 2017, in clear response to *Bretherick (See, CS/SB 128, January 26, 2017),* the Legislature passed the following relevant Amendment to F.S. 776.032:

> (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). (Emphasis added)

So prior to the Amendment the accepted procedure, burden and quantum was that as developed and established in *Bretherick.* The Amendment shifts the burden of proof as established in *Bretherick* from the defendant or movant to the prosecution **and** changes the quantum or standard of proof from preponderance as established in *Bretherick* to clear and convincing evidence.

ANALYSIS

1. Does the Amendment apply to pending cases, i.e. cases whose offense date predated the date of enactment, to-wit: June 9, 2017?

The Legislative Amendment is silent on this issue. The effective date was June 9, 2017. The Legislature only stated that the act shall take effect upon becoming law.

It is well settled that a retroactivity analysis should start with the stated legislative intent and failing any explicit language of intent, then look to whether a statute is substantive or procedural/remedial in nature. In that absence of clear legislative intent to the contrary, there is a presumption a law applies prospectively only. However, there is a dichotomy that has developed in our jurisprudence over the application of laws affecting substantive rights and those which are remedial or procedural. A law affecting substantive rights *presumptively* applies prospectively only. A law affecting affecting remedial or procedural rights *presumptively* applies to pending cases. Our jurisprudence is also replete with decisions that recognize almost a hybrid type where the distinctions are blurred, i.e. laws that upon their enactment have procedural provisions so "intimately related" or "intertwined" with substantive rights or laws so as to withstand constitutional separation of powers challenges. In discussion of the substantive versus procedural/remedial dichotomy, courts have cautioned that mechanical application of these definitions to separate one from the other can fall short of consistent application. Without passing on Constitutional concerns, our Supreme Court has declined to adopt amendments to the Evidence Code to the "extent they are procedural". *Landgraf v. USI Film Products,* 511 U.S. 244, 255-265, 275; *Metropolitan Dade County v. Chase Federal Housing Corp.,* 737 So.2d 494 (Fla. 1999); *Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.,* 67 So.3d 187, 194 (Fla. 2011); *Arrow Air, Inc. v. Walsh,* 645 So.2d 422, 424 (Fla. 2004); *Caple v. Tuttle's Design-Build, Inc.,* 753 So.2d 49, 54 (Fla. 2000); *In re Commitment: Cartwright v. State of Florida,* 870 So.2d 152, 158 (Fla. 2004); and *In Re: Amendments to the Florida Evidence code,* 210 So.3d 1231, 1239 (Fla. 2017).

Almost as if inviting Legislative response, our Supreme Court in *Bretherick* made mention that by enacting an immunity procedure it was doing what the Legislature failed to do arguably making an inference that it was doing the Legislature's job. *Id. Pages 775 and 778.*

In short there is nothing in the Amendment by which this Court can conclusively find legislative intent as to whether the statute would apply to pending cases.

The above being said, Courts have generally held that laws that create, define and regulate rights, duties and obligations to persons or their property or, as it relates to criminal law declares what acts are crimes and prescribes punishment therefor, are substantive in nature and, therefore, within the purview of the legislative branch. Whereas, procedural law is the 'machinery of the judicial process' and provides the means, mode, methods, order, process and procedures to apply and enforce those duties, rights, obligations and in criminal law the procedures or steps by which one who violates the law is punished. Procedural laws are generally the purview of the judicial branch. See, *Allen v. Butterworth,* 756 So.2d 52, 60 (Fla 2000); *Benyard v. Wainwright,* 322 So.2d 473, 475 (Fla. 1975); *State v. Garcia,* 229 So.2d 236 (Fla. 1969); and *Adams v. Wright,* 403 So.2d 391 (Fla. 1981); *Article V, Section 2(a)* Florida Constitution and Florida Rules of Criminal Procedure, 272 So.2d 65, 55 (Fla. 1972).

The State argues that the Amendment imposes new legal burdens or consequences and shifts the burden of proof from one party to another. The State argues that taken together these changes affect substantive rights, liabilities and duties. Therefore, the State argues the Amendment is a substantive change in the law which cannot apply retroactively. To support this proposition, it cites, inter alia, *Smiley v. State,* 966 So.2d 330 (Fla 2007), *Mayo v State,* 159 So.3d 917 (Fla 5th DCA 2015), *Pondella Hall for Hire v. Lamar, 866 So.2d 719, 73 (Fla 5th DCA 2004); Arrow Air v. Walsh,* 645 So.2d 422 (Fla 1994) and *Bretherick.* This Court cannot agree. *Smiley* dealt with the actual abrogation of the common law duty to retreat created by the new statute and the State's objection at trial to the proposed jury instruction thereon. Smiley's offense date pre-dated the statute which was silent on retroactivity. At page 335, the Court noted that "...the **right** of *Smiley* to use deadly force in self-defense in his taxi did not exist prior to section 776.013." (Emphasis added) On that same page in a detailed discussion

of procedural/remedial changes versus substantive changes and their applications, the *Smiley* court stated, "...This legislation clearly constitutes a substantive change in the law, rather than a procedural/remedial change in the law, because **it alters the circumstances** in which it is considered **a criminal act** to use deadly force without first needing to retreat." (Emphasis added)

Arrow Air dealt with the remedial private sector Whistle Blower's Act and its application to a cause of action that pre-dated the statute. Because this remedial statute gave the employee a substantive right to bring suit that he did not previously have, the Court correctly found its retrospective application would subject the employer to a new liability to suit for it's past conduct that it did not have at the time of the enactment of the remedial statute. In other words, no cause of action existed against the employer prior to the enactment.

