IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

THE STATE OF FLORIDA, **CASE NO. F10-9090**

Plaintiff,

v.

QUENTIN WYCHE,

Defendant.
_____/

ORDER ON "PHASE ONE" OF *ARTHUR* HEARING

Introduction

This case arises out of the tragic killing of a student-athlete on the campus of Florida International University in March of 2010. For his alleged role in that killing defendant Quentin Wyche is charged with second-degree murder.

On Thursday of last week I held an *Arthur* hearing[1] on defendant's application for pretrial release. That hearing was confined to what is referred to in courthouse parlance as "phase one" of the *Arthur* inquiry, *viz.*, whether "the proof of guilt is evident or the presumption great" (a mystifying locution about which more later). I indicated to the parties that I would reduce to writing my findings and ruling as to that inquiry. I do so now.

The Standard of Proof

The Florida Constitution of 1838 provided at Article I §11, "[t]hat all persons shall be bailable, by sufficient securities, unless in capital offenses, where the proof is evident, or the presumption strong." The same concept survives in the present-day Constitution at Article I §14 and in Fla. R. Crim. P. 3.131(a).[2] This particular form of words is a source of confusion to lawyers and law students. What is the difference between proof of guilt and presumption of guilt?

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[1] From the eponymous *State v. Arthur*, 390 So.2d 717 (Fla. 1980). *See* discussion *infra* pp. 4-9.

[2] The present iteration of this rule extends to offenses punishable by life imprisonment as well as capital offenses. Fla. Const. art. I, §14; Fla. R. Crim. P. 3.131(a).

And how can a defendant be presumed guilty, when he has a constitutional entitlement to be presumed innocent? *See, e.g., Sandstrom v. Montana*, 442 U.S. 510 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In Re Winship*, 397 U.S. 358 (1970).

Here, as elsewhere in the criminal law, a page of history is worth a volume of logic. In 1627, five men of property and good name refused to pay the enforced loan required by King Charles to finance the military adventures of Charles's then-favorite, the Duke of Buckingham. The five were imprisoned in the Tower of London, and sought admission to bail. The Court of King's Bench (occupied at that time by judges who were either in mortal fear of the Stuart dynasty, or were its toadies) ruled in what has come to be known as Darnel's Case, or The Case of the Five Knights, that the petitioners had no substantive right to bail. *See generally* Catherine Bowen, The Lion and the Throne: The Life and Times of Sir Edward Coke 478-80 (Little Brown & Co. 1956).

The reaction of the American colonists was one of outrage. "In 1641 Massachusetts advanced a unique American principle of nondiscretionary right to bail before conviction in all offenses except those capital when proof of guilt was evident of the presumption great. This idea was followed and adopted by a great majority of states in their constitutions." *Ex parte Dennis*, 334 So.2d 369, 371 (Miss. 1976). *See also* Pennsylvania Frame of Government of 1682, at cl. XI, *reprinted in* 1 B. Schwartz, The Bill of Rights: A Documentary History 132, 141 (1971). A notable early federal enactment, the Northwest Territory Act of July 13, 1787, included the same language, *i.e.*, that "all persons should be bailable, unless for capital offenses, where the proof shall be evident or the presumption great." 2 James Kent, Commentaries on American Law 14 (14th ed. 1896). Even in modern times, an overwhelming number of states – *see State v. Konigsberg*, 164 A.2d 740, 742 (N.J. 1960) (40 states) – have constitutional or statutory provisions employing the same or similar language.

Our common-law forebears drew a more emphatic distinction than we do between direct and circumstantial evidence. To a common-law lawyer or judge – to a Coke, a Hale, a Blackstone – "proof" was what resulted from direct evidence. Circumstantial evidence, however forcible,

gave rise not to proof but to what today we would call an inference. In common-law times, however, what we call an "inference" was called a "presumption." Thus to require that "proof" – read: direct evidence – "of guilt shall be evident or the presumption" – read: inference from circumstantial evidence – "of guilt great" was simply to require substantial, probative evidence of one kind or another that the defendant had committed the crime charged.[3] Whether this is more or less than what is meant by the modern-day term "probable cause" is a nice question.

