In the Court of Appeals of the State of Alaska

State of Alaska, Petitioner, v. **Keivon Duane Wright,** Respondent.	Court of Appeals No. **A-14088** **Order** Petition for Review Date of Order: **December 5, 2022**

Trial Court Case No. **3AN-22-01823CR**

Before: Allard, Chief Judge, and Harbison and Terrell, Judges

Keivon Duane Wright is charged with third-degree weapons misconduct (felon in possession of a concealable firearm).[1] As part of the pretrial proceedings, Wright's attorney filed notice that Wright may rely on the defenses of necessity, duress, and/or self-defense at trial. In response, the State filed pleadings in which it argued that self-defense was only available as a defense to criminal charges involving a defendant's use of force, and therefore was not available as a defense to a possessory offense such as third-degree weapons misconduct. The superior court rejected this argument in a written order. The State then filed this petition for review, seeking discretionary review of the trial court's order. For the reasons explained in this order, we GRANT the petition and REMAND this case to the superior court for further proceedings.

The limited nature of this order

In its petition, the State seeks a ruling that self-defense is only available as a defense to criminal charges that involve a defendant's use of force. Given the

[1] Wright is also charged with fourth-degree weapons misconduct and reckless endangerment related to his use of the gun. These charges are not at issue in this petition.

expedited nature of this petition for review, we are unwilling to make such a broad pronouncement. Instead, this order is limited to addressing whether self-defense is available as a defense to a felon-in-possession charge under the circumstances alleged here.

Our analysis

We have reviewed the parties' briefing, the relevant legislative history, and the relevant case law from other jurisdictions. We have found the case law from other jurisdictions helpful because the Alaska appellate courts have not previously ruled on this issue.[2] We have found particularly persuasive a 2007 decision from the Hawai`i Court of Appeals, *State v. Padilla*, 164 P.3d 765 (Haw. App. 2007).

As the Hawai`i court notes, "most jurisdictions recognize a justification defense where the defendant's otherwise unlawful possession of a firearm is immediately necessary for self-defense or the defense of others."[3] However, courts have not been uniform in the terminology they have used for this defense, and courts have used the terms duress, necessity, self-defense, and justification interchangeably.[4] Notably, regardless of the rubric under which the defense is permitted, the essence of

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[2] *See McGee v. State*, 95 P.3d 945, 946-47 (Alaska App. 2004) (declining to reach the question of whether self-defense is a defense to a criminal mischief charge) *rev'd on other grounds*, 162 P.3d 1251 (Alaska 2007).

[3] *State v. Padilla*, 164 P.3d 765, 771 (Haw. App. 2007); *see generally* Sara L. Johnson, Annotation, *Fact that Weapon was Acquired for Self-Defense or to Prevent its Use Against Defendant as Defense in Prosecution for Violation of State Statute Prohibiting Persons Under Indictment for, or Convicted of, Crime from Acquiring, Having, Carrying, or Using Firearms or Weapons*, 39 A.L.R. 4th 967 (originally published in 1985; updated weekly).

[4] *Padilla*, 164 P.3d at 772.

the defense often remains the same and includes elements that are similar to a necessity defense.[5] For example, under Alabama and Louisiana law,

> when a felon is in imminent peril of great bodily harm, or reasonably believes himself or others to be in such danger, he may take possession of a weapon for a period no longer than is necessary or apparently necessary to use it in self-defense, or in defense of others. In such situation justification is a defense to the charge of felon in possession of a firearm.[6]

Likewise, California courts recognize a "self-defense" defense to felon-in-possession under circumstances when a felon:

> is in imminent peril of great bodily harm or reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, does not violate [California's felon-in-possession statute]. As in all cases in which deadly force is used or threatened in self-defense, however, the use of the firearm must be reasonable under the circumstances and may be resorted to only if no other alternative means of avoiding the danger are available.[7]

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[5] *McGhee v. Commonwealth*, 248 S.E.2d 808, 810 (Va. 1978) ("The law of self-defense is the law of necessity . . . ."); *see also Commonwealth v. Lindsey*, 489 N.E.2d 666, 667 n.2, 668 (Mass. 1986) (viewing necessity as a more "apt characterization" than self-defense and noting that the justification in other jurisdictions "includes, expressly or impliedly, the requirement that the threat to the defendant must be immediate, substantial, and unavoidable and that it arise in circumstances in which action in self-defense would have been warranted (i.e., the defendant had a reasonable apprehension of death or serious bodily injury")).

