

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
JOSHUA HOLMES,	:	
	:	
Appellant	:	No. 2704 EDA 2011

Appeal from the Judgment of Sentence August 26, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0003018-2010

BEFORE: LAZARUS, OTT, and STRASSBURGER,* JJ.

DISSENTING MEMORANDUM BY STRASSBURGER, J.:

Filed: February 22, 2013

While I agree with the Majority that Holmes' first issue is without merit, I respectfully disagree with the conclusion that the trial court did not abuse its discretion by admitting evidence of the two handguns recovered from Holmes' basement. The Majority Memorandum indicates that neither of these guns was the weapon used to kill Weary and that, in fact, "the jury was informed by the trial judge that the recovered guns were not the murder weapon." Majority Memorandum at 7 (citing N.T., 6/9/2011, at 25-26). Nonetheless, the Majority concludes that these guns were both relevant and properly admissible. *Id.*

The Majority bases this conclusion on *Commonwealth v. Williams*, 640 A.2d 1251 (Pa. 1994) (*Williams I*). *Id.* at 6-7. In particular, the

* Retired Senior Judge assigned to the Superior Court.

Majority relies on *Williams I* for the proposition that evidence of a weapon totally unrelated to the crime a defendant has been accused of is admissible for the purpose of demonstrating that a defendant had "access to firearms." *Id.* at 7. The Majority supports this assertion by claiming that, in *Williams I*, the "defendant's possession of guns which were not the murder weapons was admissible to show, *inter alia*, that he 'readily obtained and disposed of handguns.'" *Id.* (quoting *Williams I*, 640 A.2d at 1260). This is a misinterpretation of our Supreme Court's holding in *Williams I*.

The defendant in *Williams I* was convicted of murdering his victim in Kuhnsville, Pennsylvania. 640 A.2d at 1257. He had hitchhiked from Tampa, Florida to Kuhnsville. *Id.* at 1260. A forensic pathologist determined that the victim was killed by a single .38 caliber bullet, which entered through the victim's back. *Id.* at 1257. At trial, the Commonwealth called as witnesses several of the truck drivers who transported the defendant. *Id.* at 1260. One driver testified that he kept a .38 caliber handgun with him on his travels and that, after he and the defendant parted ways, he discovered that the gun was missing. *Id.* Another driver testified that the defendant showed him a .38 caliber handgun as they were on the road together. *Id.* After the victim was shot, the defendant sold a .38 caliber handgun to a man in Texas. *Id.* at 1261. Both drivers also indicated that the defendant showed them an additional .25 caliber handgun that he was carrying. *Id.* at 1260. While the fate of the .25 caliber handgun is not specifically explained in

Williams I, the defendant sold that gun after the shooting as well. **Commonwealth v. Williams**, 950 A.2d 294, 318 (Pa. 2008) (**Williams II**) (a later appeal by the same defendant).

Accordingly, contrary to the Majority's characterization of this case, **Williams I** did not involve "guns which were not the murder weapons" admitted to demonstrate the defendant's "access to firearms." Majority Memorandum at 7. Rather, the case involved two guns, at least one of which more than likely **was** the murder weapon based on strong circumstantial evidence. When read in context, the quote from **Williams I** (that evidence of the guns was relevant to prove that defendant "readily obtained and disposed of handguns") merely restates the obvious – that the defendant's acquisition (prior to the shooting) and sale (after the shooting) of handguns similar to the murder weapon was highly probative of the defendant's guilt. **See Commonwealth v. DeJesus**, 880 A.2d 608, 614 n.7 (Pa. 2005) (observing that the defendant in **Williams I** "'readily obtained and disposed of handguns' that were similar to handgun used in [the] crime"); **but cf. Commonwealth v. Briggs**, 12 A.3d 291, 338 (Pa. 2011) (citing **Williams I** for the proposition that challenged testimony was relevant, *inter alia*, "to show [the a]ppellant's ability to acquire handguns").

Notably, our Supreme Court observed in **Williams II** that the result in **Williams I** was "in tension with other precedent of this Court," namely the "general rule 'that where a weapon cannot be specifically linked to a crime,

such weapon is not admissible as evidence.”¹ 950 A.2d at 320 (quoting *Commonwealth v. Robinson*, 721 A.2d 344, 351 (Pa. 1998)). If an exception were made to admit evidence of an unrelated gun simply to demonstrate that a defendant had “access to firearms,” this exception would quickly swallow the “general rule,” *supra*.

Instead, I believe this case is closely akin to *Commonwealth v. Marshall*, 743 A.2d 489 (Pa. Super. 1999). In *Marshall*, the trial court admitted into evidence a handgun that was confiscated by police long before the killing took place, and therefore could not have been the murder weapon. *Id.* at 491. This Court observed that “the only purpose that was served by the admission of the handgun was to prejudice appellant.

¹ As explained further by this Court,

Although as a general rule, the Commonwealth may not admit evidence of a weapon that cannot be linked to the crime charged, an exception exists where the accused had a weapon or instrument suitable to the commission of the crime charged.

A weapon shown to have been in a defendant's possession may properly be admitted into evidence, even though it cannot positively be identified as the weapon used in the commission of a particular crime, if it tends to prove that the defendant had a weapon similar to the one used in the perpetration of the crime.

Commonwealth v. Williams, 2012 WL 5992138 at *4 (Pa. Super. 2012) (quoting *Commonwealth v. Owens*, 929 A.2d 1187, 1191 (Pa. Super. 2007)) (quotation marks and citations omitted); *see also DeJesus*, 880 A.2d at 615 (“If evidence of possession of, or access to, a weapon other than the murder weapon were proffered for some other relevant purpose, no hard and fast rule could **require** its exclusion.”) (emphasis in original).

Therefore, the court committed error, despite its curative instruction to the jury." *Id.* at 493-94. Likewise, in the instant case, evidence relating to the guns recovered from Holmes' basement served only to prejudice him. The Majority asserts that this evidence "corroborated Fisher's testimony that she saw Holmes go into the basement to get a gun." Majority Memorandum at 7. However, in her later-recanted statement to police, Fisher claimed that Joseph told Holmes to "[g]o get **the** gun," and that Holmes then went into the basement. N.T., 6/9/2011, at 59 (emphasis added). Fisher's statement is therefore not corroborated by the fact that multiple other guns were kept in the same basement.

Moreover, even if there were any probative value to the guns, it was clearly outweighed by its prejudice. *See* Pa.R.E. 403.

Because I conclude that the trial court abused its discretion by allowing these weapons to be admitted, and this error was prejudicial, I would reverse and remand the case for a new trial.