In Florida, however, it is an entirely academic question. The appellate courts of this state have decreed that the phrase "the proof of guilt is evident or the presumption great" is to be understood as creating a standard of proof for use at the hearings to which it applies. It "is actually a greater degree of proof than that which is required to establish guilt merely to the exclusion of a reasonable doubt." *State v. Perry*, 605 So.2d 94, 96 (Fla. 3d DCA 1992) (quoting *State ex rel. Van Eeghen v. Williams*, 87 So.2d 45, 46 (Fla. 1956))[4]. Even when the prosecution's evidence is sufficient to convict on a capital or life offense, but there is some doubt arising from other evidence, contradictions, or discrepancies, this exacting standard is not met and the accused is entitled to reasonable bail. *Elderbroom v. Knowles*, 621 So.2d 518 (Fla. 4th DCA 1993).

Thus a Florida defendant charged with a crime punishable by death or life imprisonment[5] has a substantive constitutional entitlement to bail unless the prosecution can show that proof of his guilt is evident or presumption of his guilt great, *i.e.*, unless the prosecution can, at a pretrial hearing, establish the defendant's culpability to a standard higher even than that required for a

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[3] In contemporary usage, an inference is an induction from a fact or facts. *See, e.g.*, I John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law §30, at 94-5 (1st ed. 1904). By contrast, a presumption is a conditional belief, *i.e.*, a belief held or a position taken subject to the condition subsequent that evidence yet to be received not be inconsistent with that belief or position. *See, e.g.*, Anthony Hawke, Roscoe's Criminal Evidence 17 (15th ed. 1928).

[4] So far as I am aware, none of the other states in which there exists a constitutional guarantee of bail except when proof of guilt is evident or presumption of guilt great interpret that trope in the same way as do the courts of Florida.

[5] As is the defendant in the case at bar. Murder in the second degree is punishable by life imprisonment. Fla. Stat. §782.04(2).

sustainable conviction at trial. It is this determination that constitutes "phase one" of an *Arthur* hearing.[6]

The Proof of Guilt

In response to a question I posed during the hearing, counsel for the defense stated very forthrightly that, for purposes of the *Arthur* hearing (and for those purposes alone), he was not disputing that defendant Wyche killed the victim in this case, but was insisting that Mr. Wyche acted in self-defense or upon sufficient provocation. *See* Fla. Stat. §§776.012 (self-defense), 782.07(1) (manslaughter). Thus my inquiry here focuses not so much on whether the defendant committed the charged offense, but on whether he did so justifiably.

The narrative of this tragedy begins hours before the killing in which it culminated, when Quentin Wyche engaged in a heated argument with Kendall Berry's girlfriend. (Statement of Antwoine Bell at p. 3.)[7] Who started the argument, and what the argument concerned, are details that have long since ceased to matter. That the argument took place, however, would come to matter a great deal to Messrs. Wyche and Berry. According to at least one witness, "Kendall Berry was going to confront Quentin ... [o]ver ... Quentin smashing a cookie in [Kendall Berry's] girlfriend's face or something of that nature." (Statement of Colt Anderson at p. 3-4.)

The opportunity for confrontation presented itself that evening after an intramural basketball game at the recreation center on campus. One of the most specific recitations of the events that followed the game was provided by Toronto Smith, a teammate of Kendall Berry on the FIU football squad.[8] Mr. Smith recalls participating in the basketball game, which according

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[6] Even if this exacting standard is met, the defendant may be admitted to bail – not as a matter of right, but in the discretion of the court. *State v. Arthur*, 390 So.2d 717 (Fla. 1980). Such a discretionary bail determination is made, if at all, at "phase two" of an *Arthur* hearing.

[7] At the hearing, the prosecution offered in evidence a dozen witness statements. Its only *viva voce* evidence was that of Det. Hoadley, the lead investigator. Det. Hoadley was a summary, rather than a percipient, witness. I have, however, reviewed all the witness statements with great care in preparing this order.

[8] Regrettably, the copy of Mr. Smith's statement that was filed with the court by the prosecution for use in the *Arthur* hearing appears to be incomplete. It ends at page ten, in the middle of a question and answer. Clearly there must be additional pages.

to his recollection ended at about 9:00. (Statement of Toronto Smith at p. 4.) Outside the "rec center" Mr. Smith struck up a conversation with his friend Mr. Berry. It immediately became obvious to Smith that "there was gonna (*sic*) be a fight," (Statement of Toronto Smith at p. 6) because of Berry's "demeanor," because "he was locked on. He was looking for somebody. He was waiting for them (*sic*) to come by. He was kind of like pissed, looked pissed, and he's got his fists balled up." (Statement of Toronto Smith at p. 6.)

