

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC17-1978

STATE OF FLORIDA,

Petitioner,

vs.

PETER PERAZA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the Appellant, and Respondent was the Appellee in the Fourth District Court of Appeal (“Fourth District”).

The parties will be referenced as they appear before this Court. The Petitioner may also be referenced as the “State”, and the Respondent may also be referenced as “Peraza”.

STATEMENT OF THE CASE AND FACTS

On December 10, 2015 the Respondent, a Police Officer, was charged by indictment with Manslaughter with a Firearm (R. 1-5). On January 20, 2016, the Respondent filed a motion to dismiss alleging he was immune from prosecution pursuant to F.S. § 776.032 (R. 224-242). On June 8, 2016, the Respondent filed an Amended Motion for Immunity, alleging immunity pursuant to F.S. § 776.032 and F.S. § 776.05 (R. 491-510). The state filed a written response arguing that pursuant to State v. Caamano, 105 So. 3d 18 (Fla. 2d DCA 2012), the Respondent was not entitled to claim immunity under F.S. § 776.032, rather he was required to proceed pursuant to F.S. § 776.05 (R. 528-530), a statute which applies to the actions of police officers in the line of duty. The trial court declined to rule on the state argument that the Respondent was precluded from claiming immunity pursuant to F.S. § 776.032 until after the evidentiary hearing (T. Vol. 1 pp. 5-6).

After the evidentiary hearing was held, the trial court entered a written order. The undisputed facts are that the victim was walking home, during the day, with an air rifle he had purchased from a pawn shop; several people saw him openly carrying the gun and called 911; BSO Deputies, including the Respondent, responded to the scene; the victim failed to stop when commanded by the officers; and the Respondent shot and killed the victim (R. 548). The Court held that other facts and circumstances were

in dispute. Specifically, the Court credited the testimonies of the defense eyewitnesses who all stated that the victim was pointing the air rifle as he turned toward Officer Peraza. The Court noted that the testimony of state witness Michael McCarthy whose account was in contradiction to that of the others, was not credible (R. 565-566). McCarthy testified that the victim turned but never moved the rifle from behind his head (R. 564- 565).

The trial court addressed the state's legal argument that pursuant to Caamano, the Respondent was not entitled to claim immunity pursuant to the Stand Your Ground Law, and found as follows:

As noted earlier, Caamano, supra, is clearly distinguishable from the case sub judice. The decision in Caamano and Florida Statute 776.05 specifically applied to an officer's use of force while making an arrest. "[I]t is undisputed that the alleged crime occurred during the course of an arrest...." Caamano at 20. The defendant in this case was responding to an emergency and was investigating a disturbance. As the Court in Tillman v. State, 934 So. 2d 1263 (Fla 2006) found, "Section 776.051(1) does not address the use of force to resist an officer when there are grounds for an arrest but no actual arrest is taking place." Tillman at 1270. The Florida Supreme Court also stated "We reject the Fifth District's use of the interpretive maxim in pari materia to engraft the prohibition ... when an actual arrest is not involved." Tillman at 1269. The State urges this Court to apply to 776.05 the extension of "engaged in the execution of a lawful duty" to the statutory language of "arrest" noting the legislative change to 776.051(1) enacted by the legislature in 2010 as a response to Tillman and reflected in the change to the standard jury instructions for use of force. Yet, this Court must find that the Legislature, knowing of the decision in Tillman and specifically amending 776.051 at the same time, chose not to similarly amend 775.05. Additionally, Caamano was decided in 2012, again after the amendment

to 776.051(1) and limited it's holding to arrests. Therefore, the limitation on law enforcement officers to proceed under 776.05 to the exclusion of 776.032 is distinguishable from the present case as such limitation only applies, if at all, to cases where the officer is in the process of making an arrest. Therefore, this Court finds that the defendant herein is eligible to seek immunity under Florida Statute 776.012 and 776.032 in the instant case.

(R. 577-578).

