

Self-Defense: Oklahoma Lays Some New Ground Rules (Sort Of)

By James L. Hankins

When asked to explain why he had sentenced a murderer to a fine and banishment, but a horse thief to be hanged, the colorful Texas Judge Roy Bean, self-proclaimed law west of the Pecos, purportedly replied, "I've met men who needed killin', but I never met a horse that needed stealin.'"¹

Judge Bean's sentiments, or if one prefers other colloquialisms such as "better tried by 12 than carried by six," can often color our perceptions of self-defense, particularly in male-on-male encounters that end in the death of one of the combatants. Self-defense in these types of cases is a mainstay in the arsenal of the criminal defense attorney because, in general, the defense is readily understood by lay jurors, the evidence to support it is usually obvious from the facts of the case, and jurors often seem to grasp intuitively that defending oneself against an attacker is a powerful right of the accused and not a legal technicality proffered by a lawyer.

There has been a spate recently of defense verdicts from juries during the September and October 2015 jury terms where self-defense has been offered by the accused, including jury trial wins by Tahlequah attorney Tim Baker in Muskogee County, Oklahoma City attorney Jarrod Stevenson in Kay County, Enid attorney Greg Camp in Garfield County and Tulsa attorney Thomas Mortensen in Tulsa County. These jury trial acquittals are spread out along diverse geographical lines and would appear to be fueled, at least in part, by the strong public policy enacted by the Oklahoma Legislature in the form of the so-called "stand your ground" law.²

THE LAW

This law was enacted in 2006 and tweaked in 2011, to provide clear legal support to citizens who are accused of a crime but who assert self-defense. The law makes it clear that a citizen has no duty to retreat from their homes or businesses as long as they are not engaged in an unlawful activity or are "attacked in any other place where he or she has a right to be."³ The statutory language is particularly aggressive, characterizing the right of the citizen to "stand his or her ground and meet force with force, including deadly force" as long as the citizen believes reasonably that such force is necessary to prevent death or great bodily harm to himself or herself or another, or to prevent the commission of a forcible felony.⁴

As powerful as this language is, it gets even better for the citizen when defensive force is used while inside a home, business or occupied vehicle. The Legislature stated explicitly that citizens of the state of Oklahoma have a right to expect absolute safety within their own homes or places of business.⁵ In these circumstances, the law establishes a legal presumption that the person attacked has the requisite reasonable fear of death or bodily harm to justify the use of defensive force.⁶

Finally, perhaps to drive the point home more forcefully, the law provides the most powerful right of all for the legally justified use of defensive force: immunity from criminal and civil prosecution.⁷ An ounce of prevention is worth a pound of cure. Much like it is preferable to avoid being ill in the first place rather than going through illness and getting cured, avoiding the gauntlet of a criminal jury trial in the first place is much more preferable to going through the experience with an acquittal at the end.

IMMUNITY: THE RULES

But is the type of immunity set forth in the statute self-executing, or does the accused have to assert it? If so, when and how? What are the duties of the trial judge? What are the standards to be used? And is a judgment of immunity or nonimmunity appealable by either party? If so, how and when? The contours of the immunity granted by the Legislature, and how criminal defense lawyers are required to implement it for clients accused of criminal offenses, have largely been opaque since the stand your ground law was enacted.⁸

However, this changed on June 9, 2015, when the Oklahoma Court of Criminal Appeals issued an extraordinary, but unpublished, opinion in a case out of Woodward County styled *State v. Julio Juarez Ramos and Isidro Juarez Ramos*.⁹ This was a first-degree murder prosecution presided over by then District Judge Ray Dean Linder.¹⁰

The Ramos brothers, illegal immigrants from Guatemala, were charged with the strangulation death of Antonio Lopez Velasquez, who apparently loaned money to Julio, and the two men had been arguing over the loan. The brothers eventually confessed to killing Velasquez and led police to the body. However, it appeared that the prosecution was going to be in shambles when Judge Linder ruled that the confessions were inadmissible, and in addition that prosecution was precluded by the immunity provisions of the stand your ground law. The state appealed.¹¹