When Quentin Wyche came out of the "rec center" he and Berry "approached each other," (Statement of Toronto Smith at p. 7) and "squared up," by which Mr. Smith meant that both young men "put their hands up, like they were about to fight," and each "got into a fighter's stance." (Statement of Toronto Smith at p. 7.) The affray was briefly pretermitted when teammates of Mr. Berry suspected a friend of Mr. Wyche, one Cooper, of attempting to attack Berry from behind. (Statement of Toronto Smith at p. 8.) When "six or seven" of Berry's allies turned on Cooper (Statement of Toronto Smith at p. 9-10.), Wyche fled back toward the "rec center." (Statement of Toronto Smith at p. 9.)

But Wyche's tactical retreat availed him nothing. When next Mr. Smith "look[ed] over there [to where Wyche had gone, he] notice[d] that Quentin [Wyche] is getting jumped" by "[s]ix or seven" people, Kendall Berry among them. (Statement of Toronto Smith at p. 10.) So far as Smith could see, Wyche had no weapon at that time. (Statement of Toronto Smith at p. 10.)

It is at this juncture that the transcript provided to me of Smith's statement ends. Smith's narrative, however, is corroborated so far as it goes by that of other friends and teammates of Berry, including Colt Anderson ("Quentin turned and ran ... and then Kendall chased him." (Statement of Colt Anderson at p. 5)), Marquis Rolle ("[A]s Kendall and 'Q' squared up, 'Q' just took off running. And then, that's when Kendall chased 'Q.'" (Statement of Marquis Rolle at p. 3, 5)), and Jason Frierson (after Wyche and Berry "kind of like squared off ... [t]hat's when 'Q' took off running and Kendall went behind (*sic*; after) him." (Statement of Jason Frierson at pp. 4-5)).

Given the circumstances – taken together, the witness statements depict a general melee with young men running and brawling in every direction – it is unsurprising that many of the

witnesses are sketchy as to some details. What appears to be undisputed, however, is that in the midst of this brannigan Mr. Wyche managed to procure a pair of scissors, or something like a pair of scissors, and to stab Mr. Berry to death. In the immediate aftermath of this act of deadly violence Wyche was heard to mutter various imprecations, the pith of which was that he was not the least sorry for what he had done.

The foregoing summary of the night's events does not paint a pretty picture of Quentin Wyche. If he insulted and threw something at Kendall Berry's girlfriend, he is unmannerly. If he ran from Kendall Berry, he is cowardly. And if he stabbed an unarmed adversary to death, he is a killer.

A killer – but not necessarily a murderer. Florida Statute §775.012(1) provides that, "[A] person is justified in the use of deadly force and does not have a duty to retreat if ... [h]e ... reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself." *See generally Diaz v. State*, 387 So.2d 978 (Fla. 3d DCA 1980). If Quentin Wyche reasonably believed that it was necessary for him to stab Kendall Berry in order to prevent his own death or great bodily harm to himself, his actions were justified in law. Rephrasing the issue in terms apropos to an *Arthur* hearing, the prosecution must prove to a degree of certainty greater than proof beyond reasonable doubt that Quentin Wyche's belief was *not* reasonable in the circumstances.

At the hearing, the prosecution offered and I received in evidence a number of photographs of the defendant Wyche taken by the police a day or so after the death of Mr. Berry. The photos showed Mr. Wyche from the front, sides, and back, stripped to the waist and extending his arms. So far as I could tell, there was no appearance whatever of injury or bruising. From this, the prosecution argued that Mr. Wyche was never actually struck by Mr. Berry or any of Berry's teammates. Certainly this was the reasonable inference to draw.

The law, however, does not require that Mr. Wyche, or anyone situated as he was on the night in question, *actually sustain* serious bodily injury before responding with force, even deadly force. It is enough that he reasonably apprehend imminent deadly force directed against him.

According to the witness statements of Mr. Berry's teammates – witnesses unlikely to color their testimony to favor Mr. Wyche – Wyche was pursued by not fewer than half-a-dozen football players; perhaps more. Although it is difficult for me to get as complete a picture of events from witness statements as I might have gotten from live testimony, the sense I come away with from the witness statements is that, at least briefly, chaos reigned and the spirit of the moment was one of, "Cry 'Havoc!' and let slip the dogs of war."[9] I cannot conclude that the prosecution has proven to the requisite degree that, in such circumstances, Mr. Wyche did not reasonably fear for his life.

