

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
KORAN ALLEN,	:	
	:	
Appellant	:	No. 2834 EDA 2013

Appeal from the Judgment of Sentence September 17, 2013  
In the Court of Common Pleas of Philadelphia County  
Criminal Division No(s): CP-51-CR-0011047-2009

BEFORE: GANTMAN, P.J., ALLEN, and FITZGERALD,\* JJ.

MEMORANDUM BY FITZGERALD, J.:

**FILED JULY 11, 2014**

Appellant, Koran Allen, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas following a jury trial and his convictions for, *inter alia*, persons not to possess firearms,<sup>1</sup> carrying a firearm without a license,<sup>2</sup> and carrying firearms in public in Philadelphia.<sup>3</sup> Appellant challenges the sufficiency and weight of the evidence. We affirm.

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\* Former Justice specially assigned to the Superior Court.

<sup>1</sup> 18 Pa.C.S. § 6105. The court, and not the jury, convicted Appellant of this crime.

<sup>2</sup> 18 Pa.C.S. § 6106

<sup>3</sup> 18 Pa.C.S. § 6108.

In response to a radio call, on May 30, 2009, around 10:20 p.m., two plainclothes police officers in an unmarked car arrived to a crowd of fifty to eighty people, with some people fighting and others running or walking away. The officers saw Appellant, who was about five feet away from them, walk rapidly away from the commotion. One officer saw Appellant's right hand grabbing his waistband and fidgeting several times. N.T. Trial, 1/23/13, at 52. As that officer exited the vehicle, he saw Appellant lift his shirt slightly toward the right side of his waist and heard an object fall to the sidewalk at Appellant's feet, after which Appellant began running away. *Id.* at 32-33. The officer saw the object was a revolver, picked it up, and pursued Appellant, who was apprehended by other officers. *Id.* at 33. Another officer also saw Appellant fidgeting in his waistband area in a manner that in the officer's experience indicated Appellant was carrying a firearm. N.T. Trial, 1/24/13, at 30. The police tested the firearm, which has a barrel length of 1¾ inches, and stated that it was intermittently operable because it was missing a component.<sup>4</sup>

Appellant was arrested, charged, and tried by a jury. After the jury convicted him, the court sentenced Appellant on March 8, 2013, to an aggregate term of four to ten years' imprisonment. On March 18, 2013,

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<sup>4</sup> The parties dispute whether the firearm was operable. Our standard of review, however, requires us to state the facts in the light most favorable to the Commonwealth. *See Commonwealth v. Matthew*, 909 A.2d 1254, 1256-57 (Pa. 2006) (citation omitted).

Appellant timely filed a post-sentence motion challenging, *inter alia*, the weight of the evidence, and a motion for reconsideration of sentence. On March 19, 2013, the court scheduled a hearing on both motions. For various reasons, the hearing was not held until September 17, 2013.<sup>5</sup>

On September 17, 2013, the court denied Appellant's post-sentence motion and resentenced him to an aggregate sentence of four to ten years' imprisonment. Appellant appealed and filed a non-court ordered Pa.R.A.P. 1925(b) statement. The trial judge did not file a Rule 1925(a) decision as he had left the bench.

Appellant raises the following issues on appeal:

Is [Appellant] entitled to an arrest of judgment on all charges where the Commonwealth did not prove beyond a reasonable doubt, and did not establish by sufficient

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<sup>5</sup> Under Pa.R.Crim.P. 720(B), the motion was denied by operation of law on July 16, 2013. The clerk of courts, however, did not enter an order on behalf of the court denying Appellant's post-sentence motion by operation of law. **See** Pa.R.Crim.P. 720(B)(3)(c). "This Court has previously held that, where the clerk of courts does not enter an order indicating that the post-sentence motion is denied by operation of law and notify the defendant of same, a breakdown in the court system has occurred and we will not find an appeal untimely under these circumstances." **Commonwealth v. Perry**, 820 A.2d 734, 735 (Pa. Super. 2003) (citations omitted). Further, on May 16, 2013, the court granted an oral motion to vacate sentence pending a hearing on Appellant's motion for reconsideration of sentence. The court's grant was erroneous under Pa.R.Crim.P. 720(B)(3), which states the "judge shall not vacate sentence pending decision on the post-sentence motion." **See** Pa.R.Crim.P. 720(B)(3). Thus, even if the clerk of courts had entered an order on July 16, 2013, Appellant could not appeal as the court had erroneously vacated the judgment of sentence on May 16, 2013. **See id.** Given the multiple breakdowns in the court system, we hold Appellant's appeal from the September 17, 2013 judgment of sentence is timely.

evidence, that the weapon recovered had ever been possessed by [Appellant] and, in the alternative, where the weapon recovered was not operable?

Is [Appellant] entitled to a new trial where the verdict is not supported by the greater weight of the evidence and where the greater weight did not establish that [Appellant] possessed the weapon, nor did it establish that the weapon was operable?

