

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

JAVIER OCHOA,)

Defendant-Below, Appellant,)

v.)

STATE OF DELAWARE,)

Plaintiff-Below, Appellee.)

Case No. 0804030992 MJB

Submitted: April 16, 2009

Decided: July 31, 2009

Upon Appeal from the Court of Common Pleas of the State of Delaware in and for New Castle County. **AFFIRMED.** Appellant's Motion to Strike is **GRANTED.**

OPINION AND ORDER

K. Tyler O'Connell, Esquire, Office of the Public Defender, Wilmington, Delaware, for Appellant.

Scott Thomas Earle, Esquire, Department of Justice, Wilmington, Delaware, for Appellee.

BRADY, J.

INTRODUCTION

The Appellant and Defendant-below, Javier Ochoa (“Ochoa”), was charged with one count of Carrying a Concealed Dangerous Instrument in violation of 11 *Del. C.* §1443 (“Section 1443”). Prior to the trial in the Court of Common Pleas, the Court held a hearing on a Motion to Suppress filed by the Defendant. The Trial Judge denied that Motion. In the interest of efficiency, given that the case was a bench trial, the Court then admitted into the trial record all the non-hearsay evidence adduced during the suppression hearing. At the conclusion of trial, Ochoa was found guilty. Ochoa thereafter filed this appeal.

In the State’s Answering Brief, in support of its position, the State referenced statements that had been ruled hearsay in the trial, and the Defendant filed a Motion to Strike that portion of the State’s submission.

FACTS

On April 22, 2008, Wilmington Police Department officers were patrolling the City of Wilmington. The officers responded to the area of North Clayton Street, which was described as a high-crime, high-drug area, and encountered a female. The officers asked the woman her name, where she lived and what her business was in the area. She stated she was looking for a friend, “Javier.” She denied any association with a red Pontiac parked in the 100 block of North Clayton

Street. The officers searched the DELJIS database and found that a writ of capias was outstanding for her arrest, and took her into custody.

About one block from the female subject, another officer stopped a male subject, who identified himself as Javier Ochoa. The officers asked Ochoa if he knew the female subject being arrested down the street and he responded in the negative. Ochoa did, however, acknowledge an association with the red Pontiac vehicle. The officers searched the DELJIS database for Ochoa's name, which yielded no results. The DELJIS database includes not only persons who have a criminal history, or have received a traffic ticket, but also those who have a driver's license.

The officers were concerned that Ochoa had given a false name based on the fact that DELJIS did not return any results. Because the two parties were also giving the police conflicting stories, one of the officers performed a pat down search of Ochoa for officer safety purposes. The officer felt a sharp object in Ochoa's right rear pants pocket. The officer asked Ochoa what the object was, and Ochoa stated that it was "a tool." The officer removed the object, which, according to the officer, resembled a "tire punch," a tool used to repair flat tires.¹

¹ In describing the tire punch, the officer stated, "if you get a simple nail in your tire you grab onto this, it's got indents for your fingers, you pull the nail out, you ream this thing through the hole to smooth it out, you put in a plug light and then you can fill the tire back up. That's why it was called a tire punch." Transcript ("Tr.") at 43.

The officer asked Ochoa why he was carrying the tool and Ochoa replied that he used it in his work as a painter. The officer asked Ochoa where his other tools were and why he had the tool on his person. Ochoa did not respond to the questions. Ochoa did not possess any other tools or equipment on his person. Ochoa did not reach for the tool when the officers approached nor did he attempt or threaten to use it in any way that would cause injury. The object was admitted as an exhibit at trial.

Ochoa testified in his own defense at trial. He stated that he used tools of the kind found by the officer to punch holes in drywall prior to cutting it with a drywall saw. Ochoa testified that he got the particular tool at issue from his employer, that he had used it on the day in question, and had left work forgetting that he had it in his pocket. Under cross-examination, Ochoa acknowledged that he had no job in the vicinity in which he was detained. He also admitted that he had lied to the police when he denied knowing the female with whom he had arrived in the area. He stated that he told the officer that he was going to the liquor store, but testified at trial that he was looking for a friend. Neither the employer nor any co-worker testified at trial.

During the trial, the trial judge asked a number of questions of the Defendant as well, in response to which Ochoa testified that he had been seated part of the

time since he left work and during which he had the object in his pocket and that he had used the tool on the day in question.

