

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA

v.

KENNETH JOHN CHESEBRO

Indictment No.
23SC188947

ORDER ON DEFENDANT’S MOTION TO DISMISS OR GRANT IMMUNITY

On September 12, 2023, the Defendant filed a motion claiming legal justification for committing his alleged criminal acts, thereby requiring dismissal of the indictment. (Doc. 32). The State voiced its objection through a written response on September 26, 2023. (Doc. 64). Styled as a motion to dismiss or in the alternative as a request for immunity from this prosecution, the Defendant does not explain under what particularized authority a trial court could grant his request. And unless authorized by law, a trial court cannot unilaterally end a prosecution and dismiss an indictment. There must be some procedural “hook.” However, as the Defendant invokes a more familiar form of pretrial litigation by requesting immunity, the Court will address that issue.

Typically, a criminal defendant’s “immunity motion” falls under the auspices of O.C.G.A. § 16-3-24.2. This statute, a relative newcomer to our criminal code since its enactment in 1998, places a duty on the trial court to determine before trial whether a defendant is immune from prosecution. *Fair v. State*, 284 Ga. 165, 166 (2008). While an affirmative defense can only be asserted during trial, “immunity represents a far greater right” as it spares an immune party from prolonged pretrial proceedings and the trial altogether. *Bunn v. State*, 284 Ga. 410, 413 (2008). To avoid trial, the defendant must establish his immunity by a preponderance of the evidence. *Id.*

More to the point here, O.C.G.A. § 16-3-24.2 enumerates the specific defenses eligible for pretrial immunity. The “catch-all” provisions referenced by the Defendant, O.C.G.A. § 16-3-20(5) & (6), are not among them. Our Supreme Court has disapproved of the exact approach proposed

by the Defendant, warning against the incorporation of justification principles found outside the immunity statute. *State v. Copeland*, 310 Ga. 345, 355-56 (2020) (“the trial court conflated principles found in O.C.G.A. § 16-3-20(2) and (4), which are not referenced in O.C.G.A. § 16-3-24.2”); *see also* Daniel, *Georgia Criminal Trial Practice* (2021-2022 ed.), § 22:19 (“not every justification defense entitles one to immunity from prosecution”). The Defendant’s affirmative defense that he simply performed his legal duty to a client may be suitable for a jury charge. But it is irrelevant in the pretrial context of immunity, and this Court declines the invitation to supplant the jury’s role as the factfinder. *See* Ga. Const. of 1983 Art. I, Sec. I, Par. XI (“the jury shall be the judges of the law and the facts”). The motion is DENIED.

SO ORDERED, this 29th day of September, 2023.



Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit