

2012 PA Super 143

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JAMES R. MOORE,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 2032 EDA 2010

Appeal from the Judgment of Sentence March 16, 2010  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): CP-51-CR-0009849-2008, MC-51-CR-0019450-  
2008, MC-51-CR-0019451-2008, MC-51-CR-0019452-2008

BEFORE: BOWES, LAZARUS, and WECHT, JJ.

OPINION BY BOWES, J.:

Filed: July 12, 2012

James R. Moore appeals from the judgment of sentence of seven and one-half to fifteen years imprisonment that was imposed after a jury convicted him of possession of an instrument of crime ("PIC") and a violation of the Uniform Firearms Act ("VUFA"), persons not to possess. We reverse Appellant's conviction of PIC, affirm his VUFA conviction, and remand for re-sentencing.

Appellant was charged with numerous offenses based upon events that occurred on April 13, 2008, at an illegal establishment located at 5915 W. Girard Avenue, Philadelphia. The business in question, a virtual farrago of vice, provided drugs, alcohol, and prostitutes to its patrons and was euphemistically referred to by the parties as a speakeasy. On the day in question, a shooting erupted among patrons at that establishment;

Vincent Dennis, Gerald Stewart, Reginald Mailey and Appellant all were shot, and Mailey died as a result of his injuries.

Appellant was charged with attempted murder, aggravated assault, simple assault, reckless endangerment with respect to both Stewart and Dennis, and murder as to Mailey. In addition, he was charged with possession of an instrument of crime and three VUFA offenses. The aggravated assault, simple assault, reckless endangerment, and two of the firearms violations were *nolle prossed*. Appellant proceeded to a jury trial on two counts of attempted murder, and one count each of murder, possession of an instrument of crime, and the VUFA offense of persons not to possess firearms. The trial was bifurcated, and the trial of the VUFA matter was deferred.

During the first phase, the Commonwealth presented evidence that Appellant initiated the shooting, but Appellant claimed that he acted in self-defense and the other shooting victims were the aggressors. The jury acquitted Appellant of all homicide and attempted homicide counts, but convicted him of the PIC offense. Following this phase of the jury trial, evidence regarding the VUFA count was presented to the jury. After the parties stipulated that Appellant's criminal record prevented him from obtaining a license for a weapon, Appellant was convicted of persons not to possess a firearm. After judgment of sentence was imposed, Appellant filed a post-sentence motion, which was denied, and this appeal ensued. He asks

that we consider, “Is the Defendant entitled to an arrest of judgment on all charges where there was insufficient evidence to establish that the Defendant unlawfully possessed a firearm in violation of VUFA, Section 6105 and where there was insufficient evidence to establish that the Defendant was guilty of the crime of PIC where the Defendant had been acquitted on the charge of Murder?” Appellant’s brief at 3.

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

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

***Commonwealth v. Adams***, 39 A.3d 310, 323 (Pa.Super. 2012) (quoting ***Commonwealth v. Brown***, 23 A.3d 544, 559–60 (Pa.Super. 2011) (*en banc*)).

At approximately 2:30 a.m. on April 13, 2008, Appellant and Stewart admittedly had a confrontation at the speakeasy. The Commonwealth evidence established that after this event, Appellant went to his car, retrieved a weapon, returned to 5915 W. Girard Avenue, and began to fire indiscriminately with an assault pistol. Stewart and two bystanders, Dennis and Mailey, were struck with bullets. Stewart claimed that after Appellant began shooting, Stewart discovered a gun on the floor and returned fire, striking Appellant in the left thigh and right knee. Appellant left the establishment while still in possession of his weapon, entered his car, and drove away. Police stopped Appellant within minutes of the incident and recovered the gun from the front passenger's seat.

Appellant's version of events was markedly different; he maintained that after his fight with Stewart, gunfire erupted in the establishment. Appellant said that he retrieved a weapon located in the speakeasy because he knew where it was hidden and that he returned gunshots in self-defense. The jury was instructed on self-defense. The jury's acquittal of Appellant of the only charges submitted to it in connection with any activities that constituted crimes, *i.e.* the various homicide charges, reflects its acceptance that Appellant acted in self-defense.

After careful consideration of the applicable law, we conclude that since the jury acquitted Appellant of committing any crime with the firearm that he possessed, his conviction for PIC is infirm. PIC is defined as follows: "A person commits a misdemeanor of the first degree if he possesses a

firearm or other weapon concealed upon his person with intent to employ it criminally.” 18 Pa.C.S. § 907(b). Our Supreme Court has ruled that if a defendant is acquitted of all crimes that the Commonwealth alleged that the defendant committed with a firearm or weapon, then that defendant cannot be convicted of PIC. This ruling flows from the elements of the crime, which unequivocally require that the weapon or firearm be employed criminally, as those elements impact on the irreducible fact that the defendant cannot have used a weapon or firearm criminally if a jury has concluded that he did not commit a crime with it.