[6] *Diggs v. State*, 168 So.3d 156, 162 (Ala. App. 2014) (citations omitted); *State v. Blache*, 480 So.2d 304, 308 (La. 1985); *see also State v. Jackson*, 452 So.2d 776, 779 (La. App. 1984) (finding that "necessity" when raised as a defense to the illegal possession of a firearm entails proof that the threat of force by another is imminent and apparent, and that the person threatened has no reasonable alternative but to possess the firearm).

[7] *People v. King*, 582 P.2d 1000, 1007 (Cal. 1978).

The similarity between a "self-defense" and necessity justification defense in this context has led the federal courts to conclude that "[i]t is immaterial whether an affirmative defense to [the federal felon-in-possession statute] is termed 'justification,' 'necessity,' 'duress,' or 'self-defense'"[8] — a point with which we are inclined to agree except for one reason: Under Alaska law, the statutory defenses of necessity and duress are "affirmative defenses," which require the defendant to bear the burden of proof by a preponderance of the evidence.[9] In contrast, self-defense is a "defense," which the State bears the burden of disproving beyond a reasonable doubt once the defendant has produced "some evidence" on each of its elements.[10] In other words, what is really at stake in this case is not the parameters of the defense — which are likely to remain the same regardless of whether the defense is called "self-defense" or "necessity" — but instead the question of who bears the burden of proving (or disproving) the defense.[11]

To answer this question, we turn to the statutory language of each defense under Alaska law. Alaska Statute 11.81.330, the self-defense statute, provides in pertinent part that

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[8] *United States v. Beasley*, 346 F.3d 930, 934-35 (9th Cir. 2003); *see United States v. Leahy*, 473 F.3d 401, 406 (1st Cir. 2007) ("[E]ase in administration favors treating [the common law defenses of duress, necessity, and self-defense], in a federal felon-in-possession case, under a single, unitary rubric: justification."); *see also Humphrey v. Commonwealth*, 553 S.E.2d 546, 552 n.4 (Va. App. 2001) (framing the defense as a necessity defense but noting that "[c]ourts and commentators disagree over whether the appropriate label for the defense is self-defense, necessity or duress").

[9] AS 11.81.320; AS 11.81.440(a); AS 11.81.900(b)(2).

[10] AS 11.81.900(b)(19); AS 11.81.330; AS 11.81.335.

[11] Courts are split on this issue. The federal courts put the burden on the defendant to prove the justification defense. *See, e.g.*, *Beasley*, 346 F.3d at 935-36; *U.S. v. Deleveaux*, 205 F.3d 1292, 1295-96 (11th Cir. 2000). However, there are some state courts that clearly put the burden on the State to disprove the defense once it has been properly raised. *See, e.g.*, *People v. Dupree*, 788 N.W.2d 399, 408 (Mich. 2010). In many of the cases we reviewed, it was not immediately clear who bore the burden.

> A person is justified in using nondeadly force upon another when and to the extent the person reasonably believes it is necessary for self-defense against what the person reasonably believes to be the use of unlawful force by the other person, unless [certain statutory exceptions apply].

Alaska Statute 11.81.320(a), the necessity statute, provides that

> Conduct which would otherwise be an offense is justified by reason of necessity to the extent permitted by common law when
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> (1) neither this title nor any other statute defining the offense provides exemptions or defenses dealing with the justification of necessity in the specific situation involved; and
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> (2) a legislative intent to exclude the justification of necessity does not otherwise plainly appear.

The State argues that the plain language of the self-defense statute means that self-defense can be used to justify only a defendant's "use of force" and, by extension, therefore applies only to criminal charges like assault or murder where "use of force" is an element that must be proven by the State. In response, Wright argues that self-defense also applies to possessory crimes such as felon-in-possession because "[i]f one is justified in using deadly force with a firearm, practical common-sense interpretation necessarily implies that incidental possession of the firearm is also justified." According to Wright, "[t]he legislature would not intend to write a self-defense statute that permitted use, but not possession, of a firearm."