Following all the testimony, the Court found the Defendant, Ochoa, guilty of the charge of Carrying a Concealed Dangerous Instrument. The Court made certain findings of fact, including that: the object was concealed; that the object was not in an container normally used for carrying tools, and was not being carried along with other tools relevant to the Defendant's employment; that the object was readily capable of causing death or serious physical injury; that is was dangerous to carry in a back pocket, and was carried under circumstances that had nothing to do with a legitimate purpose for which it might have been designed or adapted.² The trial judge also determined, after examining the object, that it had no marks or any other indicator that it had ever been used.³ Further, the trial judge found that it made no sense for the Defendant to sit down with such an object in his pocket and not immediately remove it, not accepting the Defendant's testimony that he had forgotten he had it in his pocket.⁴ The trial court recognized that there was no evidence Ochoa attempted to use the instrument to cause death or serious physical injury.⁵ The Court addressed the defense claim that one cannot conceal and use an object at the same time, and reasoned that the only reasonable way to reconcile the

² Tr. at 61, 86.

³ *Id.*

⁴ *Id.* at 86.

⁵ *Id.* at 60, 86.

matter was to examine the circumstances under which the Defendant possessed the object.⁶

STANDARD OF REVIEW

The standard of review this Court applies when reviewing an appeal from the Court of Common Pleas is the same standard applied by the Delaware Supreme Court when reviewing an appeal from a decision of the Superior Court.⁷ By statute, an appeal from the Court of Common Pleas to this Court is “reviewed on the record and shall not be tried *de novo*.”⁸ “The Superior Court has the duty to review the sufficiency of the evidence and to test the propriety of the findings below. If such findings are sufficiently supported by the record and are the product of an orderly and logical deductive process, the Superior Court must accept them...if there is sufficient evidence to support the findings of the Trial Judge, the Superior Court sitting in its appellate capacity must affirm, unless the findings are clearly wrong.”⁹ Questions of law are reviewed *de novo*.¹⁰

⁶ *Id.* at 61, 81-2.

⁷ *State v. Cagle*, 332 A.2d 140, 142-3 (Del. 1974); *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972). *Smith v. Thomas*, 2001 WL 1729143 (Del. Super. Dec. 10, 2001); *Lynch v. State*, 1994 WL 750314 (Del. Super. Dec. 8, 1994).

⁸ 10 *Del. C.* § 1326(c); Sup. Ct. Civ. R. 72 (g).

⁹ *Cagle*, 332 A.2d at 142-3.

¹⁰ *Sutherland v. State*, 2006 WL 1680027 at *2 (Del. Super. April 28, 2006); *State Farm Mutual Auto. Ins. Co. v. Dann*, 794 A.2d 42, 45 (Del. Super. Jan. 29, 2002).

THE PARTIES' CONTENTIONS

Ochoa argues that the Court of Common Pleas committed reversible error in holding that the tool found on his person was a “dangerous instrument” under Section 222(4) because he never used, attempted to use, or threatened to use the tool in any manner making it readily capable of causing death or serious physical injury.¹¹ The State argues that an instrument cannot be actively used and concealed simultaneously, therefore the “obvious and practical reading of ‘under the circumstances in which it is being used’ means the purpose or intended use, as evidenced by the surrounding circumstances, in which the dangerous instrument is being carried concealed.”¹² Furthermore, the State argues that the prevailing Delaware case law, notably *Ciprick v. State*,¹³ confirms that actual use is not a requirement for conviction under 11 *Del. C.* §1443.¹⁴

ANALYSIS

Initially, the Court considers the Defendant’s Motion to Strike. It is **GRANTED**. Upon reviewing the transcript of the motion hearing and trial from

¹¹ 11 *Del. C.* §222(4) provides in pertinent part that a dangerous instrument is “any instrument, article or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury...”

¹² State’s Answ. Br. at 7.

¹³ 1981 WL 376964 (Del. Super. June 5, 1981).

¹⁴ 11 *Del. C.* §1443 provides in pertinent part that: (a) A person is guilty of carrying a concealed dangerous instrument when the person carries concealed a dangerous instrument upon or about the person. (b) It shall be a defense that the defendant was carrying the concealed dangerous instrument for a specific lawful purpose and that the defendant had no intention of causing any physical injury or threatening the same.

the Court below, it is evident that the Trial Judge ruled that any reference to the substance of a tip given to the police by a reliable, confidential informant that the Defendant and his companion had come into the area in the red Pontiac, had asked a person in the area for drugs, and had separated and gone different ways, was hearsay and would be considered for purposes of the suppression hearing, but would not be considered as evidence in the trial.¹⁵ The State did not appeal the Trial Judge's ruling regarding the confidential informant's statements. Therefore, the State's arguments in that regard are not properly before the Court. Even if they were, the Court finds no error in the Trial Court's ruling to exclude from the evidence the substance of the tip from the confidential informant.

