

**IN THE DISTRICT COURT OF CREEK COUNTY,
STATE OF OKLAHOMA**

The State of Oklahoma,

Plaintiff,

v.

Kenneth Ray Smith,

Defendant.

Case No. CF-2020-199
Hon. Laura S. Farris

**BRIEF IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS BASED
ON DEFENDANT’S LAWFUL USE OF DEFENSIVE FORCE**

COMES NOW Defendant Kenneth Ray Smith, by and through his counsel of record Benjamin Fu, and submits the following brief in support of his Motion to Dismiss the above-entitled cause based on Mr. Smith’s lawful use of lethal force pursuant to 21 O.S. § 1289.25.

BURDEN OF PROOF

This Court must dismiss the above-entitled cause if it finds, based on a preponderance of the evidence, that Kenneth Ray Smith reasonably believed it was necessary to use deadly force to prevent death or great bodily harm to himself or another. In Oklahoma, “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.” 21 O.S. § 1289.25(D). Any person who uses deadly force in such a manner “is justified in using such defensive force and is immune from criminal prosecution and civil action for the use of such defensive force.” 21 O.S. § 1289.25(F).

Although the Oklahoma Court of Criminal Appeals “has yet to rule in a published case on the proper allocation of the burden of proof and the standard of proof on a pre-trial § 1289.25 immunity evidentiary hearing,” it has consistently interpreted the statute to require a defendant to establish his statutory immunity from further prosecution based on a preponderance of the evidence. *Bloebaum v. State*, No. S-2013-509, 2013 OK CR, * 3-4. Oklahoma’s Stand Your Ground Law was originally patterned after Colorado’s “Make My Day” Law. *State v. Anderson*, 1998 OK CR 67, ¶ 7, 970 P.2d 32, 34. In *People v. Guenther*, the Colorado Supreme Court determined the defendant should bear the burden of proving, by a preponderance of the evidence, his entitlement to immunity. 740 P.2d 971, 980-81 (Colo. 1987) (en banc)(cited with approval *McNeely v. State*, 2018 OK CR 18, ¶ 7, 422 P.2d 1272, ____). In explicitly adopting Colorado’s rationale, the *Bloebaum* Court held, “Thus, a defendant seeking pre-trial immunity from criminal prosecution pursuant to 21 O.S. § 1289.25(F), bears the burden of demonstrating, by a preponderance of the evidence, that their use of allegedly defensive force was legally justified.” No. S-

2013-509 at *4. Further, “[t]he trial court’s ruling on such a motion clearly involves the finding of facts,” and “resolution of a pretrial 21 O.S. § 1289.25 motion falls within the trial court’s sound discretion, which when challenged on appeal will be reviewed by this Court for an abuse of discretion.” *Id*; *See also Parker v. Rudek*, No. CIV-10-908-C, 2010 W.D. Oklahoma, 2010 WL 5661429, *3 (Defendant may “invoke [§ 1289.25] prior to trial; but if he did, he would have to convince the trial court by a preponderance of the evidence that the facts would create statutory immunity”).

ARGUMENT

I. Defendant Has Established That His Use Deadly Force Was Justified Pursuant To Oklahoma Law

Title 21 O.S. § 1289.25(D) provides: (1) A person who is not engaged in unlawful activity; (2) who is attacked in any other place where he or she has a right to be; (3) may use deadly force if he believes it is necessary to do so to prevent death or great bodily harm to himself or another or to prevent the commission of a forcible felony. Currently, no published opinions exist wherein the Oklahoma Court of Criminal Appeals has affirmed a trial court’s dismissal based on § 1289.25. The dearth of such cases is better understood in the light of the fact that there does not appear to be a mechanism by which the State of Oklahoma can appeal such a dismissal, as the same is not a reserved question of law for which the State may appeal in the criminal context. *See State v. Miller*, No. S-2016-1126, 2018 OK CR, * 2-3.

