DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

WILKIN JOSE ACOSTAFIGUEROA,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

No. 4D2023-1542

[November 1, 2023]

Petition for Writ of Certiorari to the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jeffrey Dana Gillen, Judge; L.T. Case No. 2021CF007764AXXXMB.

Glenn H. Mitchell, West Palm Beach, for petitioner.

Ashley Moody, Attorney General, Tallahassee, and Heidi L. Bettendorf, Senior Assistant Attorney General, West Palm Beach, for respondent.

LEVINE, J.

Criminal defendant Wilkin Jose Acostafigueroa petitions for certiorari review of an order striking as untimely a motion to dismiss, which claimed self-defense immunity under section 776.032(1), Florida Statutes (2022).[1] The trial court concluded that the time limit in Florida Rule of Criminal Procedure 3.190(c), which requires motions to dismiss to be filed before or at arraignment, applied in this case.

We grant the petition and quash the trial court's order for three reasons. First, a motion to dismiss claiming self-defense immunity from prosecution may be entertained at any time before trial pursuant to rule 3.190(c)(3). As discussed below, the Florida Legislature in section 776.032(1) has granted immunity to a person who justifiably uses force, and rule 3.190(c)(3) permits this immunity claim to be raised at any time

[1] Petitioner sought prohibition or mandamus relief, and this court redesignated this case as a certiorari proceeding. *Conover v. State*, 346 So. 3d 56 (Fla. 4th DCA 2022).

before trial. Second, a motion to dismiss based on self-defense immunity is a "fundamental ground[]" not subject to waiver for failure to comply with the time restrictions in rule 3.190(c). Third, the trial court failed to recognize its "discretion" to "grant[] further time" and permit the filing of a motion to dismiss after arraignment. The trial court also abused its discretion by not allowing the motion to dismiss where the motion was filed before the case had even been set for trial and where there was no showing of disruption to the criminal proceedings.

In September 2021, petitioner was arrested for attempted first-degree murder with a deadly weapon. According to the probable cause affidavit, petitioner attacked a man in a restaurant for no apparent reason. Petitioner struck the victim over the head with a beer bottle and then stabbed the victim with the broken bottle several times. The victim suffered severe lacerations. A witness identified petitioner as a regular at the establishment and corroborated the victim's account that petitioner attacked the victim without provocation.

Petitioner waived arraignment the next day and again waived arraignment after the state filed an amended information in March 2023. On April 21, 2023, one year and seven months after the initial waiver of arraignment in September 2021, petitioner filed the motion to dismiss at issue claiming for the first time that he acted in self-defense and that he was immune from prosecution under section 776.032(1), Florida Statutes (2022). In the motion, petitioner alleged that the victim struck him with the bottle or mug first. At the time petitioner's motion to dismiss was filed, the case had not been set for trial. The state moved to strike the motion as untimely, because it was not filed at or before arraignment, relying on rule 3.190(c). Petitioner moved the court for additional time to file the motion, which the state opposed.

The court entered an order denying petitioner's motion for additional time and granted the state's motion to strike petitioner's motion to dismiss. The order stated, in pertinent part:

> In effect, the Motion asks this Court to retroactively grant additional time within which to file the already-but-too-late filed §776.032-motion. . . . [T]he Court finds . . . that the law contemplates that a claim seeking dismissal based on bona fide stand-your-ground justification must be made in a timely motion pursuant to Fla. R. Crim. P. 3.192[sic][2].

[2] Rule 3.192 refers to motions for rehearing. The court was clearly referring to rule 3.190, which governs motions to dismiss.

A petition for writ of certiorari is the proper vehicle to seek relief from an order striking as untimely a motion to dismiss under section 776.032. *See Conover*, 346 So. 3d at 56-57. "Certiorari relief is appropriate when . . . the trial court's ruling is flawed by legal error thereby precluding proper determination on the movant's immunity claim." *Jimenez v. State*, 353 So. 3d 1286, 1287 (Fla. 2d DCA 2023) (citation and internal quotation marks omitted); *see also Casanova v. State*, 335 So. 3d 1231, 1232 (Fla. 3d DCA 2021) (stating certiorari relief is appropriate when "the trial court's order departs from essential requirements of law, resulting in material injury that cannot be adequately remedied on appeal").

Petitioner has claimed immunity under section 776.032(1), Florida's Stand Your Ground statute. Section 776.032 states:

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

(emphasis added).

The Florida Supreme Court has held that Florida Rule of Criminal Procedure 3.190(b) "provides the appropriate procedural vehicle for the consideration of a claim of section 776.032 immunity." *Dennis v. State*, 51 So. 3d 456, 462 (Fla. 2010). Rule 3.190 provides:

> (b) Motion to Dismiss; Grounds. All defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information, whether the same shall relate to matters of form, substance, former acquittal, former jeopardy, or any other defense.
>
> (c) Time for Moving to Dismiss. *Unless the court grants further time, the defendant shall move to dismiss the indictment or information either before or at arraignment.* ***The court in its discretion*** *may permit the defendant to plead and thereafter to file a motion to dismiss at a time to be set by the court. Except for objections* ***based on fundamental grounds****,*

> *every ground for a motion to dismiss that is not presented by a motion to dismiss within the time provided herein, shall be considered waived. However, the court may at any time entertain a motion to dismiss on any of the following grounds:*
>
> (1) The defendant is charged with an offense for which the defendant has been pardoned.
>
> (2) The defendant is charged with an offense for which the defendant previously has been placed in jeopardy.
>
> (3) *The defendant is charged with an offense for which the* ***defendant previously has been granted immunity****.*
>
> (4) There are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant.

