IN THE SUPREME COURT OF GEORGIA

MARK ALAN HARRIS,	)	
Petitioner,	)	
	)	
v.	)	Case No. S15C0046
	)	
STATE OF GEORGIA,	)	
	)	
Respondent	)	

Brief of GeorgiaCarry.Org, Inc., *Amicus Curiae*

GeorgiaCarry.Org, Inc., *amicus curiae,* submits this Brief in support of the Petition for Certiorari.

John R. Monroe
John Monroe Law, P.C.
Attorney for GeorgiaCarry.Org,Inc.
9640 Coleman Road
Roswell, GA 30075
State Bar No. 516193
678 362 7650
770 552 9318 (fax)
jrm@johnmonroelaw.com

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Treatises

Part One – Statement of *Amicus Curiae*

GeorgiaCarry.Org, Inc., as an *amicus curiae,* ("GCO") submits this Brief in support of granting the Petition. GCO is a grass roots corporation organized under the laws of the State of Georgia. Its mission is to foster the rights of its members to keep and bear arms. In fulfillment of its mission, GCO engages in legislative advocacy, public interest research and education, and litigation.

GCO takes no position in this case as to the guilt or innocence of Petitioner, Mark Alan Harris ("Harris"). GCO also takes no position as to whether Harris is entitled to immunity from prosecution. Instead, GCO's interest is in establishing that ***all*** criminal defendants, including Harris, are afforded a just and equitable opportunity for a meaningful pre-trial determination of whether they are entitled to immunity when they make a timely claim for it.

Part Two – Overview of Immunity Proceeding

Harris is charged with various crimes associated with Harris' shooting and wounding of Tony Collum. Harris made a timely claim of immunity pursuant to O.C.G.A. § 16-3-24.2. The trial court held an evidentiary hearing on Harris' motion, and denied the same, finding disputes of fact. The trial court issued a certificate of immediate review, and the Court of Appeals granted a discretionary review. The Court of Appeals later dismissed the appeal on the grounds that review was improvidently granted. Harris then petitioned for certiorari.

Part Three – Argument and Citations of Authority

Standard of Review

The appellate court reviews orders on questions of law *de novo. Mize v. First Citizens Bank and Trust Co., Inc.,* 297 Ga.App. 6 (2009) The trial court did not make any factual findings, but if it had, those would be reviewable under an "any evidence" standard. *Sifuentes v. State,* 293 Ga. 441 (2013).

1 – Self Defense and Immunity

The common law in Georgia since before the Founding is that a person is privileged to use force in defense of himself (and others). Blackstone,

Commentaries on the Laws of England, vol. 3, p. 4 (1765-1769)[1]. He may do so with no duty to retreat. *Gover v. State,* 105 Ga. 597, 31 S.E. 584 (1898); O.C.G.A. § 16-3-23.1. This privilege of self defense is an "affirmative defense," meaning it is for the criminal defendant to raise as a matter of defense (and then for the State to disprove on rebuttal). *Fountain v. State,* 207 Ga.144 (1950). A criminal defendant with the most perfect and obvious application of self defense historically had to be subjected to the time, trouble, trauma, and treasury depletion of a trial in order to raise the defense.

The General Assembly has provided some relief from this somewhat unjust application of the common law. In 1998, Ga.L. 1998, p. 1153 created what now is O.C.G.A. § 16-3-24.2. Section 24.2 provides, in pertinent part:

> A person who uses threats or force in accordance with Code Section 16-3-21, 16-3-23, 16-3-23.1, or 16-3-24 shall be immune from criminal prosecution therefor ….

It is well-established that a motion for immunity pursuant to this Code Section must be decided pre-trial. *Fair v. State,* 284 Ga. 165, 664 S.E.2d 227 (2008). The trial court provided Harris with a pre-trial hearing on immunity in the present case. The issue, however, is whether the hearing and its result meaningfully provided Harris with the determination to which he was entitled. GCO asserts that they did not.

[1] *Journal on Firearms and Public Policy*, Vol. 23, Fall 2011, p. 60, "Self-Defence in England: Not Quite Dead," Joyce Lee Malcom.

2 – The Trial Court Failed to Make a Decision on the Merits

A review of the transcript of the immunity hearing reveals that the trial court treated the immunity motion somewhat similarly to a motion for summary judgment in a civil case. The trial court's opinion is rife with statements about conflicts in testimony. Tr., pp. 149-151[2]. The trial court in particular focuses on a dispute over who called whom and how long those calls lasted. Tr. P.151-152 ("The State has more investigation to do on this case before it goes to trial.... I would not have expected the State to have subpoenaed those records before this hearing as to whether certain conversations did take place.")

