

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

JUSTIN CLARKE

Appellant

No. 2120 EDA 2016

Appeal from the Judgment of Sentence Entered July 9, 2015
In the Court of Common Pleas of Philadelphia County
Criminal Division at No: CP-51-CR-0010985-2013

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

MEMORANDUM BY STABILE, J.:

FILED AUGUST 22, 2017

Appellant, Justin Clarke, appeals from the trial court's July 9, 2015 judgment of sentence imposing an aggregate three years of probation for criminal trespass and unlawful possession of a firearm.¹ We affirm.

The trial court recited the facts in its Pa.R.A.P. 1925(a) opinion:

On August 8, 2013, at approximately 10:50 a.m., building owner Scott Smith received a report that an unidentified person was sleeping in the fire tower inside of the Raleigh Apartments at 4807 Chester Avenue in Philadelphia, Pennsylvania. Smith, along with maintenance employee Chris Edmuneson proceeded to the property to investigate. In order to access the fire tower, Smith and Edmuneson entered the keyed front door of the building, then proceeded up a flight of stairs, down a hallway, and, finally, down another set of stairs to the actual fire tower.

* Former Justice specially assigned to the Superior Court.

¹ 18 Pa.C.S.A. §§ 3503 and 6108.

At this point, it was very dark, so Smith used the flashlight feature on his iPhone to see. As the two witnesses neared the bottom of the steps, Edmuneson saw a television and shoes, as well as [Appellant], who was sleeping on a mattress in the basement area of the tower. [Appellant] appeared dazed and stunned, presumably having just woken up.

At this point, Edmuneson used the panic bar to open the locked fire door, which illuminated the room and the area where [Appellant] was standing. Because Smith served as both the manager and the leasing agent for the property, he was able to recognize that [Appellant] was neither a lessee nor an authorized occupant of the building. Smith also observed a steak knife on the ground near [Appellant]. Upon seeing the weapon, Smith put his foot over the knife and kicked it away from [Appellant]. Smith then told Appellant that he was trespassing on private property and instructed him to leave.

With Edmuneson by the fire door and Smith on the second floor balcony, [Appellant] stood up from the mattress and grabbed an unidentified object from a nearby shelf, which he then placed in his right pocket. [Appellant] then proceeded to move past both men, standing roughly three to four feet away.

From his vantage point on the balcony (roughly five to ten feet from [Appellant]), Smith noticed that something was bulging from [Appellant's] right pocket. Smith also observed [Appellant] fumbling around in his pocket. Smith asked [Appellant] what he was holding and told him to remove the item. [Appellant] then pulled out a gun, which Smith described as a revolver that was bronze or copper in color, with a long barrel and a short handle. Smith, who owns a .38 special, testified that he felt threatened and scared at that point, as he identified the object in [Appellant's] hand as a real gun.

[Appellant] began waving the gun frantically. At that point, Edmuneson also observed the revolver from three to four feet away. He estimated that the firearm had a six-inch barrel length and a short handle. He also said it looked rusty. Based on his lifelong experience with firearms, Edmuneson concluded that the gun was real. He testified at trial that when [Appellant] pulled out the gun, Edmuneson felt 'uncomfortable and uneasy.'

Smith told [Appellant] to put the gun on the ground. As [Appellant] placed the gun next to his feet, both Smith and

Edmuneson heard what sounded like a 'clank,' reaffirming their suspicions that the gun was, in fact, real. [Appellant] put his hands up and told Smith and Edmuneson that he did not want any problems. At some point during this exchange, [Appellant] also stated that he was homeless because his mother kicked him out of the house, so one of his friends gave him the gun to use as protection while he was on the streets. After Smith announced that he was calling the police, [Appellant] proceeded to reach down, pick up the gun, place it in his right pocket, and exit the building through the open fire door. After [Appellant] left, Edmuneson briefly looked around the area outside, observing [Appellant] on Chester Avenue walking towards 49th Street (westbound) before police arrived at the scene.

Shortly after [Appellant's] departure, Officer Donahue and his partner arrived at the building in response to a radio call for a person with a gun. As the officers surveyed the neighborhood, Smith and Edmuneson directed Officer Donahue to 50th Street, informing him about [Appellant's] westbound path down Chester Avenue.

Familiar with the landscape of the area, the officers began to search the area between Chester and Springfield Avenue, which includes a small development of houses and an alleyway that is bordered by a SEPTA complex on the east and a large, overgrown field and a bridge to the west. At that location (roughly a block and a half from the initial incident), Officer Donahue observed a man meeting the suspect's description ([Appellant]) sitting on a concrete wall. When [Appellant] saw the officers, he ran towards the front door of Apartment E on 5000 Springfield Avenue and attempted to enter the building, despite the officers' commands to stop. The officers grabbed him, but [Appellant] continued yanking on the door to get out of the officers' grasp. Eventually, Officer Donahue and his partner were able to place [Appellant] in handcuffs and secure him in the back of the patrol car, where Edmuneson positively identified him as the individual who was inside their building minutes earlier. After [Appellant's] arrest, several officers were dispatched to the location in order to search for the firearm on the train tracks. The search effort also included the K-9 unit, who was sent to search the overgrown field. Officer Donahue estimated that at this time, the thick grass was very high, measuring at least as tall, if not taller, than the officer himself.

