NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
	:	
DEMETRIUS YOUNG,	:	
	:	
Appellant	:	No. 3460 EDA 2013

Appeal from the Judgment of Sentence July 22, 2013
In the Court of Common Pleas of Philadelphia County
Criminal Division No(s).: CP-51-CR-0003197-2012

BEFORE: GANTMAN, P.J., JENKINS, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED JULY 07, 2014**

Appellant, Demetrius Young, appeals from the judgment of sentence entered in the Philadelphia County Court of Common Pleas.[1] He contends the evidence was insufficient to convict him of firearms not to be carried without a license[2] and carrying firearms on public streets or public property in Philadelphia.[3] We affirm.

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* Former Justice specially assigned to the Superior Court.

[1] We note that a review of the docket reveals that Appellant filed a *pro se* Post Conviction Relief Act petition prior to the denial of his post sentence motions, while he was represented by counsel. When represented by counsel, *pro se* filings are legal nullities. ***Commonwealth v. Glacken***, 32 A.3d 750, 752 (Pa. Super. 2011).

[2] 18 Pa.C.S. § 6106.

The trial court summarized the facts of this case as follows:

> On February 25, 2012 at around 1:00 a.m., Officer Timothy Dunne along with other officers entered a bar called Mali Enterprises located at 741 North 37th Street in the city and county of Philadelphia to check for the liquor license, occupancy license, and also for underage drinkers in the bar. Officers of the 16th District routinely check this establishment on Friday and Saturday nights to curb the violence that usually occurs when the bar lets out on the weekends. As Office[r] Dunne, in plain clothes, entered the bar behind four or five uniformed officers, he observed [Appellant] attempting to remove a firearm from his waistband with his right hand. Officer Dunne testified that he did not see the firearm at first but assumed [Appellant] had his right hand on the butt of a firearm[4] as he had

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[3] 18 Pa.C.S. § 6108.

[4] Officer Dunne testified, *inter alia*, as follows:

> [The Commonwealth]: When you say that he was attempting to remove a firearm from his waistband, can you describe the motions that he was doing for the Judge?
>
> A: He used his right hand, went towards his waistband. I didn't see him pulling it out, but that was my assumption at the time, that he had his right hand on the butt of the weapon, the handle of the weapon.
>
> * * *
>
> Q: Officer Dunne, when you saw [Appellant] reaching for his waistband, what did you think you saw?
>
> A: A butt of a weapon; a gun.
>
> Q: When you first entered into the bar and saw [Appellant], did you see the firearm?
>
> A: I saw the handle of it.
>
> Q: You couldn't see the barrel of the weapon?

> made over fifty firearm arrests over nine years and in over half of those arrests, the firearm was located in [Appellant's] waistband. At this time, Officer Dunne ran over to [Appellant] and grabbed both of his hands, putting them over his head. At this time, [Appellant] attempted to pull away from Officer Dunne, but he was apprehended by other officers.

Trial Ct. Op., 2/20/14, at 1-2 (citations to the record omitted).

Instantly, Appellant waived his right to a jury trial. N.T. at 7. Prior to trial, Appellant made an oral motion to suppress the gun. ***Id.*** at 8. The motion was denied. ***Id.*** at 18. At the time of trial, the parties stipulated "that if Firearms Examiner Norman DeField were called to testify today, he would testify that he test fired the firearm. It's a 40 caliber Smith & Wesson, and it was fully operable at the time [Appellant] possessed it." ***Id.*** at 19. They also stipulated that Appellant was "not properly licensed to carry a firearm in the Commonwealth of Pennsylvania" and was "ineligible to carry a firearm." ***Id.*** at 19, 20. The Court found Appellant guilty of Firearms Not to be Carried Without a License, Carrying Firearms on Public Streets or Public Property in Philadelphia, and Possession of a Firearm

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> A: No.
>
> Q: That was tucked into his waistband.
>
> A: Correct.

N.T., 6/13/13, at 13, 16.

