

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL JUDICIAL CIRCUIT  
FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,  
Plaintiff,

Vs.

CASE NO. 2010 CF 005960 NC

ALPHONSE GALLO,  
Defendant.

ORDER ON  
MOTION FOR STATUTORY IMMUNITY FROM PROSECUTION

The defendant, ALPHONSE GALLO, is charged by an Information filed by the State Attorney with Second Degree Murder. If found guilty as charged, the Defendant could be sentenced to life imprisonment. The Defendant has filed a Motion For Statutory Immunity From Prosecution citing Section 776.032, Section 776.012 and Section 776.013, Florida Statutes.

Pursuant to recent decisions of the District Court of Appeal, Second District, this Court conducted an evidentiary hearing on Defendant's Motion.

Only two witnesses who were at the scene of the events that occurred in the early morning hours of May 15, 2010, testified. One was the Defendant, Alphonse Gallo, and the other was Sharama McCullough, who testified for the State.

The decedent was Patrick Barbour who the Defendant had known off and on since 2003. About a month and a half before the incident, Defendant sold a pistol and some ammunition to Mr. Barbour. The agreed price was \$350.00, of which Mr. Barbour only paid the Defendant \$150.00. The Defendant had inquired on more than one occasion about getting the rest of the money, but as of May 15, had not received it.

At about 2:00 a.m. on May 15, 2010, the Defendant, Manuel Mattos, and Mattos' cousin went to the Jamaican Club, located at the corner of MLK and Pershing in Sarasota. The Defendant was carrying his nine millimeter pistol, for which he had a permit and a Class G license. Upon leaving the Jamaican Club, the trio had a brief encounter with Patrick Barbour.



Defendant said something to Mr. Barbour, but that Barbour either ignored him or did not hear him.

According to witness McCullough, Patrick Barbour was her best friend who she had known for six years and was like a brother to her. Earlier in the evening she and Mr. Barbour had consumed alcohol at her house for about two hours. She described Barbour as being drunk that night. The medical examiner testified that her autopsy of Mr. Barbour showed that he had consumed alcohol and cocaine. She could not say when the cocaine may have been ingested. McCullough and Barbour separated, but encountered each other later during the early morning of May 15, 2010.

Defendant, Mr. Mattos and Mattos' cousin were on the street with over 100 other people when Mr. Barbour next appeared. Defendant extended his hand to shake Barbour's and said "Hey, what's up, Slim?" Without replying, Barbour twice punched the Defendant in the face. Defendant asked Barbour "What the hell is wrong with you, man?", but Barbour swung two more punches.

Defendant grabbed Barbour's shirt, pulled it over his head, and "tussled with him a little bit." Barbour ripped off his shirt, started pacing around, and then went around the corner. After Barbour left, Defendant told Mattos that they should leave. They started walking towards Defendant's van which was parked north on Pershing, when Mr. Mattos told Defendant that his cousin had apparently run off during Defendant's encounter with Mr. Barbour and that they needed to find the cousin.

The two then turned and walked south on Pershing to search for the cousin. Mr. Mattos walked on one side of the street, and Defendant walked on the side of the street closest to the Jamaican Club. This was partly to avoid Mr. Barbour, who Defendant thought might be on the other side of the street.

After Mr. Barbour and Ms. McCullough parted company, Ms. McCullough went to the area of Sarasota where the Jamaican Club is located. She arrived in the area around midnight and first spent time at the local bar known as The Town Hall. About 2:30 a.m. on May 15, 2010, she went to the Jamaican Club. She again encountered Mr. Barbour, who was wearing neither shirt nor shoes. He told Ms. McCullough that he had been in a fight.

Ms. McCullough grabbed Mr. Barbour in an attempt to calm him down and began to walk north on Pershing. At some point, the couple met Jeff Phillips and a man named Herb. They had walked some distance up Pershing, but Mr. Barbour turned around to head south. He was arguing with Jeff Phillips, asking for his car keys. Phillips did not give Mr. Barbour his keys. At this point, the Defendant appeared.

#### DEFENDANT'S VERSION

He was walking north on Pershing back towards his van without Mr. Mattos when he encountered Mr. Barbour and three other people. One was a person Defendant later learned was Jeffrey Phillips. One was a "tall individual with dreadlocks", and there was one other individual.