But the problem with Wright's argument is that a defendant's use of force with regard to a firearm will rarely, if ever, be completely coterminous with a defendant's possession of that firearm. As the Hawai`i court explained in *Padilla*,

> The terms of [Hawai`i's self-defense statutes] are not easily applied to Padilla's situation. First, the [self-defense statutes] are directed at justifying acts involving the use of force, not the act of possession. Second, once the use of force has ended, those defenses cease to apply.

> The [self-defense statutes] would only justify Padilla's possession of the gun that was simultaneous with his use of force. . . . Unlike the [self-defense statutes], the choice of evils defense set forth in [Hawai`i's necessity statute] is not limited to justifying the use of force but applies to "conduct," a term that encompasses both the use of force and the act of possession.[12]

For these reasons, the Hawai`i court concluded that the choice of evils/necessity defense provides a "more comprehensive defense and a better fit for Padilla's justification theory than the defenses of use of force in self-protection and for the protection of others set forth in [Hawai`i's self-defense statutes.]"[13] Other courts have come to a similar conclusion.[14]

There is also another reason to adopt the Hawai`i court's reasoning and to hold that "self-defense" in the context of defending against a felon-in-possession charge is best addressed through Alaska's necessity defense for which the defendant bears the burden. As already explained, Alaska law differentiates between "defenses" and "affirmative defenses" by placing the burden of disproving a "defense" on the State while placing the burden of proving an "affirmative defense" on the defendant.[15] This

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[12] *State v. Padilla*, 164 P.3d 765, 773 (Haw. App. 2007).

[13] *Id*.

[14] *See, e.g.*, *Stanfield v. State*, 269 So.3d 1188, 1191-92 (Miss. 2019) (affirming giving of necessity instruction rather than self-defense instruction and holding that, unlike self-defense, the defendant bears the burden of proving the justification defense in the context of felon-in-possession); *State v. Swindell*, 879 S.E.2d 173, 175-76 (N.C. 2022) (holding that affirmative defense of justification applies to felon-in-possession charge but because affirmative defense does not negate any elements of the offense charged, the defendant has the burden to prove justification defense); *Johnson v. State*, 650 S.W.2d 414, 416 (Tex. Crim. App. 1983) (holding that "the defense of necessity is sufficient to protect the interest of the accused" and affirming trial court's refusal to give self-defense instruction because defendant's felon-in-possession did not involve the "use of force") *overruled on other grounds by Boget v. State*, 74 S.W.3d 23 (Tex. Crim. App. 2002).

[15] *See* AS 11.81.900(b)(2); AS 11.81.900(b)(19).

distinction is rooted in the traditional distinction between "defenses" (like self-defense or voluntariness) that dispute an explicit or implicit element of the offense and "affirmative defenses" (like necessity or duress) that are "based on additional facts and circumstances distinct from the underlying offense" that "can excuse the charged conduct, but does not disprove any of the . . . elements of the offense."[16] The justification defense at issue here fits best under the rubric of an affirmative defense.

Accordingly, we conclude that a felon's possession of a concealable firearm can be excused under those rare circumstances where it is necessary for a felon to take temporary possession of a firearm because the felon reasonably believes that their life (or the life of a another) is in imminent peril, but that this "self-defense" justification defense must be expressed as a necessity defense under Alaska law, and thus the defendant bears the burden of proof by a preponderance of the evidence.

Entered at the direction of the Court.

Clerk of the Appellate Courts



Ryan Montgomery-Sythe,
Chief Deputy Clerk

cc: Court of Appeals Judges
Judge Walker
Trial Court Clerk – Anchorage

[16] *Beasley*, 346 F.3d at 934; *see also Swindell*, 879 S.E.2d at 175 (holding that the defendant has the burden to prove a justification defense in a felon-in-possession case because it is an affirmative defense that does not negate any elements of the offense charged).

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