In a fractured series of opinions in which Judge Lewis delivered the opinion of the court, but in which every judge of the Court of Criminal Appeals penned an opinion of some type, the court answered some of the fundamental questions regarding the immunity of the stand your ground law, how and when such immunity must be raised and the nature of appeals

of such rulings by the district courts of our state. The multiple opinions of the court contain seven key legal holdings that Oklahoma criminal defense practitioners and trial court judges must know:

- 1) A pretrial order granting statutory immunity under the stand your ground law is appealable by the state solely as a reserved question of law. This means that the accused walks free.¹²
- 2) Arrest and prosecution of the accused is allowed upon a showing of probable cause to believe that the use of force was unlawful.¹³
- 3) The accused must assert immunity prior to trial or the immunity is waived. The proper procedure is for the accused to file a motion to dismiss and request for an evidentiary hearing at the district court arraignment (and at the hearing the defendant need only show, by a preponderance of the evidence, that the use of force warrants immunity).¹⁴
- 4) A defendant may seek pretrial appellate review of denial of immunity (via writ of prohibition).¹⁵
- 5) In the *Ramos* case, the factual determination by the district court that the entry by the decedent was unlawful is not reviewable as a reserved question of law.¹⁶
- 6) The statute applies to the Ramos brothers, even though they are not citizens.¹⁷
- 7) The fact that the defendants may have been in the country illegally is not the sort of criminal conduct that would vitiate immunity.¹⁸

EFFECTS OF THE DECISION

Thus, in *Ramos* the court issued sweeping legal guidelines on the law of self-defense and addressed issues of first impression regarding the stand your ground law.¹⁹ What is the bench and bar to make of the *Ramos* opinion? First and foremost, the court saw fit to issue these sweeping legal guidelines in self-defense cases, including a procedural trap regarding waiver of the right to statutory immunity if it is not asserted properly pretrial, in an unpublished opinion which stated specifically, "These procedures shall govern future cases."

This pronouncement seems to be at odds with the role of unpublished opinions, which

generally are not intended to provide binding authority that governs future cases. But this phenomenon is not unprecedented. One example is the ruling in *Daniel Hawkes Fears v. State*²⁰ in which the court dealt with the issue of whether jurors should be instructed on the consequences of a verdict of not guilty by reason of insanity. This was a tough argument to make by the defendant because the issue had been decided against such instructions in a published opinion.²¹ In *Fears*, the court recognized the authority of *Ullery*, the urging by *Fears* to revisit it and agreed with *Fears* that it should be overruled.

To be sure, under the rules of the Oklahoma Court of Criminal Appeals, unpublished opinions are not binding upon that court, but it remains unclear if they are binding upon the district courts.²² One thing is for certain, the court has made it clear in *Ramos*, unpublished opinion or not, that the procedures announced in that opinion govern application of the stand your ground law in future cases beyond the facts of the *Ramos* case.

1. The quote is almost certainly apocryphal, accrued as urban myths often are from colorful or flamboyant historical figures, but Judge Roy Bean was a real person and jurist, ladies' man, survivor of two duels over women, himself arrested and imprisoned, and escaped before being a judge, and certainly eccentric enough to have said such a thing in earnest. Despite his reputation as "the hanging judge" it is believed that Judge Bean sentenced only two persons to death in his career (one of whom escaped).

2. See 21 O.S. §1289.25.

3. See 21 O.S. §1289.25(D) ("A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.")

4. *Id.*

5. See 21 O.S. §1289.25(A).

6. See 21 O.S. §1289.25(B).

7. See 21 O.S. §1289.25(F).

8. The first incarnation of the statute was actually styled the "make my day" law. *State v. Anderson*, 1998 OK CR 67, ¶4, 972 P.2d 32; see also *Dawkins v. State*, 2011 OK CR 1, ¶9, 252 P.3d 214. The Oklahoma Court of Criminal Appeals addressed some aspects of the law, but had avoided any meaningful discussion of the immunity aspect in a published opinion. See, e.g., *State v. Anderson*, 1998 OK CR 67, 972 P.2d 32 (after jury trial acquittal, the court held that the term "occupant" included visitors and was not limited to the actual homeowners); *Dawkins v. State*, 2011 OK CR 1, 252 P.3d 214 (defendant not entitled to immunity when he used an illegal sawed-off shotgun for defensive force).

