

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

STATE OF DELAWARE)	
)	
)	
v.)	DEF. I.D.: 0906019055
)	
KENJUAN CONGO,)	
)	
Defendant.)	

Date Submitted: April 29, 2010
Date Decided: May 12, 2010

MEMORANDUM OPINION

*Upon Consideration of Defendant's
Motion for Judgment of Acquittal.*
DENIED.

Robert H. Surles, Esquire, and Mark Denney, Esquire, Deputies Attorney General.
Attorneys for the State of Delaware.

Michael W. Modica, Esquire. Attorney for the Defendant.

SLIGHTS, J.

I.

On April 16, 2010, a jury convicted Kenjuan Congo (“Defendant”) of two counts of Robbery First Degree, one count of Wearing a Disguise During the Commission of a Felony, two counts of Possession of a Deadly Weapon During the Commission of a Felony, two counts of Possession of a Firearm During the Commission of a Felony (“PFDCF”), and one count of Conspiracy Second Degree.

Defendant filed this Motion for Judgment of Acquittal under Rule 29(c) of the Superior Court Criminal Rules (“the Motion”) on April 19, 2010. The State filed its Response on April 29, 2010. Defendant’s Motion relates only to his conviction of the two counts of PFDCF, counts II and IV of the indictment.¹ He argues that a hybrid weapon consisting of both a BB gun and a compressed air pellet gun must be deemed to be a BB gun for purposes of the statutes relating to the offense of PFDCF. Because the statutory definition of “firearm” expressly excludes BB guns, Defendant argues that the Court should have acquitted him of both counts of PFDCF.²

In its Response, the State contends that a renewed motion for judgment of acquittal is not the proper procedural device by which to seek reargument of the

¹ Def.’s Mot. ¶ 4.

² Defendant raised this same issue during trial on a motion for judgment of acquittal. The Court denied the Motion upon finding that the statutory definition of “firearm” unambiguously includes compressed air pellet guns. *See* 11 *Del. C.* § 222(12).

Court's earlier decision.³ Moreover, the State asserts that the statute is not ambiguous, and that applying Defendant's interpretation of the statute would be contrary to the legislative intent and would produce an unreasonable result.⁴

The Court continues to be of the view that the relevant statute is unambiguous and that the definition of "firearm" as contained therein would encompass a pellet gun that also operates as a BB gun. This view is supported by the unambiguous legislative history of the relevant statute. Accordingly, Defendant's Motion must be **DENIED**.

II.

On a motion for judgment of acquittal, the Court's function is to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty of the charged offense beyond a reasonable doubt.⁵ It is only where the State has offered insufficient evidence to sustain a verdict of guilt that a motion for judgment of acquittal will be granted.⁶

³ State's Resp. 1.

⁴ *Id.* at 1-3.

⁵ Del. Super. Ct. R. 29(a); *Seward v. State*, 723 A.2d 365, 369 (Del. 1999).

⁶ *State v. Massey*, 2007 WL 1653503, at *1 (Del. Super. May 7, 2007).

A. Defendant's Motion Does Not Raise An Issue Relating To The Sufficiency Of The Evidence

Defendant's Motion is based on the premise that a hybrid BB and compressed air pellet gun must, as a matter of law, be excluded from the definition of "firearm" contained in 11 *Del. C.* § 222(12) ("Section 222(12)"). In support of his Motion, Defendant argues that "the statute is ambiguous and the principles of statutory construction must be applied to resolve this apparent issue of first impression."⁷ Defendant's argument does not address the question of whether the State presented sufficient evidence to support his conviction on two counts of PFDCF. Defendant does not, for example, argue that the State failed to present sufficient evidence to establish that he was in possession of the gun. Rather, Defendant's argument focuses on the Court's interpretation of the applicable statutory law. As such, it is not properly presented in a motion for judgment of acquittal.⁸

B. The Evidence Presented At Trial Was Sufficient To Allow A Reasonable Trier Of Fact To Convict Defendant Of PFDCF

Assuming *arguendo* that Defendant's Motion presents an issue that could properly be considered within the framework of a motion for judgment of acquittal,

⁷ Def.'s Mot. ¶ 3.

