

IN THE SUPREME COURT OF THE STATE OF DELAWARE

COREY SMITH,	§	
	§	No. 61, 2005
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0311016691
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: August 11, 2005

Decided: August 17, 2005

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 17<sup>th</sup> day of August 2005, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

(1) The defendant-below appellant, Corey Smith, appeals from his convictions, by a Superior Court jury, of Possession of a Deadly Weapon by a Person Prohibited (“PDWPP”) and of Carrying a Concealed Deadly Weapon (“CCDW”). On appeal, Smith contends that the Superior Court erred by denying his motion for a continuance, and by shifting the burden of proof from the prosecution to the defense to affirmatively show a license to rebut the charge of CCDW. Smith also contends that the Court could not lawfully impose a three year minimum mandatory sentence, because the jury made no factual findings that

supported the imposition of that sentence. Because we find that Smith's claims of error are meritless, we affirm.

(2) On November 22, 2003, the Wilmington Police Department received an anonymous tip that a suspect in a shooting was sleeping in the passenger seat of a van parked in the vicinity of Clayton and 2<sup>nd</sup> Streets in Wilmington. The informant told the police that the suspect was in possession of a handgun. The police proceeded to the scene and awoke Smith, who was asleep on the passenger side of the van. The police officers conducted a pat-down search of Smith and found a loaded handgun in his right pants pocket. Smith later admitted to the officers that he had purchased the handgun for \$100 one week before.

(3) At the trial, Smith stipulated that he was a person prohibited from carrying a deadly weapon, because he had previously been convicted of Possession of Cocaine with Intent to Deliver. In return for that stipulation, the State redacted its indictment to remove the details of Smith's prior conviction. On the day of trial, the State presented the testimony of the arresting officer who had found the gun in Smith's possession. The two witnesses subpoenaed by the defense did not appear, and the Superior Court denied Smith's motion for a continuance to enable him to produce those witnesses. Smith did not testify, and the defense presented no other witnesses on his behalf. The jury convicted Smith of PDWPP and of CCDW. Smith appeals from those convictions.

(4) On appeal, Smith contends that the Superior Court erred: (1) by denying his request for a continuance so that he could locate the subpoenaed witnesses who had failed to appear; (2) by shifting to the defense the burden of proof affirmatively to show a license to carry a concealed deadly weapon; and (3) by imposing a mandatory three year sentence based upon Smith's earlier conviction of a violent felony within the past 10 years, where the jury had heard no evidence of the date of Smith's prior conviction.

(5) Smith first contends that the Superior Court improperly denied his motion for a continuance after the two witnesses subpoenaed by the defense failed to appear at trial. Applications for continuances are left to the sound discretion of the trial judge, whose ruling will not be disturbed on appeal unless it is found to be clearly unreasonable or arbitrary.<sup>1</sup>

(6) Here, the Superior Court did not abuse its discretion because Smith's application for a continuance did not satisfy the standards of *Secrest v. State*.<sup>2</sup> Under *Secrest*, a party seeking a continuance must establish a clear record of the relevant facts relating to the criteria for a continuance, and must also show that (i) he was diligent in preparing to present the testimony; (ii) the continuance is likely to satisfy the need to present the testimony; and (iii) the inconvenience of the

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<sup>1</sup> *Bailey v. State*, 521 A.2d 1069, 1088 (Del. 1987).

<sup>2</sup> *Secrest v. State*, 679 A.2d 59, 66 (Del. 1996).

continuance to the Court, opposing parties, witnesses, and jurors is insubstantial when compared to the prejudice that likely would result from its denial.<sup>3</sup>

(7) Smith's application for a continuance did not meet the *Secret* standards because he did not provide a time frame for the continuance, and he did not show that any prejudice would result from its denial. *Secret* requires the moving party to establish a clear record of the facts relevant to the criteria for a continuance, including the length of the continuance.<sup>4</sup> Smith did not indicate which length of time he would need to obtain the presence of the witnesses. For purposes of case management and efficiency, it is essential for a judge to know how long a continuance will last. Smith provided no suggested time frame to the trial judge.

(8) Nor did Smith show that the denial of the continuance was likely to prejudice his case. According to Smith, the two witnesses were prepared to testify that Smith did not own a gun and had never been seen with a gun before the day he was arrested. Neither of those witnesses was present when Smith was arrested, however, nor did they have any information relating to the gun found in his possession. Because the police found the gun in Smith's possession and Smith admitted to the police that he owned the gun, the probative value of the witnesses' proffered testimony, if any, was minimal. In short, Smith did not show that the

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

loss of those two witnesses prejudiced his case, when compared to the inconvenience the continuance would cause the Court and the jurors.

(9) Because Smith did not disclose any length for his requested continuance and did not show that the denial of the continuance caused prejudice to his case, his request for a continuance did not satisfy the *Secrest* standards. Therefore, the Superior Court did not abuse its discretion in denying the continuance.