In *Millsap v. State* the Oklahoma Court of Criminal Appeals in an unpublished opinion affirmed a trial court's denial of a defendant's motion to dismiss based on § 1289.25. See No. F-2012-1107, 2017 OK CR, *1-9. In *Millsap*, a situation wholly distinguishable from the present case, the Court was confronted with evidence showing that the defendant had invited the victim into the defendant's residence just prior to shooting him. *Id.* at *4. Further, "although loud and heated, the discussions were not an argument between the two men but rather revolved around [the victim and defendant] going together to confront a third party who was initially suspected of taking the property. More significantly, just before [victim] entered the home for the last time, [another witness] heard [defendant] expressly tell [victim] to come inside to continue those discussions." *Id.* Consequently, the Court found that because "the events preceding the shooting show that he was still an invited guest and was not unlawfully and forcibly entering the home when Millsap shot and killed him. Under these circumstances, § 1289.25(B)(1) has no application." *Id.*

On April 19, 2021, Mr. Smith presented the testimony of five witnesses, whose testimonies, taken in conjunction with exhibits admitted during the hearing, establish that it is more likely than not that Mr. Smith was justified in shooting Boyd on September 7, 2020.

A. Defendant Was Not Engaged In Unlawful Activity

As an initial matter, there is no serious dispute that Mr. Smith was engaged in the lawful activity of expelling a trespasser at the time he shot Boyd. Oklahoma Law explicitly defines “Trespass After Being Forbidden” as the willful or malicious entry into “the garden, yard, pasture or field of another after being expressly forbidden to do so” 21 O.S. § 1835(A). The record is undisputed that the entire household awoke the morning of September 7, 2020, to a physical altercation between Boyd and Smith’s adult stepdaughter Jasalynn Snell, who testified that Boyd had been physically assaulting her beginning the evening prior all the way through the morning in question. All witnesses concurred, under oath, that Mr. Smith and other residents of the home insisted that Mr. Boyd leave the residence immediately, which prompted Boyd to begin packing. Mr. Smith implored Boyd for approximately three hours to “just leave,” assuring Boyd that any incidental property would be returned to him once he left the property. Despite Mr. Smith’s firm and unwavering requests, Boyd refused to leave, brandishing firearms at Tamara Woodings infant child Noah and other invited guests, as well as making repeated statements of his desire to shoot people present at the scene leading all the way up to the moment of his death. Consequently, Mr. Smith was not engaged in any unlawful activity at the time of the shooting.

B. Boyd Attacked Defendant In A Place Where Defendant Had The Right To Be

Evidence in the record established that, by a preponderance of the evidence, Mr. Smith was attacked in a place where he had a right to be. The State of Oklahoma contends that Boyd was not attacking anyone at the time of his death because no witnesses explicitly testified that they saw Boyd holding and pointing his gun at Mr. Smith at the time he was killed. Such a conclusion lacks any support in fact or law and is offensive to fundamental justice. *See Davis v. State*, 2011 OK CR 29, ¶ 95, 268 P.3d 86, 114 (“Self-defense is a defense although the danger to life or personal security may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that he/she was in imminent danger of death or great bodily harm”).

The record clearly establishes that, more likely than not, Boyd was in the act of attacking Mr. Smith at the time of his death. Jasalynn Snell testified that, for the week prior, Boyd had consistently refused to move out of the home, had escalated in his physical abuse of her, and had threatened to shoot multiple members of her family. At the hearing, the Court admitted Defendant’s Exhibit 2, a text conversation between Snell and Boyd’s mother that began after Boyd had assaulted her that morning. Snell informed Williams that her son was “trying to fight everyone” and that Boyd was “calling them outside to fight saying on the B and things like that.”

See Defendant's Exhibit 2-3. Boyd's mother responded, "And please please dont [sic] allow him to come back. if he forgets something I'll get it." *Id.* at 3.

Tamara Wooding and Manuella Golden both testified that they witnessed Boyd pointing a loaded firearm at other occupants of the home, including a small child, on multiple occasions. Likewise, in addition to Michael Galbraith and Trevelyn Relf-Smith, those same witnesses testified that immediately prior to Mr. Smith shooting, Boyd threatened to shoot Mr. Smith, his brother Relf-Smith, and his guest Galbraith, before reaching for a gun in the trunk of his car. Relf-Smith and Galbraith both testified that they were standing next to Mr. Smith at the time of the shooting and that they both believed that Boyd was reaching into the trunk of his car to shoot them at the time Mr. Smith began firing his weapon. Both witnesses testified that they had a similar vantage point with the Defendant, and both witnesses testified that they believed Boyd was reaching for a gun and would have shot them had Mr. Smith not intervened. Consequently, the record before this Court establishes, at a minimum by a preponderance of the evidence, that Mr. Smith reasonably believed that Boyd was in the act of attacking multiple persons present at the time he was shot.

