PD-1319-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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CAUSE NO. PD-1319-19

FILED
COURT OF CRIMINAL APPEALS
11/8/2021
DEANA WILLIAMSON, CLERK

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

CARLOS LOZANO, Appellant

v.

THE STATE OF TEXAS

MOTION FOR REHEARING

Of the Court's Opinion on the State's Petition for Discretionary Review
Issued on October 6th, 2021

From the Eighth District Court of Appeals Decision in Cause Number 08-17-00251-CR
Styled as *Carlos Lozano v. The State of Texas* on November 1st, 2019

Reversing the Judgment of the 384th Judicial District Court of El Paso County, Texas
In Cause Number 2016-0D-00209
Styled as *The State of Texas v. Carlos Lozano* and Rendered on September 18th, 2017

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

COMES NOW the Appellant/Applicant, CARLOS LOZANO, and files this *Motion for Rehearing* of this honorable Court's ruling on October 6th, 2021 pursuant to Texas Rule of Appellate Procedure 79, *et. seq.*; and in support thereof would show the following:

1. The 384th Judicial District Court of El Paso County, Texas rendered Judgment in Cause Number 2016-0D-00209 styled as *The State of Texas v. Carlos Lozano* on September 18th, 2017 on a conviction for the criminal offense of Murder.

2. On November 1st, 2019 however the Court of Appeals for the Eighth District in El Paso, Texas issued an Opinion reversing the Trial Court's Judgment in Cause Number 08-17-00251-CR.

3. The State timely filed a *Petition for Discretionary Review* and this Honorable Court issued an Opinion reversing the decision of the Eighth District Court of Appeals on October 6th, 2021 in Cause Number PD-1319-19.

4. Accordingly, the deadline for filing a *Motion for Rehearing* in this matter is October 21st, 2021 pursuant to Texas Rule of Appellate Procedure 79.1 after the expiration of 15 days from the date of judgment.

5. However, there was a critical ambiguity in the Court's Holding – which was brought to the attention of the Court Clerk's Office by the undersigned and newly hired counsel for the Appellant/Applicant, Tate N. Saunders – as the holding only indicated that the Court was "reversing" the judgment of the Court of Appeals without delineating whether the Court was "reversing and remanding" the case for further judgment or "reversing and rendering judgment" as required by Rule 78.1 of the Texas Rules of Appellate Procedure. *See* Slip Opinion of the Texas Court of Criminal Appeals at 18 (issued on October 6th, 2021).

6. Indeed, this Honorable Court felt that omission of the particulars of the procedural outcome in this matter necessitated the issuance of a "Corrected Opinion" which was subsequently entered on October 19th, 2021 – a mere two days before the deadline for filing a *Motion for Rehearing. See* Slip Opinion of the Texas Court of Criminal Appeals at 18 (corrected and re-issued on October 19th, 2021).

7. Due to the confusion with the Court's Order and given the fact that the Appellant/Applicant has just retained the undersigned new counsel, Tate N. Saunders, to pursue a *Motion for Rehearing* and any other appellate or post-conviction remedies that might be available to him, the Appellant/Applicant requested a thirty (30) day extension of time to evaluate the merits of the case and prepare a sufficiently cogent *Motion for Rehearing* on this matter for the Court's consideration.

8. The Court granted the Appellant/Applicant's *First Motion for Extension of Time to File a Motion for Rehearing* and extended the deadline for filing by fifteen (15) days to November 5th, 2021; and this *Motion for Rehearing* is accordingly timely filed under the extension.

9. The reason the Appellant/Applicant is asking the court for a rehearing of this matter is that in focusing on whether the erroneous "duty to retreat" language that was included in the jury charge caused *egregious harm*, the Court overlooks the fact that the evidence does in fact raise a fact issue regarding the use of self-defense and support a presumption that the use of both force and deadly force was reasonable, which would necessitate a stricter application of the *egregious harm* doctrine to a valid defense that was raised by the evidence.

10. The evidence unequivocally shows that the decedent "ran around the [Appellant/ Applicant's] truck and punched him multiple times" through the window after throwing "an almost-full beer can at him through the passenger-side window; and the act of punching someone through the window of their vehicle in this context necessarily involved the actor entering the vehicle in an unlawful and forceful manner. *See* Slip Opinion of the Court at 15-16; and TEX. PENAL CODE ANN. § 9.31(a)(1)(A) and 9.32(b)(1)(A) (Vernon & Supp. 2021).

11. Indeed, Section 30.02(b) of the Texas Penal Code defines *unlawful entry* as "intruding any part of [a person's] body or anything physically connected their body" in the context of a Burglary of a Habitation offense with the intent to commit either theft or assault. *See* TEX. PENAL CODE ANN. § 30.02(b) (Vernon & Supp. 2021).

12. Moreover, under ***both*** Sections 9.31 and 9.32 of the Texas Penal Code, the Texas Legislature has made it abundantly clear that the *reasonableness* of the actions of a person claiming self-defense is *presumed* when the person against whom they are acting "unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment." *See* TEX. PENAL CODE ANN. § 9.31(a)(1)(A) (Vernon & Supp. 2021); and TEX. PENAL CODE ANN. § 9.32(b)(1)(A) (Vernon & Supp. 2021).

13. The Appellant/Applicant accordingly respectfully disagrees with the Court's holding that the presumption set out in Section 9.32(b) of the Texas Penal Code must be qualified and only applies "when the defendant first harbors a subjective belief that the use of deadly force was immediately necessary to defend himself from another's use or attempted use of deadly force;" and would assert that the *presumption* set out in Section 9.32(b)(1)(A) is actually by it's very terms and plain language *not qualified* or subject to any analysis of whether the defendant has raised proof of a "subjective belief that the use or attempted use of deadly force was immediately necessary." *See* Slip Opinion of the Court at 134; and TEX. PENAL CODE ANN. § 9.32(b)(1)(A) (Vernon & Supp. 2021).

14. And that this reading of the self-defense doctrine is not only clear from the plain language

of the statutes themselves, but also consistent with the overriding policy of what the Texas Legislature intended with the codification of the common law "*Castle Doctrine*" to *not require* law abiding citizens to demonstrate anything other than that the person whom they are exercising force or deadly force against was attempting to unlawfully enter their home, vehicle, or place of employment.

15. Accordingly, the fact that the jury engaged in an assessment of "the presumption of *reasonableness* and what it means to '*enter*'" under an improper standard as noted by the Court in it's Opinion would nearly have to be considered *egregious harm* in the context of a murder case where the defendant's sole defense was self-defense, rather than "a potential windfall of possible acquittal."

WHERETOFORE PREMISES CONSIDERED, the Appellant/Applicant, Carlos Lozano, respectfully requests that this Honorable Court grant rehearing of his case and allow further briefing and argument on egregiousness of the harm caused by the erroneous jury instruction on the issue of self-defense raised by the evidence.

RESPECTFULLY SUBMITTED on this the 5th day of November 2021,

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BY: _____
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Carlos Lozano

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above was served on the attorneys of record for the State, Ronald Banerji, at his email of record of rbanjeri@epcounty.com and the State Prosecuting Attorney's Office, John R. Messinger, at his email of record, information@spa.texas.gov on this the 5th day of November 2021via e-service/email.

BY: _____

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Status as of 11/8/2021 9:53 AM CST

Associated Case Party: Carlos Lozano

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