

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	I.D. No. 0705002422
	:	
	:	
MICHAEL NEAL,	:	
	:	
Defendant.	:	

Submitted: November 30, 2007
Decided: December 7, 2007

ORDER

This 7th day of December 2007, upon consideration of the evidence presented at trial and the supplemental memoranda of the State and the defendant, it appears that:

1. The indictment charged Michael Neal with ten counts:

Count I: Possession of a deadly weapon by a person prohibited, the weapon was a .32 caliber handgun.
Count II: Reckless Endangering First Degree (Kareem Mickens).
Count III: Possession of a Firearm During the Commission of a Felony, the associated felony is Count II.
Count IV: Reckless Endangering First Degree (Hakeem Hammond).
Count V: Possession of a Firearm During the Commission of a Felony, the associated felony is Count IV.
Count VI: Reckless Endangering First Degree (Jamel Mickens).
Count VII: Possession of a Firearm During the Commission of a Felony, the associated felony is Count VI.
Count VIII: Receiving Stolen Firearm – *nolle prossed prior to trial*.
Count IX: Criminal Mischief
Count X: Possession of a Non-narcotic Controlled Substance—marijuana.

2. The attorneys agreed prior to the commencement of the trial that Count I would be severed and tried non-jury.

3. The State failed to prove critical elements of all three counts of Reckless Endangering, Counts II, IV, and VI. They were all dismissed, as were the associated weapons charges, all of which related to a .32 caliber handgun.
4. Remaining for the jury to decide were the charges of criminal mischief and possession of marijuana. The jury returned a verdict of **not guilty** on the criminal mischief charge, and **guilty** on the charge which was never contested—that the defendant possessed a small amount of marijuana when he was apprehended.
5. Introduced into evidence at the trial were two weapons. The .32 caliber gun was found near a structure on 7th Street. The State’s theory was that the defendant had thrown the gun while riding his bicycle down the street.
6. The evidence was that the criminal mischief was caused by the .32 caliber handgun. There was also evidence to suggest that a second person had been shooting a weapon and that the location of the .32 caliber handgun was such that it would have been difficult for the defendant to have thrown it there while riding his bicycle down the street.
7. The issue is whether the defendant’s acquittal on the criminal mischief charge estops the State from pursuing the Person Prohibited charge on the grounds of double jeopardy.
8. A claim will be collaterally estopped if “the same issue was presented in both cases, the issue was litigated and decided in the first suit, and the determination was essential to the prior judgment.”¹ The defendant must show that the issue of possessing the .32 caliber weapon was “actually and necessarily decided in his favor in the prior adjudication”²
9. In deciding the charge of criminal mischief, the single rationally conceivable issue in dispute before the jury was whether the defendant was the person who fired and discarded the .32 caliber weapon. The other element of the offense, intentional damage to property in excess of \$1500, was not contested. The jury was not persuaded beyond a reasonable doubt that the defendant was the person who fired the .32 caliber weapon.
10. The evidence supports the conclusion that the defendant fired a weapon, as he was seen doing by Lieutenant Akil. A 9mm weapon was retrieved from a roof top near where he was apprehended within minutes from the time he was seen by Lieutenant Akil. The possession of a deadly weapon by a person prohibited charge is not based on the 9mm weapon—the indictment charges the defendant with possessing a .32 caliber handgun. The State must live with the allegations in the indictment. Thus, the State has not proven the offense charged.

The defendant is acquitted of Count I.

¹ *Godwin v. State*, 2006 WL 1805876 *4 (Del. 2006).

² *Id.*

Sentencing will be scheduled on the sole conviction of Possession of Marijuana.

IT IS SO ORDERED.

Judge Susan C. Del Pesco

Original to Prothonotary

xc: John S. Malik, Esquire, attorney for Michael Neal
Karin M. Volker, Esquire, Deputy Attorney General