Barbour told the man with the dreadlocks to "take care of his light work", which Defendant understood meant for the man with the dreadlocks to beat him up. Defendant said to Barbour, "This is messed up. First you're going to disrespect me by putting your hands on me for money that you owe me and now you are going to have somebody else beat me up? For what?"

Jeff Phillips said, "Hold on. Hold on. What's going on here?" Defendant told Phillips about the transaction between him and Barbour and that Barbour still owed him money. Phillips turned to Mr. Barbour and said, "Why don't you just go pay him, brother?" Barbour was apparently not receptive to this suggestion, and the Defendant offered to return Barbour's money if Barbour would return the pistol.

Barbour replied that he had "fire in his pocket" and that he was going to take what the Defendant had in his pocket. Defendant understood that this meant that Barbour had a firearm in his pocket and intended to rob him.

Defendant stated to Mr. Barbour that he wasn't sure why he was acting as he was, but that he was not going to let Barbour rob him. Barbour replied, "Oh, you're going to give it up or I'm going to shoot your f--- ass." Barbour then placed his hand in his pocket. As he did so, Phillips and the others separated either to give Barbour a clear shot at the Defendant or to get out of the way. Defendant was then definitely convinced that Barbour had a firearm in his pocket.

Defendant said to Barbour, "Think about what you're doing because when you pull out on me, you're not going to get to put it away." Barbour answered, "F---you, Ray (apparently Defendant's nickname) and pulled out a firearm. Defendant described the weapon as "Glock-shape, possibly a Glock." Defendant drew his weapon and fired three shots. Barbour spun, but stayed on his feet.

Phillips, the man with the dreadlocks, and the other individual (who, the Court finds, more likely than not, was Sharma McCullough) scattered. Phillips and the man with the dreadlocks ran south towards MLK and were both reaching in their pockets. The man with the dreadlocks pulled out a small handgun, most likely a .380 automatic pistol, and fired it over his shoulder towards Defendant. Defendant crouched behind a car and saw and heard Phillips firing a .45 caliber pistol at him. The man with the dreadlocks momentarily stopped firing and it appeared to the Defendant that the weapon had jammed or the slide had caught the hand of the man with the dreadlocks. Defendant fired two shots at Phillips and the other man, who both took cover.

When the Defendant turned back towards Mr. Barbour, Barbour was raising his pistol at defendant, so the Defendant fired four more shots and Barbour dropped to the ground. Defendant heard gunshots and felt bullets whizzing by him, because Phillips and the man with the dreadlocks were again shooting at him.

Defendant backed away, firing at Phillips and the man with the dreadlocks. At that point, Defendant was struck in the head and dropped his pistol in reflex to being struck. He was somewhat dazed and, now unarmed, began running for his van. Shots were still being fired in his direction.

At some point, Defendant was joined by Mr. Mattos and they both reached Defendant's van. Shots were still being fired at them, but they managed to enter the van and Defendant was able to start its engine. As Defendant began to drive off, Mr. Mattos apparently saw his cousin on the street. Defendant stopped this van to pick up the cousin. The cousin kept running and would not get in the van, so Mr. Mattos got out and joined his cousin. Defendant left the scene in the van.

#### THE VERSION OF SHARMA McCULLOUGH

As Patrick Barbour and Jeff Phillips were arguing about Barbour's car keys, the Defendant came up to the group and asked Patrick Barbour for his money. Patrick said, "Man, I gave you 150. That's it." Patrick then threw a drink on the Defendant and Jeff grabbed Patrick and pulled him aside. Jeff asked Defendant how much Patrick owed him in all and the Defendant told Phillips \$300. Patrick disagreed with the amount and told Herb to hit the Defendant. Jeff apparently tried to stop this, so Patrick walked around Jeff and punched the Defendant in the face.

Defendant and Patrick had words, and the Defendant said "I got my own fire." Patrick said, "Me too. The Defendant then pulled out a firearm either from his waist or his pocket and shot Patrick, who was standing about six feet away. Patrick fell back and the Defendant turned because the man with the dreadlocks had pulled out a gun. Both the Defendant and Patrick's friends were shooting back and forth.

Ms. McCullough then ran and hid by or behind a car. Ms. McCullough saw-at some point- the Defendant "standing over" Patrick while he was shooting in the direction of Patrick's friends. The Defendant then turned, "walked over" Patrick, and shot some more. Defendant then ran away. Patrick was still moving after Defendant ran, but apparently died shortly thereafter.