The trial court also found that one or more witnesses lied during the hearing, but the trial court failed to reconcile the discrepancies. Tr., p. 152 ("One of them is lying. Mr. Tony Collum called her a liar. I don't know whether she is telling the truth or not. I don't know whether Tony Collum is telling the truth.") The trial court ultimately denied immunity, saying, "I deny the motion. This case needs to go to a jury. The State needs to do some more investigating ... and the State needs to decide whether it wants to take this case to trial or not." Tr., p. 153. In denying the motion, the trial court also suggested Harris could have used a club as a weapon instead of a firearm and perhaps avoided

[2] References in this Brief to the immunity hearing transcript are "Tr." followed by the page numbers from the transcript.

criminal prosecution. *Id.* These statements by the trial court suggest that Harris did not receive the decision on the merits of his immunity claim that he was entitled to receive.

As Harris points out in his brief, a criminal defendant such as Harris has the burden of showing by a preponderance of the evidence that he is entitled to immunity. *Hipp v. State,* 293 Ga.415, 418 (2013). This Court's announcement of an evidentiary standard in *Hipp* of course implies that an evidentiary hearing will take place. An evidentiary hearing in turn implies that the trial court will be obligated to make findings of fact, which may very well include weighing the credibility of witnesses and evaluating conflicting testimony and other evidence.

Disputes of fact are inherent in the system. Except in those rare cases where the State chooses to present no evidence at an immunity hearing, one might always expect there to be some factual disputes. It is therefore incumbent on the trial court to resolve those disputes and make factual findings sufficient to grant or deny the immunity motion. Instead, however, the trial court observed there were numerous factual disputes, that the State apparently is not yet prepared, and that a jury will have to resolve the issues. That is, the trial court abdicated its role in favor of letting the jury decide.

What that means for Harris, however, is that the trial court essentially erased the immunity statute from the books. A criminal defendant is supposed to get two kicks at the proverbial cat. He can move for immunity, and failing that, still present self defense as an affirmative defense at trial. In the present case, the trial court took immunity off the table, leaving Harris with only self defense as an option. It is not that the trial court found that Harris failed to prove he was entitled to immunity. The trial court just refused to resolve the factual disputes and make a decision based on the facts.

The trial court's discussion somewhat implies that a measure of force was justified. By mentioning that perhaps Harris could have used a club rather than a firearm, the trial court gives the impression that Harris would have been justified in hitting Collum with a club rather than shooting him. There are distinctions in the law between "deadly force" and all other levels of force (and all threats of force). *See, e.g.,* O.C.G.A. § 16-3-21(a) (limiting use of deadly force to instances where the person is attempting to prevent deadly force against himself or a third person or to prevent a forcible felony).

The trial court did not elaborate on this discussion enough to allow a review of its reasoning. For the trial court to weigh the levels of force used, it would have to find facts and draw conclusions of law. Only then could a

reviewing court know what standard the trial court applied and whether the trial court's reasoning was valid.

It is important to make an appropriate and fair determination of immunity. As this Court found in *Fair,* the purpose of the immunity statute is to bar criminal proceedings against a defendant who is entitled to its protection. Punting the decision down the line to the jury deprives the defendant of that bar to prosecution and subjects him to the very jeopardy the statute was enacted to prevent.

CONCLUSION

It is important to Harris and future criminal defendants that this Court take the case and establish more fully the procedures that apply. When a criminal defendant moves for immunity, he is entitled to 1) an evidentiary hearing at which 2) the trial court makes findings of facts and 3) concludes based on those facts whether the defendant has sufficiently proven that he is entitled to immunity. If the State is allowed to deflect an immunity motion merely by raising factual disputes at the hearing, then no defendant ever will receive immunity again.

S:/John R. Monroe
John R. Monroe
Attorney for GCO
9640 Coleman Road
Roswell, GA 30075
678-362-7650
State Bar No. 516193

CERTIFICATE OF SERVICE

I certify that on November 4, 2014, I served a copy of the foregoing via U.S. Mail upon:

S. Lester Tate, III
Wm. Morgan Akin
Akin & Tate PC
Post Office Box 878
Cartersville, Georgia 30120

Rosemary M. Greene
Cherokee Judicial Circuit
135 W. Cherokee Ave. Ste. 368
Cartersville, GA 30120

S:/John R. Monroe
John R. Monroe
Attorney for GCO
9640 Coleman Road
Roswell, GA 30075
678-362-7650
State Bar No. 516193