Appellant's Brief at 3.

We summarize Appellant's arguments for his two issues together. Appellant contends the Commonwealth never proved he possessed or constructively possessed the gun. Furthermore, he suggests that because the gun was inoperable, he could not have been convicted of the instant crimes. Appellant also opines that the verdict was against the weight of the evidence. We hold Appellant is due no relief.

"A claim challenging the sufficiency of the evidence is a question of law." ***Commonwealth v. Widmer***, 744 A.2d 745, 751 (Pa. 2000).

[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . does not require a court to ask itself whether **it** believes that the evidence at the trial established guilt beyond a reasonable doubt. Instead, it must determine simply whether the evidence believed by the fact-finder was sufficient to support the verdict.

***Commonwealth v. Ratsamy***, 934 A.2d 1233, 1235-36 (Pa. 2007) (citations and quotation marks omitted). "When reviewing the sufficiency of the evidence, an appellate court must determine whether the evidence, and all reasonable inferences deducible from that, viewed in the light most

favorable to the Commonwealth as verdict winner, are sufficient to establish all of the elements of the offense beyond a reasonable doubt.” *Id.* at 1237 (citations omitted). On the issue of whether the jury’s verdict is contrary to the weight of the evidence, our Supreme Court has held that “[t]he decision to grant or deny a motion for a new trial on the ground that the verdict is against the weight of the evidence is committed to the sound discretion of the trial court.” *Commonwealth v. Pronkoskie*, 445 A.2d 1203, 1206 (Pa. 1982).

To obtain a conviction under 18 Pa.C.S. § 6105, the Commonwealth must prove that a defendant is a person who has previously been convicted of one of several enumerated offenses and that he possessed, used, controlled, sold, transferred or manufactured the firearm. 18 Pa.C.S. § 6105(a)(1). Section 6105(i) defines “firearm” as including “any weapons which are designed to or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon.” 18 Pa.C.S. § 6105(i).

With respect to whether the firearm must be operable, in *Commonwealth v. Layton*, 307 A.2d 843 (Pa. 1973), the Pennsylvania Supreme Court reversed a conviction for illegal possession of a firearm under 18 P.S. § 4628(d), the precursor statute to Section 6105, because the handgun in question was inoperable. *Layton*, 307 A.2d at 845. Section 4628(d) did not explicitly require this finding of operability, but the *Layton*

Court found that the legislative intent of the statute—“to prevent further violence”—suggested an intent to cover “only objects which could cause violence by firing a shot.” *Id.* 844. Section 4628(d) was later repealed and recodified at Section 6105. *See Commonwealth v. Gainer*, 7 A.3d 291, 297 (Pa. Super. 2010) (discussing statutory history). Critically, in 1995, the legislature amended the definition of firearm under Section 6105 to include “any weapons which are designed to or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon.” 18 Pa.C.S. § 6105(i).

In *Commonwealth v. Thomas*, 988 A.2d 669 (Pa. Super. 2009), the defendant possessed a fully loaded seven-shot revolver that was unable to fire due to a missing spring. *Id.* at 672. This Court observed:

The statutory language [in section 6105(i)] is clear, and it does **not** require proof that the weapon was capable of expelling a projectile when it was seized; on the contrary, the fact that a person can be prosecuted simply for possessing a semiautomatic pistol frame refutes this notion because the frame requires additional parts, *e.g.*, a slide and barrel, in order to fire a bullet. Thus, the use of the terms “frame” and “receiver” in section 6105(i) demonstrates that the legislature sought to eliminate the operability requirement articulated in *Layton* for purposes of [section 6105].

*Id.* at 672 (footnote omitted and emphasis added). The *Thomas* Court thus held the defect of a missing spring was irrelevant because the statutory language did not mandate a finding of operability. *Id.* The Court therefore affirmed the defendant’s conviction under Section 6105 on the grounds that,

although incapable of being fired, the firearm “was designed to shoot bullets.” **Id.**; **see** Pa.C.S. § 6105(i) (including within definition of firearm “weapons which are designed to . . . expel any projectile”).<sup>6</sup>

Section 6106 defines the offense of firearms not to be carried without a license as follows:

**(a) Offense defined.—**

(1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

18 Pa.C.S. § 6106(a)(1). The Commonwealth can convict a defendant of violating Section 6108 by establishing that the defendant carried a “firearm, rifle or shotgun at any time upon the public streets or upon any public property” in Philadelphia and lacked a license to carry that firearm. 18 Pa.C.S. § 6108.