(10) Smith next contends that the Superior Court improperly shifted to the defense the burden of proof to show a license to carry a concealed deadly weapon. At trial, Smith argued that the State should be required to prove as an element of CCDW the absence of a license to carry a concealed deadly weapon. The Superior Court rejected that argument as a matter of law. This Court reviews questions of law *de novo* to determine if the trial judge erred.<sup>5</sup>

(11) In *Lively v. State*<sup>6</sup> and *Upshur v. State*,<sup>7</sup> this Court held that in a criminal trial the defendant who is charged with CCDW has the burden to show that he had a license to carry a concealed deadly weapon.<sup>8</sup> As we said in *Lively*,

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<sup>5</sup> *Schadt v. Latchford*, 843 A.2d 689, 691 (Del. 2004); *Smithkline Beecham Pharm. Co. v. Merck & Co., Inc.*, 766 A.2d 442, 447 (Del. 2000).

<sup>6</sup> 427 A.2d 882 (Del. 1981).

<sup>7</sup> 420 A.2d 165 (Del. 1980).

<sup>8</sup> *Lively*, 427 A.2d at 884; *Upshur*, 420 A.2d at 169.

“possession of a license is best viewed as a defense to a charge of CCDW, since it is a matter more immediately within the knowledge of the defendant himself, and more readily proven by him.”<sup>9</sup> Smith contends that we should reconsider *Lively* and *Upshur*, because the 1986 amendment to the Delaware Constitution, which post-dated those decisions, expressly recognized the right to bear arms in Delaware for the first time.<sup>10</sup> Smith asserts that the 1986 amendment, which was adopted after *Lively* and *Upshur* were decided, broadened the right to bear arms and that as a result, a Delaware citizen should be presumed to be bearing arms legally unless the State proves otherwise.

(12) Smith fails to explain, however, how the 1986 amendment altered the existing law governing the right to carry a *concealed* weapon. The amendment, Article I, Section 20, provides that “A person has the right to keep and bear arms for the defense of self, family, home, and State, and for hunting and recreational use.” That constitutional provision contains no language that entitles a person to conceal the weapon he carries. Rather, any such entitlement involves only a *privilege* to carry a concealed weapon—a privilege that is regulated by statute: 11 *Del. C.* § 1441. Although Article I Section 20 confirms the constitutional right to keep and bear arms, Section 1441 denies any person the right to carry a concealed

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<sup>9</sup> *Lively*, 427 A.2d at 884.

<sup>10</sup> Del. Const. Art. I, § 20.

deadly weapon without a license to do so. Section 1441 predated the 1986 amendment and was unchanged by it.<sup>11</sup> Because the amendment did not impact the statutory privilege to carry a concealed weapon, there is no need for us to reconsider *Lively* and *Upshur*. Accordingly, the Superior Court did not err in imposing on the defendant the burden to prove a license to carry a concealed weapon.

(13) Smith’s final argument on appeal is that under 11 *Del. C.* § 1448(e)(2) and recent United States Supreme Court decisions, the trial judge could not lawfully impose the three year minimum mandatory sentence.<sup>12</sup> Section 1448(e)(2) establishes a three year mandatory sentence for a person convicted of PDWPP, if that person has been convicted of a violent felony within the past ten years. At trial, Smith stipulated that he was a person prohibited, because he had been convicted in September 2003 of Possession with Intent to Deliver Cocaine, which is designated as a violent felony. The jury did not hear evidence of the date of that prior conviction, because the State redacted that information from the indictment in exchange for Smith’s stipulation. Smith now contends that his sentence was improper because it was based on a fact—the date of his prior

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<sup>11</sup> Smith does not challenge the constitutionality of 11 *Del. C.* § 1441.

<sup>12</sup> The Court sentenced Smith to seven years in prison, suspended after three years at Level V, for six months at Level IV work release, followed by probation.

conviction—that was not considered by the jury. Smith urges that the Superior Court’s reliance on that factual element ran afoul of the United States Supreme Court’s recent decisions in *United States v. Booker*, *Blakely v. Washington*, and *Apprendi v. New Jersey*.<sup>13</sup>

(14) Smith’s argument fails because by stipulating that he was a person prohibited, he waived his right to dispute the underlying facts of that stipulation, including the date of his prior conviction. In *Warner v. State*, this Court explained that “a criminal defendant who stipulates to an element of an offense relinquishes his right to dispute the government’s case with respect to the existence of the facts underlying that stipulation.”<sup>14</sup> Here, the State redacted the indictment to eliminate any prejudice to Smith, in exchange for Smith’s stipulation that he was a person prohibited by virtue of his September 2003 conviction. Having waived his right to argue that the State had not adequately proved the facts underlying the conviction, to allow Smith to benefit from the fact that the jury was not told of the date of his prior conviction would be perverse, because Smith’s request for a redacted indictment was the reason why the date of his prior conviction was not revealed to the jury.

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<sup>13</sup> 125 S. Ct. 738 (2005); 542 U.S. 296 (2004); 530 U.S. 466 (2000).

<sup>14</sup> *Warner v. State*, C.A. No. 35, 2001, 2001 WL 1512985 (Del. Nov. 21, 2001).



(15) Because Smith validly waived his right to contest the PDWPP charge, this Court need not address the applicability of the United States Supreme Court cases that Smith cites. The Superior Court did not err in relying on the date of Smith's prior conviction in issuing the mandatory three year sentence.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice