Love v. State

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Last month, the Florida Supreme Court heard argument in a case that could have significant implications for laws regarding self-defense in that State. The implications of this case are not immediately obvious. The question presented is whether a law setting rules for pretrial proceedings in criminal prosecutions applies in prosecutions for conduct that occurred before the law's effective date. This case is significant because the Florida Supreme Court may finally settle a fifteen-year debate about statutory self-defense immunity.

From Duty To Retreat to Self-Defense Immunity

Before 2005, Florida law required a person confronted with a threat of death or serious bodily harm to retreat from his assailant, if possible. If he chose to stand his ground, and if a jury concluded that retreat was possible, then that person could be held criminally liable for the force he used to defend himself or others.[1]

Nearly a century ago, Justice Oliver Wendell Holmes noted in *Brown v. United States* that it is not reasonable to demand that a person confronted with lethal force "should pause to consider whether a reasonable man might not think it possible to fly with safety."[2] The most common criticism of requiring victims of violent attacks to make decisions under the shadow of such a rule is that innocent lives can be lost. In 2005, Florida - much like other states and the federal government - eliminated the so-called "duty to retreat."[3]

Florida's self-defense law—dubbed a "Stand Your Ground Law"—not only abolished the duty to retreat but also offered immunity from criminal prosecution to those who justifiably use force in defense of self and others.[4]

But it was not clear to the courts how they should adjudicate self-defense immunity. Consequently, in 2017, the Florida legislature shored up the law's sanctuary by requiring the State to carry the burden of disproving a prima facie claim of self-defense immunity in a pre-trial hearing by clear and convincing evidence.[5]

That amendment met immediate resistance in Florida's trial courts. One judge *sua sponte* questioned the amendment's constitutionality under Florida's constitution, which vests the power to promulgate procedural rules in the Florida Supreme Court.[6] Other judges followed suit, shifting the burden in pre-trial immunity hearings to the defendant in other cases and thereby subjecting those defendants to the same protracted limbo from which Florida's law was designed to protect them.

Love v. State

Love v. State is one such case: Tashara Love, the defendant, is charged with attempted second-degree murder for allegedly shooting Thomas Lane, who had struck her daughter, shoved her to the ground, and was poised to strike again. The court held a hearing to decide whether Ms. Love was immune from prosecution because she had acted in defense of her daughter. The judge agreed with Ms. Love that the State failed to carry its burden to prove that she did not act in self-defense by clear and convincing evidence.[7] It nevertheless rejected Ms. Love's claim of immunity because it concluded that the amendment allocating the burden to the State was unconstitutional.[8]

Ms. Love petitioned the Third District Court of Appeals for a writ of prohibition. The appellate court agreed with her that the amendment was constitutional because the Florida legislature has the power to allocate the burden of proof to the State.[9] It nevertheless denied the petition because it found that the amendment did not apply "retroactively" to hearings for defendants charged with conduct that occurred before the amendment's effective date.[10]

The Florida Supreme Court granted Ms. Love's petition for discretionary review to decide whether the law applies "retroactively." Neither Ms. Love nor the State, which agrees with Ms. Love that the amendment is constitutional, has asked the Court to rule on the amendment's constitutionality. The questions are nevertheless closely related.

Substance and Procedure

Both questions—constitutionality and retroactivity—arguably turn on the elusive distinction between substance and procedure.

Article V, Section 2 of Florida's constitution vests in the Florida Supreme Court the power to "adopt rules for the practice and procedure in all courts."[11] From this, Florida courts have divined a division of labor: "Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law."[12] The division is not absolute, however: the Legislature also has the power to enact procedural laws when

1 *Weiand v. State*, 732 So.2d 1044 (Fla. 1999). The duty was subject to an exception known as the "Castle Doctrine": a person had no duty to retreat within his or her residence. *Id.* at 1049. Until 1999, however, that "privilege of nonretreat" was not available when the assailant was also an occupant of the residence, meaning that victims of domestic violence were required to retreat from their own homes. *Id.* at 1051.

2 *Brown v. United States*, 256 U.S. 335, 343 (1921)..

3 Pamela Cole Bell, *Stand Your Ground Laws: Mischaracterized, Misconstrued, Misunderstood*, 46 U. Mem. L. Rev. 383, 400 (2015).

4 Fla. Stat. § 776.032(1).

5 Fla. Stat. § 776.032(4).

6 Order on "Stand Your Ground" Hearing, *State v. Rutherford*, No. F16-12827, (Fla. 11th Jud. Cir. Ct. July 3, 2017).

7 Order Denying Motion To Dismiss, *State v. Love*, No. F15-26627, (Fla. 11th Jud. Cir. Ct. Oct. 5, 2017).

8 *Id.*

9 *Love v. State*, 247 So.3d 609, 613 (Fla. 3d DCA 2018).

10 *Id.* at 612.

11 Fla. Const. art. V, § 2(a).

12 *Allen v. Butterworth*, 756 So.2d 52, 59 (Fla. 2000).

"the procedural provisions . . . are intertwined with substantive rights."[13] If the amendment allocating the burden of proof is either a "substantive" provision or a "procedural" provision intertwined with substantive rights, then it is within the Florida legislature's power.[14]

Likewise, in deciding whether a law applies to conduct that occurred before its effective date, "a key determination is whether the statute constitutes a procedural/remedial change or a substantive change in the law."[15] There is a "presumption against retroactive application for substantive changes," while "statutes relating to remedies or modes of procedure . . . do not come within . . . the general rule against retrospective operation of statutes."[16] At least according to the appellate court, if the amendment allocating the burden of proof is substantive, then it presumptively does not apply in Love's case, while if it is remedial/procedural, then it might.

Although the Florida Supreme Court agreed to consider only the retroactivity question, the constitutional issue loomed large at argument: if the Court granted Ms. Love's request to hold that the amendment is procedural in nature, would its decision cast doubt on the constitutionality of the amendment and dozens of other statutes allocating the burden of proof? Does the Court even need to navigate a path between the separation of powers and retroactivity? After all, the amendment sets rules for Stand Your Ground hearings—not the elements of the crime at issue in those hearings—and Ms. Love sought to apply those rules to a hearing that occurred *after* the amendment's effective date.[17]

It remains to be seen how the Court will resolve the retroactivity issue and whether, in doing so, it will weigh in on the constitutionality of the statute. If it does, then its decision may be a coda in Florida's movement from enforcing a duty to retreat to proactively safeguarding each resident's prerogative "to 'repel force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'"[18]

13 *Caple v. Tuttle's Design-Build, Inc.*, 753 So.2d 49, 54 (Fla. 2000).

14 *See Love*, 247 So.3d at 611.

15 *Smiley v. State*, 966 So.2d 330, 334 (Fla. 2007).

16 *Id.* (internal quotation marks and emphasis omitted).

17 *See Landgraf v. USI Film Prod.*, 511 U.S. 244, 291 (1994) (Scalia, J. concurring).

18 *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (brackets omitted) (quoting 1 William Blackstone, Commentaries on the Law of England *145 n.42 (St. George Tucker ed., 1803)).