C. Boyd's Act of Reaching for a Firearm Warranted the Use of Deadly Force

Circumstantial evidence supports the conclusion that, more likely than not, Boyd was attacking Smith and his friends at the time his death by reaching for a gun. Manuella Golden, Trevelyn Relf-Smith, Michael Galbraith, and Tamara Wooding

all testified that Boyd exited the house, arguing with Mr. Smith over a matter of fifty dollars when Mr. Smith reiterated – as he had consistently for the preceding three hours – that he just wanted Boyd to leave the property, to which Boyd responded, “Ya’ll think I’m playing? I’ll shoot all of you,” before reaching into the open trunk of a white BMW, where they had seen Boyd place a black duffel bag containing firearms earlier. They further testified that they saw Khalib Springer remove an item from Boyd’s person. Jasalynn Snell testified that prior to the shooting, she possessed a .40 cal Springfield XD firearm, which had been in her bedroom upon waking up that morning. She further testified that the firearm has not been located since that day. Defendant’s Exhibit 4 is the Crime Scene Investigation Report authored by Agent Eli Turley of the Oklahoma State Bureau of Investigation, wherein he noted: 1) one 250 count box of live Magtech brand .40 Caliber S&W cartridges in the trunk of the white BMW; 2) one black duffel bag with one empty Pro Mag brand .40 Caliber Smith & Wesson magazine located between the BMW where Boyd was shot and a Pontiac; and 3) the right pocket of Boyd’s shorts turned inside out consistent with someone having removed an object from his person. *See Defendant’s Exh. 5* at Bates 27. Despite having searched the entire residence, which included the location and removal of a 9mm handgun, *see id.* at Bates 26, officers never recovered Boyd’s .40 caliber Springfield XD handgun, which had been at the residence that morning. Based on a preponderance of the evidence, the record clearly demonstrates that,

more likely than not, Khalib Springer removed the .40 caliber Springfield XD from Boyd's person, along with other crucial evidence that would further establish Boyd was in the act of attacking others when he reached into the trunk. Springer's conduct was consistent with Boyd's other cohort, Theresa Williams, who likewise immediately sought to cover up evidence of Boyd's wrongdoing by seeking to conceal Boyd's jars of cannabis in the house before eventually smashing them on the driveway. *See Defendant's Exhibit 4.*

II. Evidence Submitted by the State of Oklahoma is Insufficient to Overcome the Weight of the Evidence in Favor of a Finding of Prosecutorial Immunity Pursuant to § 1289.25.

As its sole support, the State of Oklahoma offered, over the Defense's strenuous objection, the transcript of Theresa Williams's testimony at preliminary hearing conducted on February 3, 2021. Despite the fact that Ms. Williams was present in the courthouse and aware of the proceedings, the State of Oklahoma submitted a transcript in lieu of live testimony, going so far as to resist Defense Counsel's efforts to call Ms. Williams to testify at the hearing in question. Defendant maintains that his Sixth Amendment Right to Confront Witnesses Against Him was not satisfied by the issuance of a transcript of a witness's testimony that was submitted in support of the State's Probable Cause Burden at Preliminary Hearing. Nonetheless, the State's strategic decision to submit a transcript necessarily kept from the Court any opportunity to observe her demeanor and to determine her credibility, contrary to

the weight both appellate courts and common sense give to the importance of such opportunities. *See Morrison v. State*, 1936 OK CR 63, ¶ ___, 57 P.2d 882, 889 (“The rule admitting a transcript of evidence of an absent witness as his deposition on final trial grows out of circumstances of necessity, and such transcript or deposition should be excluded in all cases where the witness can be produced in person. One of the reasons for this is the accused may desire to cross-examine the witness further, and the jury, if it is possible, should have the opportunity to observe the witness and his demeanor on the witness stand”). Such a preference for observations of live testimony is not limited to the criminal context. *See e.g. Estate of Gerard v. Gerard*, 1995 OK 144, ¶ 13, 911 P.2d 266, 269 (question of probative force of evidence for trial court which has opportunity to observe demeanor and conduct of witnesses); *Manhart v. Manhart*, 1986 OK 12, ¶ ___, 725 P.2d 1234, 1237 (appellate courts will not disturb trial court that had opportunity to observe demeanor and hear testimony of witnesses and expressed concerns about credibility of a witness in a divorce); *Matter of Estate of Brown*, 2016 OK 22, ¶ 2, 384 P.3d 496, 497 (appellate courts will not disturb probate court rulings on appeal unless clearly contrary to the weight of the evidence because trial court has opportunity to observe conduct and demeanor of witnesses).