As noted *supra*, in the wake of the stabbing death of Mr. Berry, Mr. Wyche made remarks expressing a lack of remorse – indeed expressing a certain satisfaction with what he had done. The prosecution argues that such statements, albeit made after the fact, evidence that "depraved mind regardless of human life" that is the intent-state required for second-degree murder. Fla. Stat. §782.04(2). Undoubtedly that is one fair interpretation.

But there are others equally fair. Mr. Wyche may have felt a great need to persuade those within the range of his voice, and an even greater need to persuade himself, that he had acted justifiably and not otherwise. He may have perceived a continuing threat from Mr. Berry's teammates, and hoped that his rodomontade would dissuade them from taking prompt vengeance for the death of their friend. His words may have been nothing more than the unconsidered product of adrenaline, testosterone, guilt, and confusion. I cannot conclude that evidence equally susceptible of many interpretations establishes with the degree of certainty required in this context the absence of reasonable apprehension of serious bodily injury and the presence of a depraved mind regardless of human life.

According to my hastily-scribbled notes, Det. Hoadley testified that Mr. Wyche broke off the altercation with Mr. Berry, retrieved the pair of scissors, then returned and stabbed Berry. The prosecution argued that this course of conduct evidenced, not fear of serious bodily injury on the part of Wyche, but a desire to renew the struggle when he had the advantage over an unarmed

[9] William Shakespeare, The Tragedy of Julius Caesar, act III sc. 1.

man. The prosecution is quite correct that such a sequence of events, if proven, would be inconsistent with a claim of self-defense or justification.

Of course Det. Hoadley was not an ocular witness. The prosecution argued that his testimony in this important regard was based upon the statement given by Chidimma Orji, an FIU student. Det. Hoadley took a statement from Ms. Orji in April of 2010, the month following the death of Kendall Berry.

Unfortunately, Ms. Orji's statement is of limited utility to me. It reads not like a witness interview ("What did you see?" "What happened next?" "Who else was there?") but like an in-court cross-examination. Ms. Orji's answers are monosyllabic affirmations of statements made by Det. Hoadley. Apropos the key question whether Wyche could have retreated rather than turning the point of his scissors on Berry, the transcript reads in part as follows:

> Q: If Quentin, at that time, had wanted to break away from everybody who was outside the rec center and go into the rec center and seek safety in there, could he have done so?
>
> A: Yeah.
>
> Q: Did you see any crowd around him that had circled him, preventing him from going into the rec center?
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> A: No.
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> Q: Now he takes his backpack off, and you see him take a pair of scissors out of the backpack; is that correct?
>
> A: Yeah.
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> Q: Did he take anything else out of the backpack?
>
> A: No.
>
> Q: And we talked before that you observed the scissors. They had a shiny part of them?
>
> A: Yes.

(Statement of Chidimma Orji at p. 11.) Much as I admire Det. Hoadley's very considerable cross-examination skills, the foregoing exchange and others like it in Ms. Orji's statement leave me

wondering who was testifying. When Ms. Orji's deposition was taken[10] she frequently expressed an uncertainty not to be found in the statement taken from her by Det. Hoadley. (*See, e.g.* Chidimma Orji Dep. 11 (asked if, at the time he took out his scissors, Wyche was being hit by anybody, Ms. Orji answers, "I'm not sure"); Chidimma Orji Dep. 13 (asked if, just prior to his retrieving the scissors, Wyche was being chased by anybody, Ms. Orji answers, "I can't be sure of that. I don't know. I wasn't looking at Quentin.")).

No doubt the seeming contradictions and apparent uncertainties in Ms. Orji's testimony will be resolved when she testifies in open court before a jury. I cannot resolve them on the cold record before me. And because I cannot resolve them, I cannot conclude to a degree of proof exceeding proof beyond reasonable doubt that her sometime allegations that Mr. Wyche had an opportunity to break off the battle, but chose instead to escalate it, are true.

Conclusion

Considering the totality of the record before me, I do not find that "proof of guilt is evident or presumption of guilt great" as that locution is defined in Florida law.

SO ORDERED, this 4th day of April, 2011, in chambers, in Miami, Miami-Dade County, Florida.

Hon. Milton Hirsch
Judge, 11th Judicial Circuit

[10] The transcript of Ms. Orji's deposition was received in evidence at the hearing.