Prohibited.[5] Appellant was sentenced to six to twelve years' imprisonment. Appellant filed a post-sentence motion and a motion to reconsider sentence which were denied. This timely appeal followed. Appellant filed a timely court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal. The trial court filed a responsive opinion.

Appellant raises the following issues for our review:

> I. Whether the evidence was insufficient to convict Appellant of Violating the Pennsylvania Uniform Firearms Act (hereinafter known as "VUFA") section 6106 prohibiting concealed carrying of weapons, in which there was no evidence as to any attempt by [Appellant] to conceal any weapon?
>
> II. Whether (sic) evidence was insufficient to convict Appellant of VUFA 6108. [Appellant] was only ever seen inside of the bar and was not on the streets of Philadelphia?

Appellant's Brief at 3.

First, Appellant argues that because Officer Dunne's testimony indicates that he saw the butt or handle of the gun, the firearm was not concealed. Because the firearm was not concealed, Appellant contends the evidence was insufficient to convict him of carrying a concealed weapon. Appellant argues concealment requires total concealment. We find no relief is due.

[5] 18 Pa.C.S. § 6105.

The standard of review for a challenge to the sufficiency of the evidence is *de novo*, as it is a question of law. ***Commonwealth v. Ratsamy***, 934 A.2d 1233, 1235 (Pa. 2007).

> [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.

Id. at 1235-36 (quotation marks and citation omitted).

Our Crimes Code defines the offense of firearms not to be carried without a license as follows:

> (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.

In order to convict a defendant of violating Section 6106, the Commonwealth must present evidence at trial to prove beyond a reasonable doubt "(a) that the weapon was a firearm, (b) that the firearm was unlicensed, and (c) that where the firearm was concealed on or about the person, it was outside his home or place of business." ***Commonwealth v. Coto***, 932 A.2d 933, 939 (Pa. Super. 2007) (citation omitted).

Our Pennsylvania Supreme Court in ***Commonwealth v. Duncan***, 321 A.2d 917 (Pa. 1974), addressed the issue of whether penal statutes have to

be strictly construed. The ***Duncan*** Court rejected the appellant's argument that the following statute does not cover indoor prowling and loitering. "Whoever at nighttime maliciously loiters or maliciously prowls around a dwelling house or any other place used wholly or in part for living or dwelling purposes, belonging to or occupied by another, is guilty of a misdemeanor. . . ." ***Id.*** at 918 (citation omitted). The ***Duncan*** Court opined:

> In arguing that the statute does not cover indoor prowling and loitering, the appellant has relied heavily on the [principal] of strict construction of penal statutes. In so doing, however, he has ignored the complementary principle that strict construction does not require 'that the words of a criminal statute (be) given their narrowest meaning or that the lawmaker's evident intent must (be) disregarded.' . . .
>
> Another illustration of the principle modifying the rule of strict construction is the case of ***Commonwealth v. Butler***, 189 Pa. Super. 399, 150 A.2d 172 (1959). There, the appellant had been convicted of carrying a firearm 'concealed on or about his person' without a license even though the weapon was sticking out of appellant's pocket at the time. 189 Pa. Super. at 401, 150 A.2d at 173. The appellant argued that the word Concealed as used in the statute was speaking of total concealment. The court conceded that some jurisdictions with similar statutes had adopted such an interpretation and that there were no Pennsylvania cases on point. Nevertheless, stating that the courts have a duty 'to see to it that the legislative intent is not thwarted by a construction which is unreasonably rigid and inflexible' and that the primary evil which the act sought to prevent was the carrying of unlicensed weapons rather than their concealment, the Superior Court opted for the broader reading. 189 Pa. Super. at 402—403, 150 A.2d at 173.

Id. at 919 (some citations omitted).

