

2018

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Recommended Citation

Bolduc, Nickolas and Dexter, Dakota (2018) "State of Tennessee v. Antoine Perrier," *Belmont Criminal Law Journal*: Vol. 1 , Article 13.
Available at: <https://repository.belmont.edu/clj/vol1/iss1/13>

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STATE OF TENNESSEE V. ANTOINE PERRIER*

NICKOLAS BOLDUC & DAKOTA DEXTER

This opinion arose from a February 2010 shooting that occurred in a Memphis, Tennessee convenience store. According to trial testimony, convicted felon Antoine Perrier, the defendant, and his female acquaintance visited the Miracles Mini Market to purchase alcohol. Inside the store, a customer “ogled” the defendant’s acquaintance and later exchanged words with the defendant outside the store. While the testimony concerning the level of the words’ hostility differed, the witnesses all agreed that the defendant drew a pistol from his person and fired towards the store door. Several shots passed through one victim’s clothing without causing injury. However, a child inside the store was not so lucky. Investigators then discovered that the defendant possessed the only weapon at the scene. The Shelby County Grand Jury indicted the defendant on one count of attempted second-degree murder, one count of employing a firearm during the commission of a dangerous felony, and six counts of aggravated assault.

At trial, the defendant testified that he shot in self-defense due to one of the victim’s actions. After the conclusion of evidence, the trial court provided the pattern self-defense jury instruction to the jury, but added language regarding actions that may constitute unlawful activity as to negate the “no duty to retreat” language of the self-defense statute. The trial court listed various illegal conduct related to the self-defense statute and instructed the jury that it was to determine whether the defendant was “engaged in unlawful activity” at the time he fired his pistol when it decided whether the defendant could properly claim self-defense without retreat. After deliberations, the jury rejected the defendant’s self-defense claim and convicted him of one count of attempted voluntary manslaughter as a lesser-included offense of attempted second-degree murder; one count of employing a firearm during the commission of a dangerous felony; five counts of aggravated assault; and one count of assault of the store owner as a lesser-included offense of aggravated assault. During the defendant’s post-conviction proceedings, the post-conviction court granted the defendant a delayed appeal to the Supreme Court of Tennessee. This decision resulted therefrom.

* *State v. Perrier*, 536 S.W.3d 388, 407 (Tenn. 2017).

The Supreme Court of Tennessee held that the Tennessee legislature intended that the phrase “not engaged in unlawful activity” contained in the self-defense statute constituted a condition on an individual’s privilege to not retreat prior to exercising self-defense. The court further held that the trial court should determine whether a defendant was engaged in unlawful activity at the time of the alleged self-defense so as to negate the applicable instruction. The Supreme Court of Tennessee also concluded that the trial court properly instructed the jury when the trial court did not instruct the jury on a lesser-included offense of employing a firearm in the commission of a dangerous felony; that the indictment provided sufficient notice of the qualifying dangerous felony for purposes of the “employing a firearm” charge; that the trial court did not err when it failed to instruct the jury on the necessity defense; and that the State introduced sufficient evidence to convict the defendant of assault of the store owner.

The Supreme Court of Tennessee first resolved a legal question as to whether the statutory language “not engaged in unlawful activity” applies only to the statutory privilege to not retreat prior to engaging in self-defense. Specifically, a defendant claiming self-defense is entitled to a jury instruction on the duty to not retreat from a confrontation “only when the person was not engaged in unlawful activity and was in a place the person had a right to be.”¹ Here, this holding sealed the defendant’s fate. In practical terms, if one is engaged in unlawful activity at the time of the alleged act of self-defense, he or she must retreat before threatening or using force or both. The court noted that these holdings abrogated *Dyson*² and overruled *Montgomery*.³

The court also held that the trial court possesses the duty to determine whether the defendant met the conditions for the instruction on the privilege not to retreat. The court referenced *Fuller v. State*,⁴ which had similar underlying facts, to decide this issue, reasoning that having the trial court decide whether the defendant submitted evidence to justify issuing the instruction was compatible with the pattern self-defense instruction. Indeed, a Tennessee trial court must provide a self-defense instruction when the proof

1. Compare Tenn. Code Ann. § 39-11-611(b)(1).

2. *State v. Dyson*, No. W2014-01818-CCA-R3-CD, 2015 WL 9466679 (Tenn. Crim. App. Dec. 28, 2015), *perm. app. denied*, (Tenn. Aug. 19, 2016).

3. *State v. Montgomery*, No. E2014-01014-CCA-R3-CD, 2015 WL 3409485 (Tenn. Crim. App. May 28, 2015), *perm. app. denied*, (Tenn. Oct. 15, 2015).

4. *Fuller v. State*, --- So.3d ---, 2015 WL 9261777 (Ala. Crim. App. Dec. 18, 2015), *perm. app. denied*, (Ala. 2017). The defendant argued that the trial court committed reversible error when it instructed the jury that the defendant, a previously-convicted felon, had a duty to retreat. The trial court provided this instruction because it found that the defendant was “engaged in unlawful activity” by being “in possession of a pistol . . . at the time of the shooting.” The Alabama Court of Criminal Appeals rejected the defendant’s argument because the defendant “unlawfully possessed a firearm before he drove by the house where [the victim] was located and the altercation occurred.” That court of criminal appeals stated that “[w]e certainly do not believe that the Alabama legislature intended to avail armed violent felons of its stand-your-ground law.”