The trial court alternatively found, in a footnote, if the state was correct and the Respondent was required to proceed solely pursuant to section 776.05, irrespective of the disputed facts regarding whether or not the officers were effecting an arrest or whether the victim pointed the rifle at the Respondent, that the Respondent would be entitled to the protections of 776.05, and that the Court would still dismiss the case (R. 578).

The Fourth District Court of Appeal found as follows:

We conclude the circuit court's findings of fact are supported by competent substantial evidence. The record supports the circuit court's finding that the officer's account of the incident was consistent with the other credible witnesses' testimony and the physical evidence. The record also supports the circuit court's finding that the man ignored repeated warnings to stop and drop the weapon, turned towards the officers, and pointed his weapon at the officers, causing the officer to be in fear for his life and the lives of others, prompting the officer to shoot at the man, resulting in the man's death.

The circuit court's most significant finding of fact is that the officer was responding to an emergency and investigating a disturbance, but was not making an arrest. That finding of fact is significant because, if true, it eliminates section 776.05's application to this case and distinguishes this

case from Caamano, where three officers already had detained the suspect before Officer Caamano used unnecessary force against the suspect.

While we conclude the finding of fact here that the officer was responding to an emergency and investigating a disturbance was supported by competent substantial evidence, we also recognize an argument could be made that the officer here was in fact making an arrest. As the circuit court found, after the officer and his sergeant spotted the man about twenty yards from them, both the officer and the sergeant shouted the commands “Stop!”, “Police!”, and “Drop the weapon!” The officer then closed his distance from the man to approximately five to ten feet, and continued to command the man to “stop” and “drop the weapon.” It is reasonable to conclude that the officer was taking these actions to make an arrest, and not merely to investigate the man’s intentions.

Assuming that the officer was making an arrest, then we are squarely faced with the legal question which the circuit court called to our attention. That is, whether Caamano correctly held that if an officer is entitled to any immunity during the course of an arrest, then such protection must flow from section 776.05, which applies specifically to law enforcement officers, rather than section 776.032, which applies generally to the public at large.

We disagree with Caamano. We hold that a law enforcement officer, who while making a lawful arrest, uses deadly force which he or she reasonably believes 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, is not limited to invoking a defense under section 776.05(1), but is also permitted to seek immunity from criminal prosecution under sections 776.012(1) and 776.032(1).

State v. Peraza, 226 So. 3d (Fla. 4th DCA 2017) reh’g denied (October 5, 2017)

(Emphasis Added).

The Fourth District Court of Appeal certified conflict with State v. Caamano,

105 So. 3d 18 (Fla. 2d DCA 2012) and certified the following as a question of great public importance:

WHETHER A LAW ENFORCEMENT OFFICER, *WHO WHILE MAKING A LAWFUL ARREST*, USES DEADLY FORCE WHICH HE OR SHE REASONABLY BELIEVES 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, IS LIMITED TO INVOKING A DEFENSE UNDER SECTION 776.05(1), OR IS *ALSO* PERMITTED TO SEEK IMMUNITY FROM CRIMINAL PROSECUTION UNDER SECTIONS 776.012(1) AND 776.032(1), FLORIDA STATUTES (2013), MORE COMMONLY KNOWN AS FLORIDA'S "STAND YOUR GROUND" LAW.

On February 1, 2018 this Court accepted jurisdiction over this case.

SUMMARY OF THE ARGUMENT

In this case, the Fourth District Court of Appeal improperly affirmed the trial court order granting immunity to the Respondent, a police officer, pursuant to section 776.012 and section 776.032. Pursuant to State v. Caamano, 105 So. 3d 18 (Fla. 2nd DCA 2012), as a matter of law, the Respondent was not permitted to claim immunity pursuant to section 776.012 and section 776.032. Rather, because the Respondent was attempting a lawful arrest, he was required to proceed pursuant to section 776.05, which allows him to assert a claim of qualified immunity.