In its unpublished opinion in *State of Oklahoma v. David James Miller*, S-2016-1126, the Oklahoma Court of Criminal Appeals affirmed a Tulsa County district

court's finding that a defendant was entitled to prosecutorial immunity based on § 1289.25. As is true in the present case, the *Miller* Court was confronted with testimony that, on the day in question, the victim of an assault and battery with a deadly weapon twice entered the defendant's lawful residence while armed, and that the defendant twice told him to leave. *State v. Miller*, CF-13-6193, *Brief In Support filed November 10, 2016*, p. 2. Likewise, the victim in *Miller* testified contrary to the testimony of the defendant, stating under oath that he was not an intruder and the Defendant let him into the residence. *Id.* at 3. In upholding the district court's dismissal, the Oklahoma Court of Criminal Appeals held that the trial court did not simply accept the defendant's version of events without consideration of the State's evidence, but rather gave appropriate consideration of the State's evidence by permitting the State to introduce the transcript of the preliminary hearing during and to fully brief the issue, which the Court read before it rendered its decision finding that Defendant's testimony had met its preponderance standard despite having been opposed by the victim's testimony. *State v. Miller*, No. S-2016-1126, 2018 OK CR, * 3.

This Court is now confronted with a very similar record as the one considered in *Miller*. At preliminary hearing, Ms. Williams denied that Jasalynn Snell had ever told her that Boyd had been beating on Snell. (Tr. at 19:25-20:12.) Ms. Williams denied ever being informed that Boyd had been more than verbally abusive to

Jasalynn Snell. (Tr. at 23:1-8.) Ms. Williams denied that Boyd was ever agitated or that she had made any attempts to calm him down that day. (Tr. at 24:8-14.) Williams also denied ever stepping in between her son when he brandished a weapon at Tamara Wooding. (Tr. at 30:3-14.) Williams testified to a second series of shots whereby Mr. Smith walked up to her son's body and shot him in the back. (Tr. at 32:1-34:2.) Ms. Williams further denied that her son had threatened anyone while in her presence, nor was she made aware of previous threats made prior to her arrival. (Tr. at 38:17-39:1.) Ms. Williams even denied seeing her son with a gun that day. (Tr. at 39:16-18.) When asked whether or not she attempted to remove glass jars of marijuana from her son's vehicle before ultimately throwing them upon the ground, Ms. Williams responded, "I don't recall that." (Tr. at 27:21-28:9.)

Ms. Williams's testimony is starkly disputed by the witnesses who elected to testify under oath before this Court on April 19, 2021. Tamara Wooding testified that Williams was present and intervened when Boyd brandished a firearm and pointed it at her and her baby. All witnesses testified that Boyd was agitated and repeatedly told to leave. All witnesses denied Williams's assertion that Mr. Smith ever fired a second series of shots. All witnesses testified to observing Ms. Williams remove glass jars of marijuana from the vehicle and smash them on the ground, a fact that is corroborated by Defendant's Exhibit 5, which depicts broken glass jars of marijuana on the driveway next to a white BMW.

Williams's testimony is severely impeached by Defendant's Exhibit 1, which consist of text messages between Jasalynn Snell and Williams in the week leading up to the shooting, wherein Snell repeatedly texts with Williams about how volatile, violent and threatening Boyd has been to her and her entire family. Throughout the week, Williams gives advise to Snell about how to be rid of her son, advising her that the household needed peace, *Exh. 1* at 8, that she was trying to get Boyd to "get his stuff and leave" by employing a "calm and Godly voice so he will get it," *id.* at 7, that she had previously told Boyd he needed professional help for anxiety and couldn't fight his own problems, *id.* at 9. In response, Snell texted, "He's doing it again. You need to come get him tomorrow he won't leave. I can't do keep taking the abuse it's not worth it," to which Williams responded, "ok sorry I was sleep." *Id.* at 12. In conversation with Snell on August 28, 2020, approximately one week prior to the shooting, Williams inquired of Snell, "Did he say he will be gone by weekend," to which Snell replied, "He said he was but idk how promising it is, he feels he runs this household like if I do anything he'd kill us all no questions asked. I begged my brothers to not react to my situation because I'm literally scared for our life! Never know if I'm going to get beat up threatened to be killed sometimes it's a good day but I've had to many bad days ... I could not sleep I was so scared he was going to come in and blow me because he kept telling me yesterday how back he wants to smoke me that he should have the night before so in my mind I can't be at

