

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA  
APPELLATE DIVISION

FRANK SCHITTINO,  
Petitioner,

vs.

Appeal No. CRC 13-00011 APANO  
UCN 522013AP000011XXXXCR

STATE OF FLORIDA,  
Respondent.

Petition for Issuance of a Writ of Prohibition  
Addressing an Order Denying  
Motion to Dismiss entered  
by the Pinellas County Court,  
County Judge Henry J. Andringa

J. Armando Edmiston, Esquire  
Attorney for Petitioner

Bernie McCabe, Esquire  
State Attorney  
Attorney for Respondent

**ORDER AND OPINION**

PETERS, Judge.

THIS MATTER is before the Court on Petitioner, Frank Schittino's Petition for Issuance of a Writ of Prohibition. Mr. Schittino was charged by Misdemeanor Information with two counts of battery. He filed a motion to dismiss invoking statutory immunity pursuant to § 776.032, Fla. Stat. (2005). The trial court conducted a pre-trial evidentiary hearing on the motion. At the conclusion of that hearing the trial court made a finding of fact and denied the motion. Mr. Schittino requests this court to grant this

Petition for Writ of Prohibition and reverse the order denying the Petitioner's Motion to Dismiss. We affirm the trial court.

### *Background*

At the pre-trial evidentiary hearing on the claim of statutory immunity, the *stand your ground* hearing, the only witness called to testify by Petitioner was himself. The State Attorney called three witnesses; Kristen Schittino, Petitioner's former wife and alleged victim, Tony McClure the other alleged victim, and Jared Sedacca a responding police officer. The witness testimony provided starkly different descriptions of the actions of the Petitioner during the events in dispute.

The Petitioner, Mr. Schittino, testified, in pertinent part; (1) that he and his former wife were divorced on January 4, 2012 and have shared custody of their eight year old daughter, (2) the daughter stays with the former wife on Thursday, Friday and Saturday nights, (3) that he and his former wife agreed that Tony McClure, the man the former wife was romantically involved with, would not stay over-night on any night the child was there, (4) that at approximately 1:30 a.m. on Sunday, February 26, 2012, he drove to his former wife's apartment complex to see if Mr. McClure's vehicle was there, (5) Mr. McClure's vehicle was present and the lights in the former wife's apartment were off, (6) that he immediately telephoned his former wife and told her, among other things, "I'm going to call child services" and that he "hung up the phone on her," (7) that he "was very angry" and left, (8) about thirty seconds later Mr. McClure called him on his former wife's telephone, (9) Petitioner then testified as to the ensuing telephone conversation which was angry and culminated in the Petitioner returning to the apartment complex to meet Mr. McClure outside the apartment, (10) the Petitioner then provided the details of

an altercation involving himself, Mr. McClure and his former wife and insists he was battered first and was only defending himself thereafter.

The alleged victim, Kristen Schittino, testified, in pertinent part; (1) that the Mr. Schittino was angry and threatening and “got out of the vehicle and he punched Tony,” (2) there followed an altercation in which she became involved and was also battered and injured by Mr. Schittino, (3) her description depicts Mr. Schittino as the aggressor responsible for the continuing situation.

The alleged victim, Tony McClure, testified, in pertinent part; (1) that the Mr. Schittino called him out of the apartment and then battered him, (2) he then provided a description of the altercation that also depicts Mr. Schittino as the aggressor responsible for the continuing situation.

A responding police officer, Jared Sedacca, testified, in pertinent part; (1) that Mr. Schittino told him that when he (Mr. Schittino) arrived Mr. McClure began to walk outside and he (Mr. Schittino) opened the car door and struck Mr. McClure in the face, (2) that Mr. McClure told him he never “said anything or did any actions” that put Mr. Schittino in fear, (3) that Mr. Schittino said he struck Mr. McClure in self-defense but would not “elaborate why he was in fear.”

At the conclusion of the hearing the trial court found and ruled “I don’t think that you’ve proved you’re entitled to the benefit of that statute by a preponderance of the evidence. So the motion is denied.” The evidentiary hearing and ruling of the trial court was on December 21, 2012. Mr. Schittino filed his Petition for Issuance of a Writ of Prohibition on Friday, March 8, 2013. As a result the scheduled jury trial, set to begin on Tuesday March 12, 2013, was continued.

### *Jurisdiction*

A writ of prohibition is a proper remedy for an accused who is challenging his continued prosecution based on grounds of immunity after a trial court's pre-trial ruling denying his motion to dismiss. *Mocio v. State*, 98 So.3d 601 (Fla. 2nd DCA 2012). There is no specific jurisdictional time period for filing a Petition for Issuance of a Writ of Prohibition. However the court may deny relief if the petitioner unreasonably delays the filing of a petition for writ of prohibition. *See Alma's Italian & Seafood Restaurant v. Jones*, 627 So.2d 605, 606 (Fla. 1st DCA 1993) (Petitioners were not entitled to prohibition where petitioners waited until immediately before scheduled final hearing to seek relief).