#### OTHER EVIDENCE

Sgt. Rieser, Sarasota City Police Department, was parked about a block from the scene when he heard several gunshots, apparently a common week-end event in that part of town. He drove to the area, noticed the body, and called a 1018 to "bring everyone." He had to park his patrol car about 25 feet away from the body. He tried to get to the body with his medical kit, but was unable to reach the body, because the crowd of over 100 people had become hostile towards him. At least some rocks and bottles were thrown. He was finally able to get to the body with the aid of a woman who identified herself as a Registered Nurse. He found no firearms at the scene.

Technician Jerry Wagner from the Sarasota Police Department found several shell casings of various calibers at the scene. The calibers included .22,.38,.45 and 9mm.

The casings found by him and the projectiles recovered from the decedent's body were sent to the Florida Department of Law Enforcement.

Forensic Technician Jennifer Clark from the Florida Department of Law Enforcement testified that she was given 11 projectiles and 26 cartridge cases which were sent to her department in this case. No firearms were submitted to her for comparison. In her opinion, the 9mm. casings and the 11 projectiles were all fired from the same firearm.

Dr. Susan Utley, M.D. from the District 12 Medical Examiners' Office testified that Patrick Barbour's body had 11 bullet paths created by entrance wounds. In her opinion two of the entrance wounds could have been fatal. An entrance wound in his right upper abdomen was one of those wounds. She felt that whoever fired the shot would have had to have been at the deceased's feet, firing towards his head. The other possibly fatal entrance wound was created by a projectile that entered the decedent's neck, passed through both lungs, and did not quite exit the body. She testified that this was consistent with that area of the deceased's body being in contact with a hard surface. She was unable to determine the order in which the wounds were created. As previously noted, she also found evidence that the deceased had consumed alcohol earlier that day and had ingested cocaine at an undetermined time.

#### DISCUSSION

Section 776.012, Florida Statutes, provides that a person is justified in the use of deadly force and has no duty to retreat if that person reasonably believes that such deadly force is necessary to prevent imminent death or great bodily harm to himself or another or to prevent the imminent commission of a forcible felony.

Section 776.013, Florida Statutes, provides that a person who is not engaged in an unlawful activity and who is attacked in any other place where the person has a right to be has no duty to retreat and has the right to stand his ground and to meet force with force, including deadly force, if the person reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony.

Section 776.032, Florida Statutes, provides that a person who uses force as permitted in Sections 776.012 and 776.013, Florida Statutes, is justified in using such force and is immune from criminal prosecution AND civil action for the use of such force. If a defendant in a civil

action is found by the court to be immune from prosecution, that defendant can be awarded attorney's fees, court costs, compensation for loss of income, and all expenses incurred in the defense of that civil action.

In criminal cases, District Courts of Appeal have concluded that the immunity from criminal prosecution is to be determined by the Court before trial. *Martinez v. State*, 35 FLW D2175 (Fla. 1<sup>st</sup> DCA October 8, 2010). The trial judge is to conduct an evidentiary hearing at which the judge evaluates the testimony and other evidence, judges the credibility of witnesses, and determines if the defendant has established immunity under Section 776.032, Fla. Stats., by the "preponderance of the evidence." *Peterson v. State*, 983 So.2<sup>nd</sup> 27 (Fla. 1<sup>st</sup> DCA 2008); *McDaniel v. State*, 24 So.3<sup>rd</sup> 654 (Fla.2<sup>nd</sup> DCA 2009).

This Court understands these cases to mean that the trial judge conducts the equivalent of a bench trial and that "preponderance of the evidence" is the same as "greater weight of the evidence" which means "more likely than not."

Applying the statutory and case law to the facts of this case, the Court finds that the Defendant has established his immunity from criminal prosecution pursuant to Section 776.032, Florida Statutes.

The .45 caliber and .38 caliber casings were found at locations consistent with Defendant's description of events. His van had several bullet holes and one spent projectile was found inside. The Court concludes that from the moment he fired at Barbour in response to Barbour's threatening conduct to the moment he managed to drive away, the Defendant was continuously engaged in a gun fight during which he reasonably believed he was in danger of great bodily harm or even death.

After his arrest later the same day, the Defendant was taken by the Sheriff to the hospital to have a lump on his head examined. This is consistent with Defendant's testimony that he was struck in the head from behind and that he dropped his pistol as a result of the blow.