peace until I know he's gone." *Id.* at 15. In response, Williams wrote, "I'm at work now but I know what you mean. Working on getting him gone for you." *Id.* On August 31, 2020, in text conversation with Snell, Williams commented, "he needs to be gone!!! ... He is not mentally stable and you all need to rid him. So whomever comes get him let him go." *Id.* at 22. She further advised Snell, "I love my child BUT I would never agree to what he is doing. That's why I say LET him go!!! Don't Ever let him call or return." *Id.* at 24.

Ms. Williams's own texts severely undercut her own testimony as regards her observations at the scene. The State's decision not to call her to the stand to explain these dramatic inconsistencies is fatal to their case, as her testimony cannot seriously be considered more likely to be truthful than the testimony of the other witnesses at the scene. Thus, this Court is left without any meaningful opportunity to observe the demeanor and veracity of the State's sole witness whose testimony is wholly impeached by the testimony of other witnesses and physical evidence recovered at the scene. In the light of such severe impeachment, this Court cannot find that the proffered witnesses and exhibits, which clearly indicate that Boyd reached for a gun when he was shot, are not credible. Rather, when weighing the evidence, this Court should find that it is more likely than not that Mr. Smith reasonably believed that the use of deadly force was necessary to prevent death or great bodily injury either to

himself or others, and grant him immunity from prosecution in the above-entitled cause.

CONCLUSION

This Court's obligation to seriously review Smith's pre-trial claim of immunity is distinctively different than a self-defense claim pursued at trial. The defendant bears the burden of proving 21 O.S. § 1289.25 immunity if raised prior to trial; whereas, at trial the State bears the burden of proving beyond a reasonable doubt that the defendant was not acting in self-defense. Once a defendant proceeds to trial, their immunity claim is essentially subsumed by the evidence relating to their claim of self-defense. In other words, immunity is not a trial issue.

Should this Court deny Mr. Smith's motion for immunity, he will have no meaningful opportunity to appeal that decision. "Under 21 O.S. § 1289.25(f), an individual who uses certain kinds of defensive force against an intruder is "immune from criminal prosecution," which includes both charging and prosecuting. This determination by a district judge is dispositive. If one is held to be immune from prosecution, then the case is over. If a district court judge finds that an individual is not immune from prosecution, then the criminal case continues." *McNeely v. State*, 2018 OK CR 18, ¶ 1, 422 P.3d 1272, 1280 (Judge Kuehn, dissenting). Mr. Smith is a lifelong citizen of the State of Oklahoma, as well as a husband and father who, at thirty-nine years of age, owns his own business and appears before this Court with

no criminal history. Since his arrest on September 7, 2020, he has maintained that he acted in self-defense. Witnesses who testified to seeing Mr. Smith’s immediate remorse and shock, also corroborate his version of events. The evidence now before this Court clearly establishes that, on the unfortunate date of his death, Tyris Boyd was a violent trespasser who was in the act of retrieving a firearm and threatening to kill multiple invited guests of the lawful resident of the property, Mr. Smith. Consequently, in this context, Oklahoma law provides that Mr. Smith was justified in responding to Boyd’s actions with deadly force and is “immune from criminal prosecution.” 21 O.S. § 1289.25(F).

WHEREFORE, Defendant moves this Honorable Court to dismiss the above-entitled cause pursuant to 21 O.S. § 1289.25(F).

Respectfully Submitted,



Benjamin Fu, OBA# 21181
2021 S. Lewis Ave., Suite 520
Tulsa, OK 74104
(539) 777-1961

CERTIFICATE OF HAND DELIVERY

I hear by certify that a copy of the foregoing instrument was delivered on April 26, 2021, to the office of the following:

Creek County District Attorney’s Office
222 East Dewey
Sapulpa, OK 74067



Benjamin Fu