



Ohio's castle doctrine: Presuming self-defense

by Philip Bogdanoff

Since the enactment of Ohio's "castle law" doctrine, uncertainty remains about what constitutes a presumption of self-defense in a crime occurring on or inside a defendant's private property.

In Pike County, a person who ripped off a drug dealer was sitting in the passenger seat of the car with his brother. As the drug dealer tried to open the car door in the dispute over drugs, the person shot the drug dealer through the heart, killing him.¹ In Franklin County, a stranger entered a person's home at 11 p.m. armed with a gun and tried to force his way into the house. The home owner killed the intruder and then removed the murder weapon from his house. The police subsequently obtained a search warrant for this home indicating that they had previously bought drugs from this home. The search revealed a safe containing marijuana, assorted pills and other drug paraphernalia.² In Cuyahoga County, four friends went to a bar, drank alcohol most of the evening and returned to the home of Jonathon Madera. Madera argued with one of his friends and told him to leave his home. When the friend refused, Madera slashed him with a decorative sword causing serious physical injuries.³

In these cases, the assailant has a statutory presumption pursuant to Ohio Revised Code 2901.09(B) that he or she acted in self-defense, because the homicide or assault occurred in the assailant's car or

home, even though the assailant's wrongful actions may have contributed to the death or injury to the victim. Two years after the enactment of S.B.184 containing Ohio's castle doctrine set forth in R.C. 2901.05(B) and R.C. 2901.09, courts are now confronting the issue of whether a defendant who was at fault in creating the situation or involved in illegal conduct should obtain a presumption that he or she acted in self-defense.

Defending your castle, a presumption of self-defense

Self-defense is an affirmative defense that requires a defendant to admit the facts claimed by the prosecution as an initial step toward establishing a justification for what would otherwise be criminal conduct.⁴ The defendant has the burden of proving self-defense by a preponderance of the evidence.⁵

Revised Code 2901.09(B) indicates that a person does not have a duty to retreat from his or her own home or their own car or car of a family member before using deadly force in self-defense or defense of another. Revised Code 2901.05(B)(1) states there is a rebuttable presumption

that a person acted in self-defense when "a person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force." This presumption may be rebutted by the prosecutor by a preponderance of the evidence.⁶ The two exceptions to this statute indicate that this presumption does not apply if the victim is a lawful resident of the residence or owner of the vehicle, or if defendant is unlawfully or without privilege to be in the residence or vehicle.⁷

Under the castle doctrine, a person is presumed to have acted in self-defense when attempting to expel or expelling another from his or her home who is unlawfully present. Further, under this doctrine, a person attempting to expel or expelling another is allowed to use deadly force or force great enough to cause serious bodily harm.⁸ The obvious intent of this legislation was to allow law-abiding citizens to use deadly force when protecting their homes and their families in life-threatening situations from home invaders and carjackers.

Ohio's common law castle doctrine

Before S.B. 184, Ohio applied a common law rule indicating that a person did not have a duty to retreat from his or her own home. However, there are several differences between the statutory and common law castle doctrines. First, in the common law rule, the defendant did not obtain a presumption that he or she acted in self-defense. The defendant maintained the burden of proving that he or she was not at fault in creating the situation, that he or she had "a bona fide belief," i.e., reasonable grounds to believe and an honest belief, even if mistaken, that he or she was in imminent danger of death or great bodily harm and that the only means of escape from such danger was by use of deadly force. A person attacked in his or her home was only relieved of his duty to retreat and to avoid the use of deadly force.⁹

Second, the common law rule that a person's home is his or her castle never applied to a person's vehicle or mode of transportation. Third, it did not allow the defendant to automatically use deadly force to defend his or her home but he or she was only privileged to use "as much force as is reasonably necessary to repel the attack."¹⁰ The force that was used had to be reasonable under the circumstances and could not be grossly disproportionate as to show revenge or criminal purpose.¹¹

Fourth, courts were not limited to a statutory definition of what was considered a residence. Revised Code 2901.05 indicates that a residence includes a dwelling that has a roof over it and that is designed to be occupied by people lodging in the building or conveyance at night. Under the common law doctrine, courts expressed a broader view of what was considered a home, stating that an inmate had no duty to retreat from his or her jail cell because it was considered his or her residence.¹² Further, a person did not have a duty to retreat from his tent at a campsite because it was considered that person's temporary residence.¹³

Fifth and most crucial, in *State v. Thomas*, the Supreme Court of Ohio also indicated that this common law doctrine would apply only if the defendant was not at fault in creating the situation. "A person who, *through no fault of her own*, is assaulted in her home may stand her ground, meet force with force, and if necessary, kill her assailant, without any duty to retreat."¹⁴ The Ninth District Court of Appeals

found that a defendant had a duty to retreat in his or her own home when at fault in creating the situation following *Thomas*.¹⁵ The Second, Fourth, Eighth and 12th District Courts of Appeal have followed suit, indicating that a defendant has a duty to retreat if at fault in creating the situation.¹⁶

Prosecutors are unhappy with this legislation, since it allows individuals involved in illegal activities or who are at fault in creating the situation that led to a homicide or assault to obtain a presumption of self-defense.