9. A copy of the opinion can be found on-line at www.ocdw.com/main/wp-content/uploads/2016/02/Ramos-Julio-Juarez-2.pdf.

10. Judge Linder assumed the bench as a district judge in 1982 and remained until his retirement in January 2015.

11. Judge Linder had originally suppressed the confessions based upon the failure of law enforcement to advise the Ramos brothers of their rights pursuant to the Vienna Convention on Consular Relations. However, this decision was reversed in a prior appeal. See *State v. Ramos*, 2013 OK CR 3, 297 P.3d 1251.

12. The court recognized the "formidable power" of the district court judge in this regard, but stated, "We trust that trial courts do not lightly exercise the power to grant immunity from criminal prosecution, and leave the wisdom of this policy for the judgment of the Legislature." *Ramos* at 8-9.

13. *Ramos* at 9.

14. *Ramos* at 10 (citing *State v. Jones*, 311 P.3d 1125, 1130-1133 (Kan. 2013); and *Guenther v. State*, 740 P.2d 976, 980-81 (Colo. 1987)).

15. The court fashioned this right of pre-trial appellate review based upon analogous cases dealing with a claim of double jeopardy, which makes sense because if an accused is erroneously forced to stand trial then the privilege of immunity is effectively lost. See *Ramos* at 11 (citing *Todd v. Lansdown*, 1987 OK CR 167, ¶8, 747 P.2d 312, 315 (granting writ of prohibition to prohibit trial of murder charge in violation of double jeopardy), and *Sussman v. District Court*, 1969 OK CR 185, 455 P.2d 724 (granting timely filed application for writ of prohibition where prosecution was barred by former jeopardy)).

16. This conclusion is congruent with the nature of appellate review of reserved questions of law. As the court noted, if it were tasked in every case with determining the applicability of the law to a given set of facts, "We would constantly be engaged in a re-trial of every case involving an acquittal." *Ramos* at 12-13 (citing *State v. Anderson*, 1998 OK CR 67, ¶2, 972 P.2d 32).

17. The court concluded that the fact the Ramos brothers were illegal immigrants did not preclude them from asserting statutory immunity. This holding was based upon the expansive wording of the statute which affords such immunity to any "person" and does not make a distinction based upon citizenship. See *Ramos* at 14.

18. On this issue, the court cited *Dawkins*, 2011 OK CR 1, ¶11, 252 P.3d at 218, noting that in *Dawkins* the accused was not eligible for immunity because he used an illegal sawed-off shotgun, but that the legislative intent was to exclude persons from the benefit of the statute when they were actively committing a crime, not those who may have committed a crime in the past.

19. Judge Lewis delivered the opinion of the court, but each sitting judge on the Court of Criminal Appeals addressed the issues in separate opinions. Judge Smith concurred in the result and expressed the view that either party should be entitled to appellate review. Judge Lumpkin concurred in affirming the judgment but dissented "to the advisory dicta set forth in the Opinion" that addressed the unresolved procedural aspects of stand your ground immunity such as appellate review and the rules governing assertion of the right pre-trial. Judge Johnson specially concurred and emphasized the right of the accused to assert immunity pre-trial and to appeal.

Finally, Judge Hudson concurred in part and dissented in part, echoing Judge Lumpkin's concern about addressing issues not raised and creating an interlocutory appeals process in stand your ground cases.

20. No. F-2004-1279 (Okla. Cr., July 7, 2006) (unpublished).

21. See *Ullery v. State*, 1999 OK CR 36, 988 P.2d 332, 346.

22. Rule 3.5(C)(3), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2015), provides: "In all instances, an unpublished decision is not binding on this Court. However, parties may cite and bring to the Court's attention the unpublished decisions of this Court provided counsel states that no published case would serve as well the purpose for which counsel cites it, and provided further that counsel shall provide opposing counsel and the Court with a copy of the unpublished decision."

ABOUT THE AUTHOR



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