Furthermore, even under section 776.05(1), the Respondent is not entitled to pre-trial immunity. Rather because the trial court found that the material facts surrounding the shooting are in dispute, this cause must be remanded for trial. At trial, the Respondent may raise section 776.05(1) as an affirmative defense.

ARGUMENT

THE TRIAL COURT IMPROPERLY GRANTED IMMUNITY AS A MATTER OF LAW.

In this case, the Fourth District Court of Appeal improperly affirmed the trial court order granting immunity pursuant to section 776.012 and section 776.032. Here, because the Respondent, a police officer, was attempting an arrest, he is not entitled to immunity under section 776.012 and section 776.032, and instead, he was required to proceed pursuant to section 776.05(1), which is specific to law enforcement, and therefore required Peraza to assert a claim of qualified immunity. Additionally, the Fourth District Certified the following question as one of great public importance:

WHETHER A LAW ENFORCEMENT OFFICER, *WHO WHILE MAKING A LAWFUL ARREST*, USES DEADLY FORCE WHICH HE OR SHE REASONABLY BELIEVES 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, IS LIMITED TO INVOKING A DEFENSE UNDER SECTION 776.05(1), OR IS *ALSO* PERMITTED TO SEEK IMMUNITY FROM CRIMINAL PROSECUTION UNDER SECTIONS 776.012(1) AND 776.032(1), FLORIDA STATUTES (2013), MORE COMMONLY KNOWN AS FLORIDA'S "STAND YOUR GROUND" LAW.

This Court must find that an on-duty officer is required to proceed pursuant to section 776.05(1) and is not permitted to proceed under section 776.032. Allowing an officer facing a criminal charge, stemming from his efforts to arrest, to elect an

absolute immunity over qualified immunity bypasses the statute specifically designed to apply to on-duty officers, and renders section 776.05(1) meaningless.

Below, the Fourth District Court of Appeal found that assuming that Peraza was making an arrest, it disagreed with the decision of the Second District Court of Appeal in Caamano, and instead found that a law enforcement officer, who while making a lawful arrest uses deadly force, is not limited to invoking a defense under section 776.05(1), but is also permitted to seek immunity from criminal prosecution under sections 776.012(1) and 776.032(1).

The Fourth District Court of Appeal ignored longstanding precedent that a specific statute controls over a general statute, and reasoned, as did the trial court, that because sections 776.012(1)'s and 776.032(1)'s plain language is clear and unambiguous, and applies to “a person”, this includes a law enforcement officer, who under any reasonable understanding of our language qualifies as “a person”. This holding disregards the fact that section 776.05(1), is specifically tailored to the actions of law enforcement acting in the line of duty.

It has long been the law in Florida that a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. Adams v. Culver, 111 So.2d 665, 667 (Fla.1959); State v. Billie, 497 So.2d 889, 894 (Fla. 2d DCA 1986), review denied, 506 So.2d 1040 (Fla.1987);

McKendry v. State, 641 So. 2d 45 (Fla. 1994); Stoletz v. State, 875 So.2d 572, 575 (Fla. 2004); Rochester v. State, 95 So. 3d 407, 409 (Fla. 4th DCA 2012). The more specific statute is considered to be an exception to the general terms of the more comprehensive statute. Floyd v. Bentley, 496 So.2d 862, 864 (Fla. 2d DCA 1986), review denied, 504 So.2d 767 (Fla.1987).

Moreover, in construing a statute, a court's purpose “is to give effect to legislative intent, which is the polestar that guides the court in statutory construction.” Larimore v. State, 2 So.3d 101, 106 (Fla.2008). To determine legislative intent, one must first look to the actual wording of the statute and give it its appropriate meaning. See id. Then, the doctrine of in pari materia applies. Id. This doctrine “is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent.” Fla. Dep't of State, Div. of Elections v. Martin, 916 So.2d 763, 768 (Fla.2005). Consequently, “related statutory provisions must be read together to achieve a consistent whole,” and “[w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.” Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So.2d 891, 898 (Fla.2002) (alteration in original) (quoting Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 455 (Fla.1992)).