The common law castle doctrine applies to co-inhabitants

Oddly enough, this common law castle doctrine still applies today where the defendant and the victim reside in the same residence, since this is one of the two exclusions in 2901.05(B). The Supreme Court of Ohio mandated that there is no duty to retreat from a person's house even if attacked by a co-inhabitant of the house, indicating "there is no rational reason for a distinction between an intruder and a cohabitant when considering the policy for preserving human life where the setting is the domicile."¹⁷ In a 2009 incident involving a violent physical altercation between two roommates in the defendant's home, the defendant hit the victim with a machete, stabbed him numerous times with a screwdriver and bit him several times, severing part of the victim's ear. The Ninth District Court of Appeals applied the common law castle doctrine and rejected the defendant's claim of self-defense, indicating that the defendant has a duty to retreat from his own residence where he was at fault in creating the affray.¹⁸

Ohio courts refuse to apply this new presumption

Since the enactment of S.B. 184, there has been a dearth of case law interpreting

this statute, and most courts have refused to apply this presumption or find that the defendant acted in self-defense, especially where the defendant is at fault in creating the situation. In *State v. Suarez*, the defendant claimed he acted in self-defense and requested an instruction pursuant to R.C. 2901.09(B) when he tried to remove a guest at a party in his home and the victim was beaten by the defendant and several men leaving the victim unconscious and bleeding in the basement. The Court found that although the state's evidence indicated that the defendant assaulted the victim, the defendant testified that he did not touch the victim and therefore a castle doctrine jury instruction was inconsistent with his testimony and properly denied.¹⁹

In *State v. Madera*, the defendant contended that the victim was a trespasser, and therefore the jury committed error when failing to find that he acted in self-defense as he tried to eject this trespasser from his house. The court first noted that, "The first thing in the human personality that dissolves in alcohol is dignity."²⁰ The Court concluded that it was a jury issue of whether the defendant was a trespasser in the home and that the state had rebutted the presumption of self-defense by presenting evidence that the defendant had known the victim for 10 years, the victim entered the house without any objection, was permitted to stay and was only asked to leave immediately before the physical altercation began.²¹ It summarized the case by finding that, "The Castle Doctrine, on which Madera relies, is often applied to situations where an intruder enters a home, and the resident uses force to protect himself or his family. We have not seen it applied successfully in situations where a party of drunken friends dissolves into an all-out brawl, and subsequently the resident attacks a guest to forcibly remove him from the premises."²²

In *State v. Clellan*, the defendant was convicted of aggravated menacing when he pulled a gun out of his truck and threatened to shoot Robert Litchfield and Karen Devine-Riley when their car was blocking the roadway, preventing the defendant from parking his truck in his driveway.²³ The defendant asserted under the castle doctrine that the prosecutor never rebutted his presumption of self-defense as Litchfield tried to enter his truck and threatened to kill him. The Court rejected the defendant's argument, indicating that there was conflicting evidence on whether

Litchfield ever attempted to enter the defendant's truck. Further, the Court pointed to evidence that the defendant was outside his vehicle when he brandished this weapon and therefore could not assert the castle doctrine presumption.²⁴

In *State v. Miller*, Abby Myer, Jennifer Bowman, Joshua Smith and Jeremy Bishop were leaving a bar at 11 p.m. and driving toward Interstate 71 when several drunken passengers in the defendant's vehicle harassed Myer and Bowman. The state's witnesses testified that after occupants from both cars threw objects at each other, the vehicles stopped on the road and the defendant and several other men exited their car and punched Joshua Smith and Jeremy Bishop.²⁵ The defendant testified that occupants from the other car got out of their vehicle, tried to punch him, and that he only punched the victim in self-defense. The defendant assigned as error that the Court improperly place the burden of proving self-defense on the defendant contrary to Ohio's statutory castle doctrine. The Court rejected this argument, finding that, "appellant admittedly did not occupy his vehicle during the physical altercation, and competent and credible evidence existed to support the conclusion that appellant was at fault in creating the situation leading to the altercation, the rebuttable presumption that appellant acted in self-defense under R.C. 2901.05(B)(1) does not apply."²⁶

Other states limit the use of this presumption

Other states that have enacted castle doctrine legislation have sought to avoid this fault issue by prohibiting a defendant from raising this presumption where the defendant was involved in illegal activities. The Arizona, Alabama, Oklahoma, South Carolina, Tennessee and Florida castle doctrine statutes indicate that a person is precluded from raising this presumption of self-defense where the person who uses physical force or deadly physical force is engaged in an unlawful activity or is using the residential structure or occupied vehicle to further an unlawful activity.²⁷ These statutes also preclude a person from obtaining this presumption when the defendant injures a police officer who announces his or her presence in the performance of his or her duties. The Texas statute also contains a condition that the defendant cannot "provoke the person against whom the force was used." In Louisiana the presumption does not apply

if the person is involved "in the acquisition of, the distribution of, or possession of, with intent to distribute a controlled dangerous substance in violation of the provisions of the Uniform Controlled Dangerous Substances Law."²⁸

Has S.B. 184 improved our criminal justice system?