Unlike Section 6105, Sections 6106 and 6108 generally<sup>7</sup> employ the definition of “firearm” set forth in Section 6102:

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<sup>6</sup> The Court in **Commonwealth v. Stevenson**, 894 A.2d 759 (Pa. Super. 2006), applied the **Layton** operability factors to a case under Section 6105. **Id.** at 775-76. However, in **Thomas**, the Court observed that the **Stevenson** Court erred in applying these factors and that it had failed to review the pertinent statutory language. **Thomas**, 988 A.2d at 672. The **Thomas** Court noted further that the **Stevenson** Court’s application of the **Layton** factors had no effect on the outcome of the case. **Id.**

Any pistol or revolver with a barrel length less than 15 inches, any shotgun with a barrel length less than 18 inches or any rifle with a barrel length less than 16 inches, or any pistol, revolver, rifle or shotgun with an overall length of less than 26 inches. The barrel length of a firearm shall be determined by measuring from the muzzle of the barrel to the face of the closed action, bolt or cylinder, whichever is applicable.

18 Pa.C.S. § 6102; **see Gainer**, 7 A.3d at 297 (employing Section 6102 in construing whether firearm was required to be “operable” for conviction under Section 6106).

Following **Layton**, when presented with the issue of whether the evidence was sufficient to sustain a conviction under Section 6106, the appellate courts have applied the rules regarding operability as enunciated in **Layton**. For instance, most recently, in **Commonwealth v. Stevenson**, 894 A.2d 759 (Pa. Super. 2006), the appellant contended the evidence was insufficient to support his conviction under, *inter alia*, Section 6106. In finding the evidence to be sufficient, this Court, citing to **Layton**, began with the proposition that “[i]n order to sustain convictions under [this] section, the firearm in question must have been operable or capable of being converted into an object that could fire a shot.” **Stevenson**, 894 A.2d at 775 (citing **Layton, supra; Commonwealth v. Berta**, 356 Pa. Super. 403, 514 A.2d 921 (1986) (construing Section 6106); **Commonwealth v. Siiams**, 260 Pa. Super. 409, 394 A.2d 992 (1978) (construing Section 6106)). **See also Commonwealth v. Thomas**, 988 A.2d 669, 672 (Pa. Super. 2009) (“The original definition of the term firearm, which is codified at 18 Pa.C.S.A. § 6102, focuses solely on barrel length or the overall length of the weapon. The Uniform Firearms Act continues to utilize that definition, unless otherwise noted,

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<sup>7</sup> Section 6106(e)(1) states “For purposes of subsection (b)(3), (4), (5), (7) and (8), the term ‘firearm’ shall include any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of the weapon.” 18 Pa.C.S. § 6106(e)(1).

and therefore certain sections retain the requirement in **Layton.**").

**Gainer**, 7 A.3d at 298 (footnote omitted).

"Constructive possession" is found where the individual does not have actual possession over the illegal item but has conscious dominion over it. In order to prove "conscious dominion," the Commonwealth must present evidence to show that the defendant had both the power to control the firearm and the intent to exercise such control. These elements can be inferred from the totality of the circumstances.

**Commonwealth v. Heidler**, 741 A.2d 213, 215-16 (Pa. Super. 1999) (citations omitted).

Instantly, Section 6105 imposes no obligation on the Commonwealth to establish operability of a firearm. **See Thomas**, 988 A.2d at 672. The fact that Appellant's revolver was "designed to shoot bullets" satisfies the statutory requirements. **See id.** Thus, that Appellant's firearm may not have been operable or was intermittently operable is not pertinent to the Commonwealth's burden of proof for Section 6105. **See id.; see also** 18 Pa.C.S. § 6105. With respect to Sections 6106 and 6108, the record viewed in the light most favorable to the Commonwealth established that the revolver was intermittently operable. **See Gainer**, 7 A.3d at 298. Thus, the Commonwealth met its burden of proof to sustain a conviction under Sections 6106 and 6108. **See** 18 Pa.C.S. §§ 6106(a)(1), 6108.

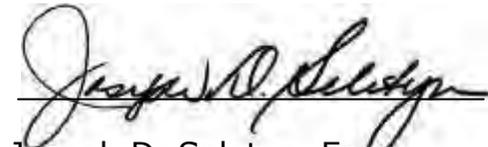
With respect to Appellant's suggestion that the Commonwealth did not establish he constructively possessed the revolver, we disagree. As set forth

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above, from five feet away, the police saw Appellant fidgeting around his waist several times, heard an object fall, and flee. **See** N.T. Trial, 1/23/13, at 32-33. The police immediately saw the object was a revolver. **See id.** The record and all reasonable inferences therefrom viewed in the light most favorable to the Commonwealth established Appellant constructively possessed the firearm. **See Heidler**, 741 A.2d at 215-16; **see also Ratsamy**, 934 A.2d at 1235-37. For these reasons, we also discern no abuse of discretion in the trial court's decision that the verdict was not against the weight of the evidence. **See Pronkoskie**, 445 A.2d at 1206. Accordingly, having discerned no error of law, we affirm the judgment of sentence. **See Ratsamy**, 934 A.2d at 1235.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive, flowing style.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 7/11/2014