NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. GARY J. J. SAUNDERS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3309 EDA 2012

Appeal from the Judgment of Sentence July 20, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0014025-2011

BEFORE: FORD ELLIOTT, P.J.E., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY OTT, J.: **FILED JULY 14, 2014**

Gary J.J. Saunders appeals from the judgment of sentence imposed on July 20, 2012, in the Court of Common Pleas of Philadelphia County. Following a non-jury trial before the Honorable Glenn B. Bronson, Saunders was found guilty of simple assault, conspiracy to commit simple assault, carrying a firearm in public in Philadelphia without a license, and person not to possess a firearm.[1] Saunders received an aggregate sentence of three and one-half to nine years' incarceration. Saunders raises three issues in this timely appeal: (1) was there sufficient evidence to establish possession of a firearm, (2) did the trial court err in limiting his right to cross-

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 2701(a), 903(c), 6108, and 6105(a)(1), respectively.

examination of the complaining witness, and (3) is the sentence manifestly excessive. After a thorough review of the submissions by the parties, relevant law, and the certified record, we affirm.

We adopt the factual background as stated by the trial judge in his Pa.R.A.P. 1925(a) Opinion.

> At trial, the Commonwealth presented the testimony of Antoine Alston. [Saunders] presented the testimony of Candace Saunders. Viewed in the light most favorable to the Commonwealth as verdict winner, their testimony established the following.
>
> On June 1, 2011, at approximately 11 p.m., Antoine Alston was standing in the street outside his apartment at 3145 Allegheny Avenue, drinking beer with friends. Mr. Alston then saw [Saunders], who was with one of [his] brothers. Mr. Alston knew both men because another one of [Saunders'] brothers was dating Mr. Alston's sister. Mr. Alston had also let [Saunders] live with him for approximately four months, when [Saunders] had nowhere else to stay. It had been approximately three months since [Saunders] had moved out of Mr. Alston's apartment.
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> When Mr. Alston saw [Saunders], he asked him whether he had Mr. Alston's bicycle, which he had loaned to [Saunders]. [Saunders] told Mr. Alston he was not going to give the bicycle back, and then "sucker punched" Mr. Alston in the face. Mr. Alston, who was backed against a wall, hit [Saunders] back in an effort to defend himself. After hitting Mr. Alston five or six times, [Saunders] yelled to his brother, "get him, get him, get him," and [Saunders] and his brother both began hitting Mr. Alston. [Saunders] told Mr. Alston, "I should shoot your punk ass," after which a black handgun fell out of [Saunders'] pants. [Saunders] picked up the gun and he and his brother ran away, leaving Mr. Alston behind.
>
> Mr. Alston went to Temple Hospital, where he was treated for a broken nose. Several of Mr. Alston's teeth also fell out when he attempted to eat, requiring Mr. Alston to return to the hospital

> for treatment. Mr. Alston continues to have problems with his remaining teeth as a result of the assault.

Trial Court Opinion, 2/27/2013, at 2-3 (record citation omitted).

We note that Alston further described the gun as a "cop gun." N.T. Trial, 5/10/2012, at 43. He indicated it was similar to the gun carried by the sheriff in the courtroom, identified as a "[G]lock[2] type gun." ***Id***. at 44.

In Saunders' first issue, he claims there was insufficient evidence to prove he possessed a firearm. Specifically, he argues that the Commonwealth produced no evidence that whatever fell out of his trousers pocket was "designed to or may be readily converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon." Appellant's Brief, at 12, *quoting* 18 Pa.C.S. § 6105(i).

Our standard of review for a challenge to the sufficiency of the evidence is as follows:

> The standard of review of the sufficiency of the evidence is whether the evidence admitted at trial, and all reasonable inferences drawn from that evidence, when viewed in the light most favorable to the Commonwealth as verdict winner, was sufficient to enable the factfinder to conclude that the Commonwealth established all of the elements of the offense beyond a reasonable doubt.

Commonwealth v. Myers, 86 A.3d 286, 290 (Pa. Super. 2014) (citations omitted).

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[2] "Glock" is a brand of semi-automatic handgun. The notes of testimony actually state it was a "block type gun," which we presume is a typographical error.

The fact that the gun was not recovered and Alston could not testify as to the operability of the weapon does not render the conviction infirm. It has long been held that,

> [a] reasonable fact finder may, of course, infer operability from an object which looks like, feels like, sounds like or is like, a firearm. Such an inference would be reasonable without direct proof of operability. The inference of operability, however, cannot reasonably be made where all parties agree that the object was not operable.