(emphasis added).

I. Statutory right to immunity

Initially, we find the trial court erred because a motion to dismiss claiming section 776.032 immunity from prosecution may be entertained by a court at any time before trial under rule 3.190(c)(3). Rule 3.190(c)(3) expressly states that "the court *may at any time* entertain a motion to dismiss on any of the following grounds: . . . The defendant is charged with an offense for which the defendant *previously has been granted immunity*." (emphasis added). The Florida Legislature has granted immunity to anyone who justifiably "uses or threatens to use force." § 776.032(1), Fla. Stat. The immunity statute, section 776.032, plainly states that a person who justifiably uses force is "immune from criminal prosecution," a term which "includes arresting, detaining in custody, and charging or prosecuting the defendant." "It is a basic rule of statutory construction that 'the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.'" *Dennis*, 51 So. 3d at 463 (quoting *Martinez v. State*, 981 So. 2d 449, 452 (Fla. 2008)).

As the supreme court recognized in *Dennis*, "section 776.032 contemplates that a defendant who establishes entitlement to the statutory immunity will not be subjected to trial." *Id.* at 462. "Section 776.032(1) expressly grants defendants a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally

justified force. The statute does not merely provide that a defendant cannot be convicted as a result of legally justified force." *Id.* Further, "the grant of immunity from 'criminal prosecution' in section 776.032 must be interpreted in a manner that provides the defendant with more protection from prosecution for a justified use of force than the probable cause determination previously provided to the defendant by rule." *Id.* at 463. Thus, interpreting section 776.032 in a manner to provide petitioner with more protection from prosecution would be consistent with permitting petitioner to file a motion to dismiss after arraignment in this case.

We have previously found that the legislature did not restrict the timeframe for determining immunity. In *Velasquez v. State*, 9 So. 3d 22, 24 (Fla. 4th DCA 2009), *abrogated on other grounds by Dennis*, 51 So. 3d 456, this court explained:

> By defining "criminal prosecution" to include the arrest, detention, charging, or prosecution of the defendant, the statute allows for an immunity determination at any stage of the proceeding. Created to eliminate the need to retreat under specified circumstances, the statute authorized the immunity determination to be made by law enforcement officers, prosecutors, judges, and juries. In enacting the statute, however, the legislature did not restrict the time frame for determining immunity, but rather provided a time continuum stretching across the entire criminal process.

The Second District has also recognized that the applicable rules do not restrict the timing of a motion claiming section 776.032 immunity from prosecution. *See Lewis v. State*, 251 So. 3d 310, 311 (Fla. 2d DCA 2018) ("[N]either the Florida Rules of Criminal Procedure nor the Florida Rules of Appellate Procedure address the timing of Stand Your Ground motions to dismiss . . . ."); *see also* Crim. Pro. Rules Comm., minutes of meeting (Oct. 18, 2019) (declining to add to the rule a timeframe for filing a Stand Your Ground motion).

The immunity granted by section 776.032 exists even if the immunity has not been previously adjudicated by a court. The statutory immunity is self-executing, like the transactional immunity once provided by section 914.04, Florida Statutes.[3] *Jenny v. State*, 447 So. 2d 1351, 1353 (Fla. 1984) ("By its very plain meaning, the statute [section 914.04] is self-executing."). Immunity under section 776.032 is granted by operation of

[3] Transactional immunity is no longer provided by statute. *Meek v. State*, 566 So. 2d 1318, 1321 n.1 (Fla. 4th DCA 1990).

law whenever a person justifiably uses force. Petitioner's motion to dismiss claiming self-defense immunity from prosecution falls within rule 3.190(c)(3) because petitioner contends that he was "charged with an offense for which the defendant previously has been granted immunity." Because rule 3.190(c)(3) applies, the motion to dismiss may be filed "at any time," including after arraignment.

II. Fundamental grounds

We further find the trial court erred because a motion to dismiss asserting a claim of self-defense immunity falls within the exception in rule 3.190(c) for motions based on fundamental grounds. Again, rule 3.190(c) states: "*Except for objections based on fundamental grounds*, every ground for a motion to dismiss that is not presented by a motion to dismiss within the time provided herein, shall be considered waived." (emphasis added).