As a result of those conditions, the K-9 unit was pulled off the search and the officers were unable to recover the firearm.

Trial Court Opinion, 11/7/16, at 1-4 (record citations omitted).

Appellant proceeded to a May 6, 2015 bench trial, at the conclusion of which the trial court found him guilty of the aforementioned offenses. The trial court imposed sentence on July 9, 2015. This timely appeal followed. Appellant challenges both the sufficiency and weight of the evidence in support of his conviction under § 6108. Section 6108 prohibits carrying a firearm on the streets of Philadelphia without a license.² Appellant argues that a conviction under § 6108 requires an operable firearm, and that the Commonwealth failed to prove his firearm was operable. We review a challenge to the sufficiency of the evidence as follows:

[O]ur standard of review of sufficiency claims requires that we evaluate the record in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. Evidence will be

² Section 6108 provides:

No 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 unless:

(1) such person is licensed to carry a firearm; or

(2) such person is exempt from licensing under section 6106(b) of this title (relating to firearms not to be carried without a license).

18 Pa.C.S.A. § 6108.

deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Nevertheless, the Commonwealth need not establish guilt to a mathematical certainty. Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

The Commonwealth may sustain its burden by means of wholly circumstantial evidence. Accordingly, [t]he fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence. Significantly, we may not substitute our judgment for that of the fact finder; thus, so long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant's crimes beyond a reasonable doubt, the appellant's convictions will be upheld.

Commonwealth v. Hecker, 153 A.3d 1005, 1008 (Pa. Super. 2016).

Appellant argues that the Commonwealth cannot obtain a conviction under § 6108 where it fails to refute evidence of the weapon's inoperability. Appellant and the trial court cite ***Commonwealth v. Horshaw***, 346 A.2d 340, 342 (Pa. Super. 1975), in which this Court held that, if a defendant introduces evidence of the inoperability of a firearm, the Commonwealth bears the burden of proving a firearm's operability in order to obtain a conviction. The trial court reasoned that § 6108 applies only to operable firearms, but found sufficient circumstantial evidence of operability in this case. We conclude the record supports the trial court's finding that Appellant's firearm was operable. We do not address whether criminal liability under § 6108 requires an operable firearm.

The seminal case on firearm operability is ***Commonwealth v. Layton***, 307 A.2d 843 (Pa. 1973). There, our Supreme Court reversed a conviction under the predecessor of current 18 Pa.C.S.A. § 6105 where the record demonstrated that the defendant's firearm could not have been fired at the time of his arrest. ***Id.*** at 845. Significant for present purposes is the following passage: "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." ***Id.*** at 844. As recounted by the trial court, two witnesses, both of whom were familiar with firearms, testified that Appellant's gun looked like a firearm. The gun made a metal clang when Appellant dropped it on the floor. In addition, Appellant told the witnesses he acquired the gun for protection. These facts support a conclusion that Appellant's firearm was operable.

Appellant's argument to the contrary ignores the standard governing our review of sufficiency of the evidence arguments. The Commonwealth can obtain a conviction based upon circumstantial evidence, and this Court's standard of review requires us to draw reasonable inferences in favor of the Commonwealth as verdict winner. ***Hecker***, 153 A.3d at 1008. Viewed in light of this standard, the evidence is sufficient to support a finding of operability.

Appellant also argues that there is no evidence he carried a firearm on a public street in Philadelphia. We disagree. As recounted by the trial court, Smith and Edmuneson observed Appellant walking on Chester Avenue after he picked up the firearm and walked out the door of the fire tower. Police did not find Appellant in possession of a weapon, and therefore concluded that he disposed of it after he left the fire tower. These facts are sufficient to support a finding that Appellant carried his gun on a public street in Philadelphia.

Next, Appellant argues that his conviction is against the weight of the evidence. We conduct our review as follows:

Appellate review of a weight claim *is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence.* Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

This does not mean that the exercise of discretion by the trial court in granting or denying a motion for a new trial based on a challenge to the weight of the evidence is unfettered. In describing the limits of a trial court's discretion, we have explained:

The term 'discretion' imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice,


personal motivations, caprice or arbitrary actions. Discretion is abused where the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill-will.

Commonwealth v. Clay, 64 A.3d 1049, 1055 (Pa. 2013) (citations omitted; emphasis in original).

Appellant argues that the verdict was against the weight of the evidence because the only incriminating evidence witness' account of a "gun-shaped object." Appellant's Brief at 19. The witness' observations were sufficient under ***Layton***. Furthermore, Appellant ignores his own statement that he carried the gun for protection. The trial court did not abuse its discretion in rejecting Appellant's weight of the evidence argument.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/22/2017