Thus, this Court should adopt the well-reasoned opinion of the Second District Court of Appeal in State v. Caamano, 105 So. 3d 18, 21-22 (Fla. 2nd DCA 2012). In that case, the Second District Court of Appeal found as follows:

Upon such a review, it is evident that if Caamano is entitled to any immunity under either statute in this case, then such protection must flow from section 776.05. **We hold that the specific language of section 776.05, titled “Law enforcement officers; use of force in making an arrest,” must apply to the behavior of law enforcement officers during the course of an arrest, rather than the language of section 776.032, which applies generally to the public at large.** We agree with the State's argument that holding otherwise would render the specific statute meaningless. See Mendenhall, 48 So.3d at 749.

Id. at 22 (Emphasis added).

The Second District Court of Appeal correctly found that where the actions of a law enforcement officer using force in the line of duty are concerned, the **specific** language of § 776.05 must apply, rather than § 776.032, which affords immunity generally to the citizenry. Caamano, 105 So.3d at 21.

Turning to the statutes, Section 776.032(1) Fla. Stat. provides in relevant part that:

A person who uses force as permitted in [s. 776.012](#), [s. 776.013](#), or [s. 776.031](#) is justified in using such force and is immune from criminal prosecution and civil action for the use of such force

(emphasis added). A plain reading of this statute reveals that it is a **general statutory provision**, covering the use of force by any person. Compare this with the specificity

of § 776.05(1) Fla. Stat., which is in the same chapter:

A law enforcement officer, or any person whom the officer has summoned or directed to assist him or her, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. The officer is justified in the use of any force:

(1) Which he or she reasonably believes to be necessary to defend himself or herself or another from bodily harm while making the arrest . . .

(emphasis added). Section 776.05 is thus a **specific statutory provision** that applies to law enforcement officers using force in attempting an arrest.

Based upon a plain reading of the law, there is no question that section 776.05(1), speaks directly to actions of law enforcement and his or her efforts to make an arrest, and section 776.032 does not. Consequently, the provision of 776.05 regarding on-duty law enforcement, must control the facts of this case and this Respondent's official actions as a policeman during the shooting death of the victim.

In fact, with respect to section 776.032, in Smiley v. State, 966 So. 2d 330, 333-334 (Fla. 2007), this Court recognized that the enactment of the “Stand Your Ground” law, was an **abrogation** of the common law duty to retreat. See Mederos v. State, 102 So. 3d 7 (Fla. 1st DCA 2012) (finding that the “Stand Your Ground” law abrogates the common law duty to retreat and generally authorizes the use of force in self-defense or in the defense of others). The preamble of the law creating section 776.032 states that “the Legislature finds that it is proper for law-abiding people to protect themselves,

their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others.” Ch.2005–27, at 200, Laws of Fla. This was the first time the right to claim immunity from prosecution and avoid a trial was expanded to the general citizenry.

However, by comparison, although codified as section 776.05 in 1974, police officers have never had a duty to retreat. See *Brownlee v. State*, 116 So. 618, 622 (Fla. 1928)(explaining that an officer, in the discharge of his duty, when assailed or resisted, is not bound to retreat or give way, rather, he may oppose force to force sufficient to overcome the resistance he encounters, or to subdue the efforts of the party offering resistance); *Sanford v. State*, 106 So. 406, 407 (Fla. 1925)(finding that when an officer, while lawfully arresting a person, is resisted by armed force, he is not compelled to retreat, but may use such force as will enable him to overcome the resistance offered him). Moreover, in *Brown v. City of Clewiston*, 644 F. Supp. 1417, 1420 (Fla. S.D. 1986), the Southern District recognized that Florida enacted this statute to **codify** the common law rule that police officers did not have a duty to retreat and could use deadly force in the line of duty.