⁸ See, e.g., *Massey*, 2007 WL 1653503, at *2 ("As the only grounds on which a motion for judgment of acquittal may be granted is the insufficiency of the evidence, and the Defendant's challenge is directed at the sufficiency of the law, the Defendant's Motion is, thus, **DENIED.**") (footnote omitted).

the Court still would conclude that the Motion lacked merit. At trial, the State presented the testimony of Officer Paul Smack, Jr. of the New Castle County Police Department. Officer Smack testified generally about the operation and mechanism of the gun allegedly used to commit the robberies at issue, including its capability to work both as a BB gun and a compressed air pellet gun. He also demonstrated the mechanism by which air can be compressed into the gun's chamber so that it can force a pellet to be discharged from the barrel.

Defendant does not appear to contest Officer Smack's testimony. That is, he is not arguing that the gun was not a hybrid device, or that the gun was not designed to shoot either BBs or pellets. Rather, Defendant's argument is centered on the premise that the statutory definition of "firearm" is ambiguous as applied to a hybrid device, and that principles of statutory construction, when applied to this statute, lead to the conclusion that a hybrid weapon falls outside of the statutory definition.

As defined in Section 222(12), "[f]irearm' includes any weapon from which a shot, projectile or other object may be discharged by force of combustion, explosive, gas and/or mechanical means, whether operable or inoperable, loaded or unloaded. It does not include a BB gun."⁹ The instruction read to the jury at trial conformed to the definition of "firearm" contained in Section 222(12), except that the

⁹ 11 *Del. C.* § 222(12).

Court added the following sentence to the instruction: “It does include a compressed air pellet gun.”¹⁰ The jury instruction made no attempt to classify the gun in evidence as either a BB gun or a compressed air pellet gun (or a hybrid), nor did it indicate whether the gun in evidence was or was not a “firearm.”¹¹ Indeed, the Court permitted defense counsel to argue, as a matter of fact, that the gun in evidence was not a “firearm,” and he did so vigorously in his closing argument.

Defendant argues that the statute is ambiguous because it does not address whether a hybrid BB/compressed air pellet gun falls within the statutory definition of “firearm.” He urges the Court to engage in an in-depth analysis of the statute in order to ascertain its meaning.¹² As stated, in support of his position, Defendant cites several well-known rules of statutory construction, including the propositions that “penal statutes are strictly construed against the government,”¹³ and “more specific language is entitled to greater weight than general language.”¹⁴

¹⁰ See Docket Item (“D.I.”) 21 at 13.

¹¹ See generally *id.*

¹² Def.’s Mot. ¶ 3.

¹³ *Id.* at ¶ 6 (citing *State v. Sharon H.*, 429 A.2d 1321, 1328 (Del. Super 1981)).

¹⁴ *Id.* at ¶ 7 (citing *State v. Colasuonno*, 432 A.2d 334, 338 (Del. Super. 1981)).

The Court’s task is to construe the statute in a manner that gives meaning to the legislative intent.¹⁵ In doing so, “the Court must perform a two-step analysis: (1) The Court must first determine whether the statute is ambiguous by applying the rules [of statutory interpretation] in order to ascertain the Legislative intent and (2) if, and only if, the statute is clearly ambiguous, then the Court must apply the rules again to give practical effect to the previously ascertained legislative intent.”¹⁶ “Among the most important extrinsic aids are the statute’s legislative history and the legislative policy evidenced by other related statutes.”¹⁷

Defendant argues that ambiguity arises when Section 222(12) is applied to a hybrid device capable of shooting both BBs and pellets. The Court disagrees. The definition of “firearm” includes “any weapon from which a shot, projectile or other object may be discharged by . . . mechanical means”¹⁸ The word “mechanical” is not defined. Therefore, the Court must interpret the term in accordance with its

¹⁵ *Ramirez v. Murdick*, 948 A.2d 395, 398 (Del. 2008) (quoting *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007)).

¹⁶ *Marcucilli v. Boardwalk Builders, Inc.*, 2000 WL 703333, at *5 (Del. Super. Apr. 13, 2000).

¹⁷ *Ciprick v. State*, 1981 WL 376964, at *1 (Del. Super. June 5, 1981) (citing *Dooley v. Rhodes*, 135 A.2d 114 (Del. 1957)).

