

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 2009

JOHN CHARLES GRAY, JR.

Appellant,

v.

Case No. 5D08-3486

STATE OF FLORIDA,

Appellee.

/

Opinion filed May 29, 2009

Petition for Writ of Certiorari Review of Order
from the Circuit Court for Orange County,
Jennifer Davis, Judge.

Mark L. Horwitz and Cassandra A. Snapp,
of Law Office of Mark L. Horwitz, P.A., for Appellant.

Bill McCollum, Attorney General, Tallahassee,
and Ann M. Phillips, Assistant Attorney General,
Daytona Beach, for Appellee.

ON MOTION FOR CERTIFICATION

GRIFFIN, J.

After having denied the petition for writ of certiorari, we now have this case on a
Motion for Certification of a Question of Great Public Importance, to wit:

In determining a defendant's motion to dismiss on the
grounds of immunity from prosecution under § 776.032
Florida Statutes, what is the procedure the trial court must
follow, what is the correct allocation of the burden of proof,
and what standard of proof must a party meet in order to
carry the burden allocated to him or her?

The question arises in light of two recent decisions by our sister courts. In *Peterson v. State*, 983 So. 2d 27 (Fla. 1st DCA 2008), the First District Court of Appeal concluded that the right to immunity from criminal prosecution afforded in section 776.031(1), Florida Statutes (2007) (commonly known as the "stand your ground" law) is to be determined by the court after an evidentiary proceeding in which the criminal defendant has the burden of proof by a preponderance of the evidence. Recently, the Fourth District has disagreed with the First District in *Velasquez v. State*, 34 Fla. L. Weekly D266 (Fla. 4th DCA Feb 2, 2009).¹ In *Velasquez*, the panel majority ruled that Florida Rule of Criminal Procedure 3.190(c)(4) is the proper device for testing this immunity and that whenever the State traverses and properly disputes the facts contained in the defense motion, the motion must be denied and the issue determined at trial.

In this proceeding, Defendant has taken a view different from that of both courts. Defendant urges that because the burden remains with the State to prove its case, including the absence of self-defense, the proper approach is to have the court make the determination at a proceeding much like the one *Peterson* requires, except that the burden at such a proceeding would be on the State to establish that Defendant is not entitled to immunity.

In our prior opinion, which was issued virtually simultaneously with *Velasquez*, we adopted the procedure described in *Peterson*. Now, with the benefit of *Velasquez*, we see no reason to alter our opinion. In the case before us, the trial court conducted both a *Peterson*-type hearing, as well as a rule 3.190(c)(4) hearing, and denied

¹ See also *Dennis v. State*, __ So. 2d __, 2009 WL 605356 (Fla. 4th DCA Mar. 11, 2009).

Defendant's claim of immunity in both. The court explained that Defendant did not meet his burden of establishing his claim of immunity by a preponderance of the evidence.

We elect not to certify the question posed at this time, although it appears from the number of cases already resulting in opinions and the differing views expressed about how the new statutory immunity should be determined, that this is a question that eventually will require a definitive answer from our high court. In this case, we will take it up, if raised, on plenary appeal. Accordingly, the Motion to Certify is denied.

MOTION DENIED.

SAWAYA and MONACO, JJ., concur.