Commonwealth v. Layton, 307 A.2d 843, 944 (Pa. 1973). Although ***Layton*** addresses the operability of the firearm, we believe the rule allowing for a reasonable inference is similarly applicable to the functional design as well.

Here, circumstantial evidence points to the fact that Saunders possessed a firearm. Alston identified the gun as being similar to those carried by the police and specifically the gun carried by the sheriff in the courtroom. Further, Alston testified that during the fight, Saunders threatened to shoot and kill him. Such a threat implies the possession of a real firearm. In light of this evidence, the trial court, sitting as fact finder, permissibly drew the inference that the object that fell from Saunders' trousers pocket, which looked like a gun, was a firearm as defined by statute and so was capable of firing a bullet in the conventional manner. Therefore, we reject Saunders' sufficiency challenge to his firearms convictions.

In his next issue, Saunders claims the trial court erred in preventing him from fully cross-examining Alston regarding whether he believed the gun was real.

During the cross-examination of Alston, this exchange took place:

> Q. Today as you sit here under oath can you definitively say that this was a gun and not possibly [a] BB gun, or not possibly a plastic gun?
>
> A. Right about that, Sir, but if you – it looked like the Cop gun, that man got on his hip.
>
> Q. But there's -
>
> A. Well, put it toward –
>
> Q. And as you sit here today under oath can you see [sic] definitively one hundred percent this is a real loaded gun?
>
> [ADA:] Objection.
>
> THE COURT: Sustained. You can make arresting[3] as to that.

N.T. Trial, 5/10/2012, at 94.[4]

Initially, we note that, "[o]ur standard of review relative to the admission of evidence is for an abuse of discretion." ***Commonwealth v. Wantz***, 84 A.3d 324, 336 (Pa. Super. 2014) (citation omitted).

In questioning Alston, defense counsel sought to show that Alston could not say with one hundred percent certainty that Saunders dropped an

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[3] We believe this is a typographical error and should be "argument".

[4] This was the culmination of a series of questions directed to Alston's familiarity with handguns.

actual handgun. Saunders has provided no legal authority indicating that the victim of a crime is required to certify the authenticity of a firearm. In his Pa.R.A.P. 1925(a) Opinion, the trial judge stated, "Because the question addressed a matter that was repeatedly covered, the objection was properly sustained." Trial Court Opinion, 2/27/2013, at 8. The trial judge determined that the information being sought was cumulative. This indicates the trial court was aware of the point defense counsel was attempting to make and understood the limits of Alston's testimony, having heard it repeatedly. The trial judge, as fact finder, already heard Alston's opinion about the gun. Therefore, we discern no abuse of discretion in sustaining the Commonwealth's objection.

Finally, Saunders claims his sentence was manifestly excessive in that Saunders received an aggregate sentence of three and one-half to nine years' incarceration for misdemeanor crimes, and the trial court improperly focused on the nature of the crime and the fact that he was on probation for an assault on the same victim at the time of this crime.[5]

Before we can address the merits of this claim, we are required to determine whether this challenge to the discretionary aspect of his sentence represents a substantial question. ***See Commonwealth v. Tuladziecki***,

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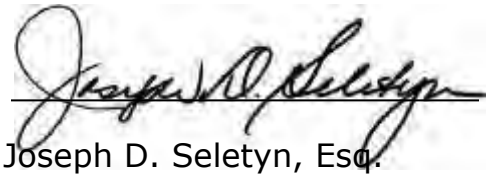
[5] The record shows that Saunders had stabbed Alston in a fight that occurred in 2011.

522 A.2d 17 (Pa. 1987). To that end, a defendant is required to submit a Pa.R.A.P. 2119(f) statement of reasons relied upon for allowance of appeal. ***Id***. Rule 2119(f) requires the statement be set forth immediately preceding the argument on the merits. If no such separate statement has been included and if the appellee objects, as the Commonwealth has done instantly, we are precluded from addressing the merits of the argument. ***See Commonwealth v. Hudson***, 820 A.2d 720, 727 (Pa. Super. 2003) (where Commonwealth objects to failure to file separate Rule 2119(f) statement, sentencing claims are waived). Accordingly, because no separate Rule 2119(f) statement has been filed and the Commonwealth has objected, we are required to find this claim waived.[6]

In light of the foregoing, Saunders is not entitled to any relief on the claims instantly presented.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/14/2014

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[6] Nonetheless, we note we have read the trial court's analysis of Saunders' claim and are in agreement with its cogent reasoning.