In ***Commonwealth v. Berta***, 514 A.2d 921 (Pa. Super. 1986), this Court found the defendant concealed his gun based upon the testimony of a Pennsylvania State Police trooper that "'[u]pon approaching [the defendant, he] noticed a butt of a weapon sticking out from underneath his coat.' 'When I approached him I saw the butt of the weapon sticking out and I reached in and took it.' 'It was stuck in his pants.'" ***Id.*** at 922 n.2 (citations omitted). This Court concluded the partially hidden weapon was "concealed." ***Id.*** at 923.

Instantly, the trial court found the evidence was sufficient to convict Appellant under Section 6106. We agree. Although the butt of Appellant's gun was visible, the evidence was sufficient to convict him of carrying a concealed firearm. ***See Duncan***, 321 A.2d at 919; ***Berta***, 514 A.2d at 923.

Lastly, Appellant contends the evidence was insufficient to convict him of carrying a firearm in public in Philadelphia under Section 6108 because he was never seen in public with the firearm nor was he seen outside a private establishment. Appellant's Brief at 12.

Section 6108 provides "[n]o person shall carry a firearm, rifle or shotgun at any time upon the public streets or upon any public property in a city of the first class . . . ." 18 Pa.C.S. § 6108.

> There is no definition of the phrase "any public property" either in [§] 6108 or anywhere else in the Crimes Code. Hence the phrase must be interpreted using its common and approved usage. The following definition appears in Black's Law Dictionary, (4th ed. 1968):

> "Public property. This term is commonly used as a designation of those things which are *publici juris*, (q. v.,) and therefore considered as being owned by 'the public,' the entire state or community, and not restricted to the dominion of a private person. It may also apply to any subject of property owned by a state, nation, or municipal corporation as such."
>
> As can be seen from this definition, "public property" is used in two senses. In one sense the term may refer to the character of the use of the property, who has access to the property, and whether or not private individuals have greater dominion over the property than the general public. In another sense, the term reflects the character of ownership of the property.

Commonwealth v. Goosby, 380 A.2d 802, 805-06 (Pa. Super. 1977) (footnote omitted).

Although Section 6108 does not define public place, in construing a public drunkenness statute, this Court in ***Commonwealth v. Meyer***, 431 A.2d 287 (Pa. Super. 1981) noted:

> The term does appear, however, in two places in the Crimes Code: in the section dealing with prostitution, section 5902, and in the section dealing with disorderly conduct, section 5503. Section 5902(f) defines it as "any place to which the public or any substantial group thereof has access." The ordinary meaning of "access" is: "the right to enter or make use of;" "the state or quality of being easy to enter."
>
> Section 5503(c) defines public places as, *inter alia*, "any premises which are open to the public."

Id. at 289 (footnotes omitted).

In ***Commonwealth v. Hopkins***, 747 A.2d 910 (Pa. Super. 2000), the appellant argued the Commonwealth failed to present sufficient evidence

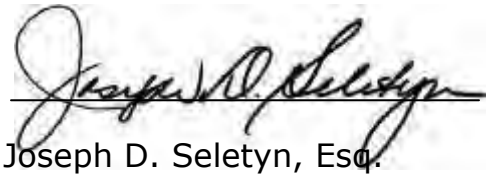
that he violated Section 6108 when he struck the victim with the butt of his gun on the victim's stoop. ***Id.*** at 918. This Court found the argument to be without merit based upon the fact that the "circumstantial evidence was sufficient to support the reasonable inference that [the defendant] traveled at least some distance on a public street in order to be able to access the front entryway of the [victim's] home." ***Id.***

In the case *sub judice*, the trial court opined that "[t]he bar should be considered public property and therefore, there was sufficient evidence to convict [Appellant] of Carrying a Firearm in Public in Philadelphia." Trial Ct. Op. at 5. We agree.

It is undisputed that the bar was open to the public. ***See Meyer***, 431 A.2d at 289. Instantly, even if the bar were not a public place, Appellant traversed the public streets of Philadelphia, carrying the gun, to reach the bar. ***See Hopkins***, 747 A.2d at 918. Therefore, the evidence was sufficient to convict him of carrying a firearm in public in Philadelphia, under Section 6108.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/7/2014