In *Meek*, 566 So. 2d at 1319, this court found that a claim of transactional immunity was not time-barred for failure to raise it during the original trial proceedings, due to its fundamental nature. In discussing rule 3.190(c), we stated: "[T]he language of Rule 3.190 does suggest that a claim of immunity is of a fundamental nature . . . ." *Id.* This court relied on *State v. Johnson*, 483 So. 2d 420 (Fla. 1986), which "held that a claim of double jeopardy may be raised for the first time in collateral proceedings. That ruling was predicated on the fundamental nature of the issue, rather than the provisions of the criminal rules." *Meek*, 566 So. 2d at 1320. "Similarly, it appears that a claim of transactional immunity is of a fundamental nature." *Id.* "Case law has held that transactional immunity precludes the exercise of a court's jurisdiction over a person granted immunity. Accordingly, it would appear that immunity, like double jeopardy, is a fundamental issue . . . ." *Id.* at 1321 (citations omitted).

Additionally, the supreme court has indicated that immunity is jurisdictional and thus is a fundamental ground that may be raised at any time in a motion to dismiss. In *Tsavaris v. Scruggs*, 360 So. 2d 745, 747 (Fla. 1977), the supreme court stated that the proper procedure "for raising the issue of immunity" is to "challenge the jurisdiction of the . . . court to proceed by claiming immunity . . . ." (citation omitted). "The question whether [the defendant] is immune from prosecution . . . may also be stated as the question whether the circuit court has jurisdiction to try him." *Id.* "A court does not have jurisdiction to try a defendant . . . if he is entitled to a discharge because of a violation of his immunity from prosecution . . . ." *Sherrod v. Franza*, 427 So. 2d 161, 163 (Fla. 1983).

Applying the foregoing authority, a motion to dismiss based on section 776.032 immunity is fundamental in nature. Rule 3.190(c) expressly provides that "objections based on fundamental grounds" are not subject to the time limitations in the rule for filing a motion to dismiss. Pursuant to the plain language of rule 3.190(c), petitioner was not limited by any time restrictions for filing a motion to dismiss based on section 776.032 immunity. By not filing the motion to dismiss at or before arraignment, petitioner did not waive his right to raise his claim before trial.

III. Discretion under rule 3.190(c)

Additionally, we find the trial court erred, and failed to recognize its discretion, in denying petitioner's motion as untimely. Rule 3.190(c) expressly states: "*Unless the court grants further time*, the defendant shall move to dismiss the indictment or information either before or at arraignment. The court *in its discretion* may permit the defendant to plead and thereafter to file a motion to dismiss at a time to be set by the court." (emphasis added). Thus, the plain language of the rule, which applies to all motions to dismiss, contemplates permitting the filing of a motion to dismiss after arraignment. However, the trial court denied petitioner's motion on the sole basis that it was not filed at or before arraignment. The trial court did not consider other factors, such as the allegation in the petition that the case had never been set for trial, or the absence of any concerns about gamesmanship by the defense or disruption to the criminal proceedings. *See Graham v. State*, 24 So. 3d 781, 782 (Fla. 5th DCA 2009) (granting certiorari where the trial court was "[a]pparently unaware that it had the discretion to extend the time for ruling on [a] motion"); *Broadway v. State*, 179 So. 3d 560, 562 (Fla. 4th DCA 2015) (reversing where the trial court mistakenly believed it had no discretion).

Martinez v. State, 44 So. 3d 1219 (Fla. 1st DCA 2010), is instructive. In *Martinez*, the defendant filed a motion asserting entitlement to self-defense immunity seven weeks before trial. *Id.* at 1220. The trial court found that there was insufficient time to hold a pretrial evidentiary hearing. *Id.* The First District ordered the trial court to conduct a separate evidentiary hearing prior to trial. *Id.* at 1220-21. The First District recognized that "the Stand Your Ground law was intended to establish a true immunity and not merely an affirmative defense" and that "a defendant may raise the question of statutory immunity pretrial . . . ." *Id.* at 1220 (citation omitted). The court stated: "Where, as here, entitlement to the immunity is claimed well in advance of a scheduled trial date, declining to conduct a pretrial hearing and determine the immunity issue prior to trial operates to deprive a defendant of at least some measure of the 'true' immunity contemplated by legislature." *Id.* The *Martinez* court noted the state's

concerns that "because there are no clear time constraints on raising a statutory immunity claim, the potential exists for defendants to abuse the process by withholding their claim of immunity until a point at which some procedural or substantive advantage may be unfairly gained." *Id.* at 1221. However, the court found that those concerns were "simply not implicated in this case." *Id.*

Like in *Martinez*, here, petitioner's motion to dismiss was filed "well in advance of a scheduled trial date." *Id.* at 1220. Indeed, the petition alleges the case has never been set for trial. Additionally, like in *Martinez*, any concerns about gamesmanship are not implicated in this case. By denying the motion to dismiss on the sole basis that it was not filed before or at arraignment, the trial court failed to recognize and properly exercise its discretion to permit petitioner to file a motion to dismiss.

Accordingly, for all the above reasons, the petition is granted since the trial court departed from the essential requirements of law, causing material injury that cannot be remedied on appeal. Thus, we quash the trial court's order summarily denying the motion to dismiss as untimely and direct the trial court to hold further proceedings consistent with this opinion.

Petition granted.

KUNTZ and ARTAU, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.