A review of the February 10, 2005 Senate Staff analysis of Senate Bill #436, which eventually resulted in the enactment of the Stand Your Ground law and related provisions, establishes that the Legislature recognized that the use of force by law

enforcement officers was specifically addressed in section 776.05. Fla. S. Comm. on Judiciary, CS for SB 436 (2005) Staff Analysis 5 (Feb. 10, 2005). Thus, because police officers have never had a duty to retreat, and the legislature chose not to include section 776.05 as one of the sections that allows for stand your ground immunity¹, it is clear that the legislature did not intend for officers, such as the Respondent, to be permitted to pick and choose under which statute he would prefer to proceed.

Consistent with this analysis is this Court’s reasoning in Bretherick v. State, 170 So. 3d 766, 778(Fla. 2015), wherein this Court rejected a claim that the standard for determining immunity for claims brought in § 1983 actions should be applied in the context of immunity pursuant to the Stand Your Ground Law. This Court found that considerations involved in determining immunity from suit pursuant to § 1983 were different from the evaluation of claims of immunity from prosecution under the Stand Your Ground Law. Id. This Court explained that the two statutes concern **different actors operating in different capacities and were enacted by different legislative bodies based upon different policy rationales.** Id. citing Wyatt v. Cole, 504 U.S. 158, 167, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992) (noting that “special policy

1 Since it was enacted in 2005, section 776.032(1) Fla. Stat. has provided that “[a] person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force”. Section 776.05 has never been included as the type of force that allows for assertion of stand your ground immunity.

concerns” mandating qualified immunity for government officials under § 1983 included the need to “preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service”).

The same analysis should be applied here because section 776.05(1) and section 776.032, concern **different actors** and the statutes were enacted based upon **different policy rationales**. The enactment of section 776.05 codified the common law rule that an officer has never had a duty to retreat. However, the enactment of section 776.032 did nothing more than grant the average citizen the right to stand his or her ground. It makes no sense to apply this statute to officers who have always had the right to stand their ground. Thus, permitting an officer, to elect an absolute immunity over qualified immunity bypasses the statute specifically designed for this scenario, and renders section 776.05(1) meaningless.

Undersigned recognizes that in a footnote the trial court explained that he would have alternatively found the defendant immune pursuant to section 776.05 (R. 578), however this alternative finding is error because the trial court found that the facts surrounding the shooting were disputed (R. 548). Under the law, once a trial court has found the facts to be in dispute, pre-trial immunity pursuant to section 776.05(1), is no longer available and the case must be remanded for trial wherein the Respondent may

raise section 776.05(1) as an affirmative defense. Brescher v. Perez, 696 So. 2d 370, 374 (Fla. 4th DCA 1997). In fact, in Lozano v. State, 584 So. 2d 19, 25 (Fla. 3d DCA 1991) the Court stated that whether or not Lozano was effecting an arrest is an issue of fact for the jury.

Thus, this Court should follow the reasoning of Caamano and reverse the trial court order because where the actions of a law enforcement officer using force in the line of duty are concerned, the specific language of section 776.05 should apply, not the general language of section 776.032. Furthermore, with respect to the certified question, this Court must require an on-duty officer, who is engaged in efforts to make a lawful arrest, to proceed pursuant to section 776.05. Finally, the facts surrounding the shooting are in dispute, therefore the question of whether qualified immunity pursuant to section 776.05 applies, is for the jury not the judge and the order granting immunity must be reversed and this case remanded for a jury trial.

CONCLUSION

WHEREFORE, based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests that this Court reverse the opinion of the Fourth District Court of Appeal, answer the certified question in the affirmative, affirm the holding of Caamano, and remand this case for trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Petitioner's Brief on Jurisdiction" has been furnished electronically Eric Schwartzreich on March 26, 2018 to:admin@floridalawyerdefenseteam.com;eschwartzreich@floridalawyerdefenseteam.com .

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 14-point Times New Roman Type.

/s/ Melanie Dale Surber
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