“fairly rais[es]” the issue.⁵ Thus, the trial court could simply decide another legal issue regarding the jury instruction, and this procedure provides yet another duty for the trial court. Moving forward, parties must submit evidence to obtain whatever instruction result they desire. The defense must put forth evidence to fairly raise the self-defense issue so that the applicable instruction will be provided. Likewise, the State must produce clear and convincing evidence that the defendant was engaged in unlawful activity so that the duty-to-retreat instruction would be inapplicable.

Due to the applicability of these new holdings, the Supreme Court of Tennessee then had to decide whether the trial court committed reversible error when it instructed the jury. The state supreme court held that the trial court erred when it instructed the jury. However, the Supreme Court of Tennessee then held that the trial court’s error was harmless beyond a reasonable doubt. The state supreme court held the error harmless “because no reasonable jury would have accepted the defendant’s self-defense theory. The court also left the defendant’s “causal nexus” argument for another day. Indeed, the accredited facts demonstrated that, as only mere words were exchanged prior to the shooting, the defendant could not have been in imminent danger of death or serious bodily injury to warrant self-defense.

The Supreme Court of Tennessee also decided several other issues, all against the defendant. First, the court decided that the trial court did not plainly err when it failed to instruct the jury on “possession of a firearm” as a lesser-included offense of “employment of a firearm during the commission of a dangerous felony.” The defendant argued that the court should adopt the *Henderson* rule.⁶ However, comparing the facts to another decision, the court did not address the defendant’s argument regarding *Henderson* because it determined that the evidence clearly showed that the defendant did not merely possess the firearm. Indeed, the defendant fired the pistol during the store altercation, and thus he actually employed the firearm. Accordingly, the court held that the trial court did not commit plain error by not instructing the jury on “possession of a firearm.”

Additionally, the court decided that the indictment provided adequate notice of the underlying felony to the defendant for purposes of the “employing a firearm” charge. Pursuant to both the state and federal constitutions, a defendant must be properly noticed to a charge so that he may defend himself against the allegation. The defendant contended that the indictment provided insufficient notice because it did not expressly name the underlying dangerous felony. The Supreme Court of Tennessee determined that the defendant possessed sufficient notice of the underlying dangerous felony because the “attempted second-degree murder” charge in Count One was the only count that constituted a dangerous felony. The state supreme

5. *State v. Hawkins*, 406 S.W.3d 121, 129 (Tenn. 2013).

6. *See Henderson v. United States*, 568 U.S. 266 (2013). The Court in *Henderson* held that, under the plain error standard, a decision is error if adjudged an error at the time of appeal rather than the time of trial.

court also found that the firearm count referenced the applicable statutory section in the indictment. Finally, the defendant failed to argue any reason why the applicable precedent should be overruled. Thus, the state high court overruled the defendant's challenge.

Next, the court held that the trial court correctly decided to not instruct the jury on the necessity defense. The necessity defense constitutes a general defense, and thus the trial court must instruct the jury on the defense if the proof adduced at trial fairly raises the defense. The necessity defense may negate culpability if the defendant acts upon a reasonable belief that the action is necessary to avoid harm and where the harm to be avoided is clearly greater than the harm caused by the criminal act.⁷ Specifically, the court stated that the necessity defense was unavailable to the defendant, reasoning that, even if one of the victims had threatened to shoot the defendant, his shooting towards the convenience store endangered multiple other people uninvolved in the altercation.⁸

Finally, the Supreme Court of Tennessee decided that the State introduced sufficient evidence for the jury to convict the defendant of assaulting the convenience store owner.⁹ The defendant contended that he did not assault the owner because the owner was behind bulletproof glass. To prove that the defendant assaulted the owner, the State had to prove beyond a reasonable doubt that he knowingly or intentionally caused the owner to reasonably fear imminent bodily injury.¹⁰ At trial, the owner testified that he was scared after the defendant shot at him. The court decided that the defendant was simply requesting that the court reweigh the evidence that jury already decided in the State's favor. Thus, the Supreme Court of Tennessee affirmed the defendant's conviction for assaulting the store owner.

In conclusion, the law now holds that the Tennessee legislature intended that the phrase "not engaged in unlawful activity" contained in the self-defense statute constitutes a condition on an individual's privilege to not retreat prior to exercising self-defense. Thus, a convicted felon, such as the defendant in this case, seemingly must retreat prior to engaging in any use of a firearm for self-defense purposes. Next, the trial court now possesses the duty of determining whether a defendant was engaged in unlawful activity at the time of the alleged self-defense as to negate the applicable instruction.

7. Tenn. Code Ann. § 39-11-609 (2014 & 2017 Supp.).

8. *Perrier*, 536 S.W.3d 388, 407 (Tenn. 2017). The Supreme Court of Tennessee decided the issue differently than did the Court of Criminal Appeals, as the intermediate appellate court grounded its decision on the fact that a crime of violence occurred rather than a cost-benefit analysis the state supreme court seemingly undertook.

9. See Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions . . . shall be set aside if the evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt."); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (the key inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.");

10. See Tenn. Code Ann. 39-13-101(a)(2) (Supp. 2009).

Those holdings are the newest additions to Tennessee law. However, the Supreme Court of Tennessee also concluded that, in this case, the trial court properly instructed the jury when it did not instruct it on a lesser-included offense of employing a firearm in the commission of a dangerous felony; that the indictment provided sufficient notice of the qualifying dangerous felony for purposes of the “employing a firearm” charge; that the trial court did not err when it did not instruct the jury on the necessity defense; and that the State introduced sufficient evidence to convict the defendant of assault.