The State and the Defendant are in agreement about most of the facts stated in this order. The primary issue, central to Defendant's case, is whether the decedent, Patrick Barbour, possessed and attempted to use a firearm as described by the Defendant or whether he did not

have a firearm as claimed by Sharama McCullough. The Court finds that it is more likely than not that Patrick Barbour had a firearm during the events of May 15, 2010, and tried to use it.

At the hearing, when asked directly, Ms. McCullough stated that Barbour "never had a gun." During cross-examination, she admitted that she heard Barbour tell the Defendant that he had "fire in his pocket", but attempted to qualify that admission by saying, "He say he got fire. He ain't never said he had it on him."

Earlier in her direct testimony, Ms. McCullough said, in describing her actions after the shooting started "...And I ran behind the car, and I was looking at Patrick and so Patrick and him shot some more, and that's when he walked off." (Emphasis added.)

A portion of Ms. McCullough's video recorded statement to law enforcement officers was played during the hearing. It was primarily used by the Defendant's lawyers to successfully impeach Ms. McCullough's testimony at the hearing that only one shot was fired after the Defendant shot at Mr. Barbour. In addition to clearly establishing that several shots were fired after the initial exchange between Barbour and the Defendant she stated "Yeah, he was going to shoot him. After – after he – after he fired – after her – after Pat fired (inaudible) the man was, like, Damn, and he went in his pocket. And Pat was drunk." (Emphasis added).

In addition to the conflicts in Ms. McCullough's recollection, the undisputed facts, even according to Ms. McCullough, leading up to the first shots are that Barbour had continuously been the aggressor, punched the Defendant on at least two separate occasions, and the Defendant still did not use his pistol. It is more likely than not that Defendant fired his pistol at Barbour because Barbour pulled a firearm from his pocket.

No firearm was found at the scene, but this is not inconsistent with Defendant's version of the case. Before any law enforcement officers arrived, a crowd of more than 100 was milling about the area. That crowd became hostile to law enforcement, and Sgt. Rieser could not even reach Barbour's body. There was ample time for a person, or several persons, in the crowd to take the two pistols for their use, sale, or to conceal evidence.

The medical examiner's findings are not so inconsistent with Defendant's version of events so as to defeat his immunity claim. Defendant stated that after the first exchange of shots between him, Jeff Phillips, and the man with the dreadlocks, the Defendant turned towards



Barbour. Barbour was raising his pistol towards the Defendant and the Defendant fired again at Barbour. If Barbour was standing, sitting, or even lying on the ground, the entrance wound to Barbour's abdomen was more likely than not Defendant's reaction to Barbour's apparent threat to shoot him. Defendant was trying to flee the scene under continuous gun fire. Even if he then fired the shot that entered Barbour's neck as he passed by, Defendant could reasonably have still considered Barbour a source of death or great bodily harm.

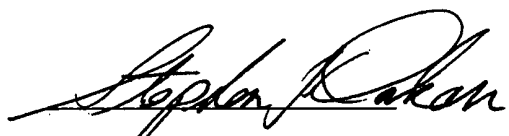
The Defendant was in a place where he had a right to be and was not acting unlawfully. He had more than enough reason to believe he was in danger of imminent death or great bodily harm. Under current Florida law, Defendant had no duty to retreat and was legally entitled to meet force with force and, certainly in this case, even with deadly force. By all accounts, the entire episode, beginning with the first shot, lasted a minute or two at the most. Defendant was under fire from that first shot until he was able to escape in his van. All of his actions were made in response to a reasonable fear of imminent death or great bodily harm.

It is, therefore,

**ORDERED**

That the Defendant, ALPHONSE GALLO, is immune from criminal prosecution in this case pursuant to the provisions of Section 776.013, Florida Statutes, and is entitled to be released from the custody of the Sheriff of Sarasota County in this case.

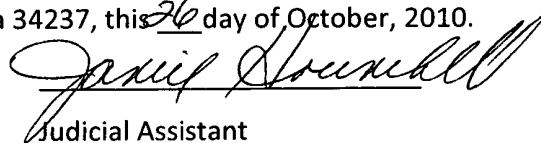
**DONE and ORDERED** this 26th day of October, 2010.



Stephen L. Dakan – Senior Circuit Judge

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of this Order was furnished by mail to Suzanne O'Donnell, Office of the State Attorney, Sarasota, Florida, and to Eric Reisinger, Esq., Attorney at Law, 12 South Lime, Ave., Sarasota, Florida 34237, this 26 day of October, 2010.



Judicial Assistant

10.26.10  
Ice: SSO Booking