*Commonwealth v. Gonzalez*, 527 A.2d 106 (Pa. 1987), speaks directly to the issue. Therein, the issue addressed was whether there was sufficient evidence to support the jury’s decision to convict Gonzalez of PIC. At trial, Gonzalez was acquitted of murder and manslaughter after he killed someone with a shotgun, but he was convicted of the single offense of PIC. As Appellant did herein, Gonzalez admitted shooting the weapon in question but argued that he acted in self-defense. Our Supreme Court observed that, the jury’s acquittal “reflected an acceptance of that defense.” *Id.* at 107.

Gonzalez argued that insufficient evidence was presented at trial to prove beyond a reasonable doubt that he possessed his gun with the intent to employ it criminally since the jury acquitted him of any crime committed in connection with his possession of that weapon. Our Supreme Court agreed, noting that an intent to employ a weapon or firearm criminally “cannot be inferred from mere possession.” *Id.* at 108. It continued that

since Gonzalez was not guilty of committing a crime with his firearm, he could not, as a matter of law, have intended to employ that item criminally. The **Gonzalez** decision was not the first application of this principle; it applied prior authority on the subject.

**Commonwealth v. Watson**, 494 Pa. 467, 431 A.2d 949 (1981), controls this case. The appellant in **Watson** shot and killed her husband during a struggle and was convicted of both voluntary manslaughter and carrying a concealed weapon. We held that insufficient evidence had been presented at trial to disprove self-defense and reversed the voluntary manslaughter conviction. We further held that the conviction for carrying a concealed weapon must also be reversed due to insufficient evidence to establish criminal intent in possessing the gun used in the killing. No crime had been committed with the gun, and there was no other evidence presented to support a finding of criminal intent. **Id.**, at 475, 431 A.2d at 953.

**Id.** at 108. The Supreme Court concluded that since Gonzalez “did not commit a crime with the shotgun, and no other evidence sufficient to support a finding of criminal intent was presented at trial, appellant’s conviction for possessing an instrument of crime must be reversed.” **Id.** at 108 (footnote omitted). **See also In re A.V.**, 2012 WL 1080358 (Pa.Super. 2012) (evidence insufficient to establish offense of PIC where evidence was that juvenile merely possessed counterfeit bills; evidence had to demonstrate that juvenile intended to employ the counterfeit bills criminally since possession, in and of itself, does not establish PIC).

We applied **Gonzalez** in the matter of **In re A.C.**, 763 A.2d 889 (Pa.Super. 2000). Therein, the juvenile was adjudicated delinquent for committing acts that constituted PIC despite the fact that she had been

accused of performing actions that were not only PIC but also simple assault and aggravated assault. In that case, the juvenile court concluded that the juvenile acted in self-defense with respect to the assault charges and thus, the adjudication was based solely on commission of PIC. We held that there was not sufficient evidence to sustain a delinquency adjudication based upon PIC. We framed the question before us as “whether a trier of fact can acquit on underlying crimes of violence based on self defense and still find evidence sufficient to prove that the accused had the requisite intent to possess an instrument of crime.” *Id.* at 890.

In answering that inquiry in the negative, we noted that under § 907, to sustain a PIC conviction, “the Commonwealth must prove two elements: (1) possession of an object that is a weapon; and (2) intent to use that weapon for a criminal purpose.” *Id.* Relying upon ***Gonzalez***, we then observed that “the intent required under § 907(b), to prove that a defendant employed a weapon criminally, cannot be inferred from mere possession of the weapon.” *Id.* at 891. We ruled, as required by ***Gonzalez***, that where a defendant is acquitted of the underlying crime and no other proof regarding criminal intent is presented other than possession of the item, the defendant’s intent to employ the weapon or firearm criminally is absent. We continued, “More specifically, a conviction for PIC cannot stand if the appellant is acquitted on the underlying charge on the basis of self defense, because the factfinder cannot reasonably infer that the defendant intended

to make criminal use of a weapon that she employed solely in her defense.”

*Id.* We therefore vacated the adjudication and discharged the juvenile.