The Court next addresses the substantive issue before it. The Court must decide whether the evidence supports, as a matter of law, the finding of guilt in this case. There is little precedent in the case law regarding a defendant prosecuted for this instant offense and examples in which the defendant did not actually use the (previously concealed) instrument to cause injury, or attempt or threaten to use the instrument to do so, are rare.

11 Delaware Code, Section 222(4) defines a "dangerous instrument" as "any instrument, article or substance which, under the circumstances which it is *used, attempted to be used or threatened to be used*, is readily capable of causing death

¹⁵ Trans. p. 3, 57, 76, 77.

or serious physical injury...”¹⁶ It is a defense to the crime if the defendant was “carrying the concealed dangerous instrument for a specific lawful purpose and that the defendant had no intention of causing any physical injury or threatening the same.”¹⁷

Ciprick v. State is the only case of which the Court is aware that squarely addresses this issue.¹⁸ In *Ciprick*, this Court, in dicta, explicitly rejected the appellant’s argument that Section 222(4) requires the State to show that he used, attempted to use, or threatened to use his knife, before appellant could be convicted of Carrying a Concealed Dangerous Instrument.¹⁹ The Court in *Ciprick* did an analysis of the legislative history of the revisions to the Delaware Code which resulted in the creation of the offense of Carrying a Concealed Dangerous Instrument, which is instructive. The intent in the enactment of a separate offense and definition was to more narrowly define the term “deadly weapon” and create a different level of severity for the concealed carrying of those, specified objects as distinct to objects which may have a legitimate purpose. In *Ciprick*, the Court found that the circumstances in which the object is used serves as a “guideline by

¹⁶ 11 *Del. C.* §222(4). (emphasis added)

¹⁷ 11 *Del. C.* §1443 (b).

¹⁸ *See supra*, n. 13.

¹⁹ The language cited in the *Ciprick* case is dicta because the Court below found that the knife in question was a “deadly weapon” and therefore did not fall under the definition of “dangerous instrument” in Section 222(4).

which the Court may determine whether a defendant intended to use an ordinary object to cause injury.”²⁰

The Court accepts the *Ciprick* Court’s interpretation of Section 222(4). Because an instrument cannot be actively used and concealed simultaneously, the Court reads the language “under the circumstances in which it is being used” to mean the purpose or intended use, as evidenced from the surrounding circumstances in which the dangerous instrument is being carried concealed.

The Pattern Jury Instructions are also instructive in this matter. The elements a jury is instructed they must find to convict a defendant of the charge of Carrying a Concealed Dangerous Instrument are the following:

- 1) There was a dangerous instrument; and
- 2) The defendant carried the instrument; and
- 3) The instrument was concealed; and
- 4) The defendant acted knowingly.

The Defendant can present a defense to the charge by showing:

- 1) That he had a specific lawful purpose in carrying the dangerous instrument; and
- 2) That he had no intention of causing any physical injury or threat thereof.

²⁰ *Ciprick*, 1981 WL 376964, at * 2.

In *Ciprick*, the defendant attempted to establish a defense pursuant to 11 *Del. C.* §1443(b) by proffering legitimate uses for the knife found concealed on his person. The defendant testified that he used the knife for hunting and fishing. The Court reviewed the record below and rejected the defendant's testimony, upholding the trial judge's determination that the defendant failed to establish a lawful purpose for carrying the knife. Similarly, the Trial Judge in the case at bar made a determination, based upon the evidence presented at trial, that the elements of the offense had been established, and that the Defendant's explanation was not credible. The Trial Judge relied upon several factors in reaching his decision, including the fact that Ochoa had the tool concealed in his back pocket, a location that was at least uncomfortable, if not dangerous for the Defendant, if seated,²¹ that Ochoa was not found in possession of other painting equipment or painting tools,²² that the tool did not appear to have been used previously,²³ that the tool was capable of causing death or serious physical injury,²⁴ and that Ochoa was stopped in an area known to law enforcement to be a high-drug, high-crime area, an inherently dangerous location.²⁵

²¹ Tr. at 86.

²² *Id.* at 61, 86.

²³ *Id.*

²⁴ *Id.*

²⁵ Tr. at 38.

CONCLUSION

The Trial Judge appropriately ruled, after a review of the record below, that the instrument at issue was being carried concealed for the purpose of being used as a dangerous instrument. The conviction below of Appellant for Carrying a Concealed Dangerous Instrument is hereby **AFFIRMED**. Appellant's Motion to Strike is **GRANTED**.

IT IS SO ORDERED.

_____/s/_____
M. Jane Brady
Superior Court Judge