It is still too early to determine the impact of S.B. 184. Certainly, prosecutors are unhappy with this legislation since it allows individuals involved in illegal activities or who are at fault in creating the situation that led to a homicide or assault to obtain a presumption of self-defense. As Pike County Prosecutor Rob Junk commented on this legislation, "it was not made to protect drug dealers from drug dealers, but that is how it is being used."²⁹

Judges now have to be cautious when instructing the jury on this defense because Ohio has two castle doctrines, common law and statutory, with two different jury instructions depending on whether the victim and defendant are both residents of the same home. Finally, defendants who seek this presumption still have the burden of proving their location at the time they used deadly force to obtain this rebuttable presumption. This new law does not give a defendant a "free pass" to use deadly force in his or her home or vehicle, but only a presumption that the prosecutor can rebut.

The jury is still out on whether this legislation has benefitted Ohio. Only time will determine the limits of this new law and whether it is a shield for criminal conduct or a weapon in an arsenal to fight crime. ■

Author bio



Philip Bogdanoff was a career assistant prosecutor for the Summit County Prosecutor's Office for close to 30 years before retiring from that office in 2008. He argued cases in the Ninth District Court of Appeals and Supreme Court of Ohio. He is doing interactive CLE presentations on ethics, professionalism, contempt of court, self defense and other issues. He has spoken to various groups including the Ohio Judicial College, Ohio Prosecuting Attorney Association, West Virginia Prosecuting Attorney Association and Ohio Municipal Attorney Association.

His presentations have been described as "informative, entertaining and engaging." Mr. Bogdanoff can be reached at (330) 310-4479.

Endnotes

- ¹ *Athens News*, Nov. 4, 2010.
- ² *Columbus Dispatch*, Aug. 14, 2009.
- ³ *State v. Madera*, Cuyahoga No. 93764, 2010-Ohio-4884.
- ⁴ *State v. Martin* (1992), 21 Ohio St.3d 91.
- ⁵ R.C. 2901.05.
- ⁶ R.C. 2901.05(B)(3).
- ⁷ R.C. 2901.05(B)(2)(a)(b).
- ⁸ *State v. Johnson*, Cuyahoga App. No. 92310, 2010-Ohio-145 at ¶18.
- ⁹ *State v. Thomas* (1997), 77 Ohio St.3d 323, 326.
- ¹⁰ *State v. Kendricks*, Franklin No. 10AP114, 10AP115, 2010-Ohio-6041 at ¶34.
- ¹¹ *State v. Cronin*, Sandusky No. S-CA-032, 2010-Ohio-4717 at ¶37.
- ¹² *State v. Cassano* (2002), 96 Ohio St.3d 94.
- ¹³ *State v. Marsh* (1990), 71 Ohio App3d 64.
- ¹⁴ *State v. Thomas* (1997), 77 Ohio St.3d 323, 327. Emphasis added by author.
- ¹⁵ *State v. Franklin*, Summit No. 22771, 2006-Ohio-4569.
- ¹⁶ *State v. Powell* (2008), 176 Ohio App.3d 28, 36; *State v. Hairston*, Cuyahoga No. 88738, 2007-Ohio-3650 at ¶16; *City of Middleton v. Phillips*, Butler No. 2007-04-097, 2008-Ohio-352 at ¶9; *State v. Goff*, Lawrence No. 07CA17, 2009-Ohio-4914 at ¶69, reversed on other grounds *State v. Goff* (2010), 128 Ohio St.3d 169.
- ¹⁷ *State v. Thomas* (1997), 77 Ohio St.3d 323, 328.
- ¹⁸ *State v. Andrews*, Summit No. 25114, 2010-Ohio-6126 at ¶16.
- ¹⁹ *State v. Suarez*, Greene No. 10CA0008, 2011-Ohio-1438 at ¶19.
- ²⁰ *State v. Madera*, Cuyahoga No. 93764, 2010-Ohio-4884 at ¶3.
- ²¹ *Id.* at ¶37.
- ²² *Id.* at ¶38.
- ²³ *State v. Clellan*, Franklin No. 09AP-1043, 2010-Ohio-3841.
- ²⁴ *Id.* at ¶24-25.
- ²⁵ *State v. Miller*, Warren No. CA2009-10-138, 2010-Ohio-3821.
- ²⁶ *Id.* at ¶38.
- ²⁷ Ala. Code 1975 13A-3-23, A.R.S. 13-419, 776.013, Florida Statutes (2007), Okla. 21 O.S.2001 §1289.25, Section 16-11-440 of the South Carolina Code, Tenn. Code Ann. §39-11-611, 9.31 of the Texas Penal Code.
- ²⁸ La.R.S.14:20
- ²⁹ *Columbus Dispatch*, Nov. 14, 2010.