Further guidance on this question can be found in ***Commonwealth v. Weston***, 749 A.2d 458 (Pa. 2000). In that case, the defendant and his alleged co-conspirator were involved in an argument with the victim about selling drugs in a territory that the defendant claimed belonged to him. Soon thereafter, the defendant shot the man to death but claimed that he acted in self-defense after the victim first shot at him. At trial, the defendant was acquitted of murder but convicted of voluntary manslaughter, conspiracy, PIC, and two VUFA offenses. On appeal, he claimed that the jury’s determination that he committed manslaughter rather than murder precluded a determination that he employed his gun criminally. The Supreme Court disagreed and held that “a conviction for voluntary manslaughter does not negate the requisite intent for” a PIC conviction. *Id.* at 459. The Court observed that voluntary manslaughter is referred to as an imperfect self-defense involving circumstances where the defendant subjectively but unreasonably believes that he needs to protect himself.

In upholding the PIC conviction, the ***Weston*** Court noted that the facts therein contained a critical distinction from those involved in ***Gonzalez***. It stated, “As this court explained in ***Gonzalez, supra***, the appellant could not be convicted of PIC since he was acquitted of the underlying killing on the basis of self-defense. Where an appellant has been acquitted of the underlying crime, and no other evidence has been presented



to establish criminal intent, an appellant cannot be deemed to possess the requisite intent to employ a weapon criminally—a prerequisite to a conviction for PIC.” *Weston, supra* at 460 (citation omitted). The *Weston* Court stated that the “reasoning in *Gonzalez* is commonsense, since where a defendant has justifiably used force in self-defense, then no crime has been committed.” *Id.* (footnote omitted). The Supreme Court found that *Gonzalez’s* “reasoning is inapt where there has been a conviction.” *Id.* Since the defendant in *Weston* was convicted of a crime, the Court ruled that he was properly found guilty of PIC.

In this case, the trial court upheld the PIC conviction because Appellant continued to possess the weapon after he was finished using it to defend himself, and the trial court suggested that this action supported that Appellant intended to employ the gun criminally. However, the fact that Appellant held the gun while he left the speakeasy and entered his car is nothing more than mere possession of that item. The case law leaves no room for a finding that possession of a weapon or firearm can sustain proof of intent to employ the object criminally. There simply was no fact, other than possession, to support the jury’s determination that Appellant intended to use the gun criminally after he ceased to employ it to defend himself. The trial court also noted that Appellant ran from the speakeasy, but, since he had just been involved in a shooting and was shot himself, we fail to see the significance of this fact. There was no proof that Appellant intended to commit a crime with his gun after he left the illegal establishment, and he

engaged in no actions, other than holding the gun, that would support an inference that he planned to commit a crime.

The Commonwealth seeks to uphold Appellant's PIC conviction based upon the maxim that inconsistent verdicts do not render a conviction infirm and that an acquittal of one crime does not operate as a specific finding as to another. It notes that its evidence established that Appellant did not act in self-defense and therefore maintains that its proof was sufficient to sustain a PIC offense.

However, this principle of law has no application in the present case, where intent to employ the weapon or firearm criminally is a necessary element of PIC and where the defendant actually was acquitted of committing a crime with the instrument in question. This critical distinction was explained in ***Commonwealth v. Magliocco***, 883 A.2d 479 (Pa. 2005), where the defendant was convicted of ethnic intimidation but acquitted of committing the predicate offense invoked by the Commonwealth to sustain an ethnic intimidation conviction.

Therein, the defendant, a Caucasian, was charged, *inter alia*, with terroristic threats and ethnic intimidation after he shouted profanities and racial epithets at the victims, who were two young African-American girls, obtained a baseball bat, and continued to follow the victims while swinging the bat and verbalizing racial slurs and vulgar language. Police were called and overheard the defendant state that he planned to kill every African-American, to whom he referred in a racially offensive term, on his block.

After a non-jury trial, Magliocco was convicted of ethnic intimidation but acquitted of terroristic threats.

In affirming our decision to reverse the ethnic intimidation conviction, the Supreme Court first examined the elements of the crime. A person is guilty of ethnic intimidation "if, with malicious intention toward the race . . . of another individual or group of individuals, he commits an offense under any other provision of this article or under Chapter 33 . . . or under section 3503 . . . or under section 5504 . . . with respect to such individual . . . or with respect to one or more members of such a group." 18 Pa.C.S. § 2710(a). In that case, the only applicable predicate offense, as outlined in § 2710, was that the defendant had committed terroristic threats. The Supreme Court acknowledged that § 2710 did not require an actual conviction of a qualifying offense, only the commission of such an offense. It thus conceded that an actual conviction of a predicate offense was not required to sustain an ethnic intimidation conviction so long as the fact finder is aware of the elements of that offense. However, that situation did not exist in the *Magliocco* case because the defendant was charged with both ethnic intimidation and terroristic threats and convicted of the former offense while acquitted of the latter.