¹⁸ 11 *Del. C.* § 222(12).

ordinary meaning.¹⁹ In doing so, the court may refer to the dictionary for guidance.²⁰ Webster’s Dictionary defines “mechanical” as “caused by, resulting from, or relating to a process that involves a purely physical as opposed to a chemical change.”²¹ Officer Smack’s description of the hybrid gun involved in this case fits the dictionary definition of “mechanical.” He testified that the operator of the gun must mechanically pump air into the chamber in order to build up air pressure, which then is released when the operator pulls the trigger, thereby forcing a projectile from the barrel. This process is consistent with the dictionary definition of “mechanical,” as the projectile is released from the gun as the result of a “purely physical” process, namely the containment and subsequent release of air pressure, and the mechanical process acts upon the projectile in a manner that causes the projectile to be propelled out of the barrel of the gun. Since a hybrid BB/compressed air pellet gun falls squarely within the definition of “firearm,” Section 222(12) is unambiguous as applied to this case.

¹⁹ 1 *Del. C.* § 303 (“Words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language.”).

²⁰ *See, e.g., Ingram v. Thorpe*, 747 A.2d 545, 548 (Del. 2000) (“Dictionary definitions of undefined terms can be useful in construing statutes . . .”).

²¹ *Webster’s Tenth New Collegiate Dictionary*, 721 (10th ed. 1996)

To the extent the Court had any question regarding the meaning of the statute, the Court need look no further than the legislative history to discern the intent of the General Assembly. The Second Amendment to Senate Bill 13 deleted the phrase “or Compressed Air Pellet Gun” from the exceptions to the definition of “firearm” contained in Section 222(12), leaving BB guns as the only guns excepted from the definition.²² The legislative intent is further clarified by the synopsis that follows the amendment, which states: “This Amendment will include Compressed Air Pellet Guns within the definition of ‘firearm.’”²³ If the General Assembly had intended to continue to exclude compressed air pellet guns from the statutory definition of “firearm,” it would not have removed that exception from the statute.²⁴

The Court might engage in the type of statutory construction analysis endorsed by the Defendant if the Court found the statutory definition to be ambiguous and if the Court did not have the clear legislative history that is available here. In this case, however, there is both an unambiguous statute and clear legislative history that

²² 64 Del. Laws ch. 17, § 1 (1983) (amending 11 *Del. C.* § 222(12)).

²³ *Id.*

²⁴ *See, e.g., Evans v. State*, 516 A.2d 477, 479 (Del. 1986) (“[T]he deletion of any reference to consecutive sentencing in the 1980 amendments indicates that the legislature did not seek to impose such a requirement in the reenactment.”); *Nichols v. Chester Mack Sales & Serv., Inc.*, 1990 WL 251559, at *2 (Del. Super. Dec. 5, 1990) (“What the lawmakers determined as the appropriate definition was what was enacted into law.”).

directly addresses the language at issue. There is simply no reason for the Court to expand its inquiry beyond these sources.

With clear guidance from the statute, the jury's function was to determine if the weapon described by Officer Smack fit the definition of a "firearm."²⁵ Officer Smack's testimony that the gun was a hybrid capable of shooting both BBs and pellets was uncontroverted. While Defendant argued that the jury should find that the device was a BB gun and, therefore, not a "firearm" for purposes of the PFDCF charges, the jury's verdict of guilty on all counts indicates that they chose not to accept Defendant's interpretation of the facts. This weighing of evidence is within the sole discretion of the jury, and the Court will not disturb the jury's verdict under these circumstances.²⁶

III.

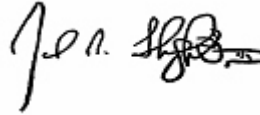
In light of the clear legislative intent, and the evidence presented at trial indicating that the gun in evidence was designed to fire either BBs or pellets, the Court finds that a reasonable fact finder could have concluded that the hybrid gun

²⁵ See *Probst v. State*, 547 A.2d 114, 120 (Del. 1988) (holding it is the province of the jury to apply the law to the facts and evidence presented at trial).

²⁶ See, e.g., *State v. Biter*, 119 A.2d 894, 898-99 (Del. Super. 1955).

was a “firearm” under Section 222(12). Accordingly, Defendant’s PFDCF convictions will not be set aside and Defendant’s Motion for Judgement of Acquittal is **DENIED**.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "J.R. Slights, III". The signature is written in a cursive, somewhat stylized font.

Judge Joseph R. Slights, III

JRS, III/sb

Original to Prothonotary