The State's argument that the Amendment creates a new legal burden or consequence and is therefore, a substantive change is unavailing. This Court does not see the subsequent statutory changes of shifting the burden of proof and altering the quantum thereof to be a new legal burden, liability or consequence as supported by case law. Again, no legal right has been created, altered or modified thereby. No crime has been created or any punishment prescribed thereby. Additionally, Courts have consistently held that matters relating to burdens of proof are generally procedural in nature. *See, Shaps v. Provident Life & Accident Insurance Co.,* 826 So.2d 250, 254 (Fla. 2002); *Walker & LaBerge, Inc. v Halligan,* 344 So.2d, 239, 243 (Fla. 1977); *Stuart L. Stein, P.A. v Miller Industries, Inc., 564 So.2d 539 (Fla 4th DCA 1990),* Kenz v. Miami-Dade County, *116 So.2d 461, 464 (Fla. 3rd DCA 2013).*

Courts have long held that no one has a "vested right in any mode of procedure" and that changes or alterations to the burden of proof are not viewed as substantive changes. *See, Walker & LaBerge, Inc. v.Halligan,* 344 So.2d 239, 243 (Fla. 1977); *Kenz v. Miami Dade County,* 116 So3d 461, 464 (Fla 3d DCA 2013); and *Shaps v. Provident Life & Accident Ins. Co.,* 826 So2d 250, 254 (Fla. 2002).

What appears to have happened is the Legislature enacted a law providing for a substantive right. At that time, it could have enacted a procedure to include the burden and quantum of proof to apply to that substantive right and same would have been seen (at least by this Court) to be so intertwined with the

substantive right created that it would have passed Constitutional muster. However, as a remedial measure the Legislature has years after the original enactment now come back in response to the *Bretherick* invitation and made a procedural amendment.

This Court finds that the Amendment is procedural. It does not establish or define a new substantive right, duty or obligation. It does not create a new defense to a crime. The amendment does not create a new legal burden or legal consequence as this Court interprets same according to the case precedent. It does not alter or modify the substantive immunity right previously established. . It does not declare or modify the elements of a crime, decriminalize conduct or prescribe a punishment. Instead it speaks to the 'machinery of the judicial process' and provides the means, method, order and process by which a claim of immunity is enforced within the judicial system under the statute. This Court finds the Amendment to be procedural and presumptively applicable to pending cases.

2. Is the Amendment violative of Article X, Section 9 of the Florida Constitution?

Citing, inter alia, *Smiley* and trial court decisions of the 11th Judicial Circuit, the State argues that should this Court find application to pending cases, then the Amendment is violative of Article X, Section 9 of the Florida Constitution.

Article X, Section 9 (formerly Article 3, Section 32) states: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed."

The Florida Supreme Court has held that changes to a statute which are not substantive in nature, i.e. procedural or remedial, are not Constitutionally infirm even when applied to prosecutions for offenses committed before the legislative change was made. Laws enacted during pending prosecutions reducing the number of peremptory challenges and procedures under which prosecutions are conducted have been upheld. See, *Mathis v. State,* 31 Fla. 291 (Fla. 1893); *Lovett v. State,* 33 Fla. 389 (Fla. 1894); *Lee v. State,* 128 Fla. 319, 321-22 (Fla 1937); *Justus v. State,* 438 So.2d 348, 368-69 (Fla. 1983); and *State v. Watts,* 558 So.2d 994, 999 (Fla. 1990).

Again, *Smiley* dealt with a substantive change in the law to a pending case and the resulting manner the accused could be prosecuted. It dealt with the new statute's actual abrogation of the common law duty to retreat, a right not available to *Smiley* prior to its enactment, and the State's objection at trial to the proposed jury instruction thereon. It clearly substantively affected the prosecution of the accused.

This Court does not find the application of the Amendment to pending cases to be violative of Article X, Section 9, Florida Constitution. This Court has not been explicitly called upon by the parties to rule as to any other Constitutional issue relative to this statute and accordingly, does not do so.

Accordingly, it is hereby ORDERED and ADJUDGED:

The State's Objection on the grounds cited is DENIED.

DONE and ORDERED in Chambers at Kissimmee, Osceola County, Florida this 11 day of December, 2017.

ELAINE A. BARBOUR
CIRCUIT JUDGE

COPIES FURNISHED TO:

CHRISTOPHER SMITH, ASA
PETER SCHMER, APD