### *Standard of Review*

An appellate court's review of a trial court's order on a motion claiming immunity pursuant to Florida Statute § 776.032 is governed by the same standard of review which applies in an appeal from an order denying a motion to suppress. *Mederos v. State*, 102 So.3d 7, 11, (Fla. 1st DCA 2012); *Hair v. State*, 17 So.3d 804, 805 (Fla. 1st DCA 2009); *see Loreda v. State*, 836 So.2d 1103, 1105 (Fla. 2d DCA 2003); *Darling v. State*, 81 So.3d 574, 577 (Fla. 3rd DCA 2012). [The appellate court] review[s] the trial court's legal findings de novo, and [the appellate court] review[s] the findings of fact for competent, substantial evidence. *Leasure v. State*, 105 So.3d 5, 12 (Fla. 2nd DCA 2012). The trial court's factual findings are entitled to deference and must be supported by competent substantial evidence.<sup>FN1</sup> *This court will not reweigh the evidence.* The trial court's legal conclusions are reviewed *de novo*.

FN1. "Competent substantial evidence" has been described as follows:  
The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential

element and as to the legality and admissibility of that evidence. Competency of evidence refers to its admissibility under legal rules of evidence. “Substantial” requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, “tending to prove”) as to each essential element of the offense charged.

*Joseph v. State*, 103 So.3d 227, 229 -230 (Fla. 4th DCA 2012).

On appeal, the trial court's legal conclusion is reviewed de novo, but its findings of fact are presumed correct and can be reversed only if they are not supported by competent substantial evidence. ... In conducting its review, an appellate court must restrain itself from the natural human impulse to consider that its own view of the facts is superior to that of a trial judge. ... So long as there is competent substantial evidence to support the findings made by the judge who was on the scene, the reviewing court must yield.

*State v. Vino*, 100 So3d 716, 719 (Fla. 3rd DCA 2012) (internal citations omitted).

#### *Procedural Requirements*

“When immunity under [Florida Statute § 776.032] is properly raised by a defendant, the trial court must decide the matter by confronting and weighing only factual disputes. [...] [A] defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches.” *Peterson v. State*, 983 So.2d 27, 29-30 (Fla. 1st DCA 2008) *approved by Dennis v. State*, 51 So3d 456, 458 (Fla. 2010). [A] defendant raising the immunity [has] the burden of establishing the factual prerequisites to the immunity claim by a preponderance of the evidence. *Id* at 29; *see Leasure*, 105 So.3d at 12.<sup>1</sup> When a defendant's motion to dismiss on the basis of statutory immunity from prosecution for the justified use of force is denied, the defendant

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<sup>1</sup> The burden of proof and procedure involved in pre-trial evidentiary hearing on a criminal defendant's immunity claim should not be confused with the procedural requirements for presenting and contesting an affirmative defense in a criminal jury trial.

may still assert the issue to the jury as an affirmative defense. *McDaniel v. State*, 24 So.3d 654, 656 (Fla. 2nd DCA 2009).

*The Present Case*

In the present case, the trial court conducted the required pre-trial evidentiary hearing, considered the testimony presented regarding the disputed issues of fact, announced its finding and denied the motion. The finding of the trial court addressed the issue presented in the motion to dismiss and was clearly supported by competent substantial evidence. Therefore that factual finding is, as a matter of law, presumed correct. The trial court's legal conclusion based on that finding of fact was correct.

*Conclusion*

Mr. Schittino did not establish by a preponderance of the evidence that his actions were justified because he reasonably believed those actions necessary to defend him against some imminent use of unlawful force by Tony McClure or his former wife, Kristen Schittino. He did not establish entitlement to statutory immunity pursuant to Florida Statute § 776.032. Given these circumstances, this appellate court has no lawful authority to reverse the trial court's ruling on Mr. Schittino's motion to dismiss. Mr. Schittino's argument presented in his petition is without merit.

This court does not reach the issue of whether Mr. Schittino's delay in filing his petition until the eve of a scheduled jury trial was unreasonable and a sufficient cause to deny the petition.

**IT IS THEREFORE ORDERED** that the Petition for Issuance of a Writ of Prohibition is denied.

**ORDERED** at Clearwater, Florida this 19<sup>th</sup> day of March 2013.

Original order entered on March 19, 2013, by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

Copies furnished to:

Honorable Cathy McKyton  
J. Armando Edmiston, Esquire  
Office of the State Attorney