The Commonwealth relied upon the well-established Pennsylvania precedent that any inconsistency in a verdict is not grounds for a finding that the evidence was insufficient and that an acquittal is never to be interpreted as a specific finding in relation to some of the evidence. Thus, the

Commonwealth argued that the acquittal of terroristic threats did not operate as a specific finding as to the existence of the elements of ethnic intimidation. It continued that since its evidence was sufficient to prove that defendant actually committed the crime of terroristic threats, even though he was acquitted of that offense, as well as a malicious intent toward African-Americans, the defendant's conviction for ethnic intimidation should be upheld.

The Supreme Court rejected the Commonwealth's argument. It ruled that an offender cannot be held to have committed one of the underlying offenses for purposes of ethnic intimidation in a situation where: 1) the offense was specifically charged; 2) the issue of whether the offense occurred was submitted to the factfinder; and 3) the defendant was actually acquitted of that crime at trial. It declined to apply the general rule that a facial inconsistency in verdicts is not a valid basis upon which to upset a conviction that is otherwise based upon adequate proof. It concluded that this principle did not apply due to "the necessary effect of an actual acquittal of a crime in the admittedly unusual circumstance presented here, where that crime is both separately charged and prosecuted and is also a specific statutory element of another charged offense. Acquittals, of course, have been accorded a special weight in the law." *Id.* at 492.

Thus, the *Magliocco* Court held that the general rule that inconsistent verdicts are not grounds for reversal was inapplicable where the offense in question required that the defendant commit a crime and where the trier of

fact specifically acquitted the defendant of the crime that was the necessary element of the offense for which the defendant was convicted.

That is the precise scenario at issue herein. The offense of PIC mandates that the defendant intended to employ a weapon or firearm criminally. Appellant was acquitted of committing any crime with his weapon. Thus, the general precept that inconsistent verdicts will not invalidate a conviction is inapplicable herein, and Appellant's conviction for PIC cannot stand. Even accepting the truth of the Commonwealth's evidence that Appellant exited the bar and retrieved the gun from his car, those facts establish nothing more than possession of the weapon since he was acquitted of committing any crime with his gun.

The Commonwealth also seeks to bootstrap the VUFA conviction in support of the criminality element of PIC. Under this scenario, one could logically argue that where a defendant is prohibited from the possessing of a firearm, the fact of possession, in and of itself, does establish intent to employ the gun criminally. While we might be inclined to agree with this reasoning, the procedural posture of this case prohibits application of the VUFA offense to the PIC offense. The trial was bifurcated in this matter, and when the jury found Appellant guilty of PIC, no evidence of the firearms violation had been presented to it. We are only permitted to examine the evidence presented to the factfinder in determining whether it is sufficient to sustain a conviction. When Appellant was convicted of PIC, the only proof of any crimes that he committed with his weapon were the crimes for which he

was acquitted. We cannot validate a conviction for a crime when no evidence was presented at the proceeding to sustain the conviction. Our standard of review of a sufficiency claim prevents us from using facts dehors the record to sustain a verdict. Since the jury acquitted Appellant of all crimes charged in connection with the PIC offense and since there is no evidence of record, beyond the mere fact of possession, that Appellant intended to employ the gun criminally, the PIC conviction is infirm under controlling Supreme Court precedent.

However, Appellant's conviction of VUFA suffers from no such infirmity. The crime of persons not to possess firearms is defined in 18 Pa.C.S. § 6105(a), which states: "(1) A person who has been convicted of an offense enumerated in subsection (b), . . . shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth." At trial, Appellant stipulated that his criminal history rendered him ineligible to lawfully own a gun. N.T. Trial, 1/19/10, at 29. Thus, the only question which remains is whether he possessed the weapon.

In this connection, according to his own version of events, Appellant not only retrieved the gun from its hiding place in the speakeasy, but also carried that weapon from the illegal establishment and placed it in his car, where it was recovered by police. Furthermore, for purposes of this offense, mere possession, along with the prior criminal conviction, does establish the elements of the crime. While Appellant attempts to engraft an element onto

this offense, that being that he possessed the gun unlawfully, the statute contains no such language. Appellant had previously been convicted of a triggering offense and was in violation of § 6105 by his possession of the weapon. Furthermore, since Appellant maintained control over the gun after he needed to use it in self-defense, we need not decide whether a prohibited person who retrieves someone else's gun momentarily and uses it solely in self-defense can be convicted under § 6105.

Appellant's violation of the Uniform Firearms Act is affirmed. Appellant's conviction for possession of an instrument of crime is reversed. Case remanded for resentencing. Jurisdiction relinquished.