NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. VERNON BENNETT, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3481 EDA 2010

Appeal from the Judgment of Sentence Entered December 3, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0012045-2010

BEFORE: BENDER, P.J., OTT, J., and STRASSBURGER, J.*

MEMORANDUM BY BENDER, P.J. **FILED DECEMBER 10, 2013**

Appellant, Vernon Bennett, appeals from the judgment of sentence of three years' probation, imposed following his conviction for multiple violations of the Uniform Firearms Act, 18 Pa.C.S. §§ 6101 - 6187. Appellant contends that the evidence was insufficient to sustain his convictions, and the verdict was against the weight of the evidence. After careful review, we affirm.

Appellant proceeded to a nonjury trial on December 3, 2010. The facts adduced at trial were as follows:

> 1. On September 6, 2010, Officers Dakos and Hall . . . responded to a call . . . of a black male, in a white t-shirt, armed with a gun.

---

* Retired Senior Judge assigned to the Superior Court.

> 2. The officers observed [Appellant] standing on the sidewalk outside of his apartment complex. Noticing that [Appellant] matched the above flash description for the gun call, Officer Dakos asked [Appellant] what was going on. [Appellant] did not respond, however. He repeatedly looked at his girlfriend who was standing at the front step of his apartment complex. The officers then exited their vehicle.
>
> 3. [Appellant] began backing up and stated that he had a gun in his back pocket. He then laid down on the ground. The officers observed a black firearm (a 9 millimeter Rugger [*sic*]) sticking out of his back pants pocket. Officer Dakos immediately recovered the weapon. Officer Hall placed [Appellant] in custody.
>
> 4. Officer Hall subsequently observed another firearm (a silver Colt 380) in plain view—it was located in a baby stroller, which stood in the front doorway. The serial number was scratched off. Once the weapons were secure, [Appellant] was placed in the back of the police car ….
>
> 6. It is uncontested that the Defendant did not have a permit or license to carry or possess a weapon on the streets of Philadelphia at the time of the incident.
>
> 7. The silver handgun that was recovered had an unrecoverable serial number—the number was unable to be identified. It was operable, loaded, and had a barrel length of 2.75 inches.
>
> 8. The 9 millimeter Rugger [*sic*] was also operational and loaded, and it had a barrel length of 3.75 inches.

Trial Court Opinion (TCO), 5/14/13, at 2 – 3 (citations to the record omitted).

At the conclusion of Appellant's trial, the court found him guilty of all the charges and sentenced him to a term of three years' probation. Appellant filed a timely notice of appeal, as well as a timely concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). He now presents the following questions for our review:

I. WHETHER THE VERDICT WAS CONTRARY TO LAW[?]

II. WHETHER THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE[?]

Appellant's Brief at 8.

Appellant first argues that the evidence offered at trial was insufficient to sustain his convictions. Our standard of review of sufficiency claims on appeal is well-established:

> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be 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. … When reviewing the sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000) (citations omitted).

The crime of carrying a firearm without a license is defined by 18 Pa.C.S. § 6106(a)(2):

> A person who is otherwise eligible to possess a valid license under this chapter but 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 and has not committed any other criminal violation commits a misdemeanor of the first degree.

The crime of carrying firearms on public streets or public property in Philadelphia is defined by 18 Pa.C.S. § 6108(1): "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 . . . such person is licensed to carry a firearm."

The crime of possession of a firearm with an altered manufacturer's number is defined by 18 Pa.C.S. § 6110.2(a): "No person shall possess a firearm which has had the manufacturer's number integral to the frame or receiver altered, changed, removed or obliterated."

Appellant claims that the evidence did not establish his guilt for sections 6106 and 6108, as "the totality of the circumstances show [] Appellant was close enough to the entrance of his apartment to have been within his place of abode." Appellant's Brief at 15. However, for the reasons stated below, Appellant's analysis of the evidence does not comport with the correct standard of review on appeal.

Appellant points to testimony from his preliminary hearing in support of his argument. However, our standard of review mandates that we only asses the sufficiency of the evidence adduced at trial. He also relies on the testimony offered by his girlfriend, which cannot be reconciled with the testimony offered by witnesses for the Commonwealth. Officer Dakos testified unequivocally at trial that he observed Appellant standing on a public sidewalk. As noted above, the evidence is construed in the light most favorable to the verdict winner on appeal. In the instant case, the verdict winner is the Commonwealth. Our review of the record below, under the proper standard of review, readily establishes that Appellant stood on a public sidewalk. Accordingly, the evidence offered at trial was sufficient to

establish that Appellant carried a firearm upon a public street without a license, and is therefore sufficient to sustain his convictions for sections 6106 and 6108.

Appellant also argues that the evidence is insufficient to establish his conviction for possessing a firearm with an altered manufacturer's number, because he testified that he had received the firearm immediately before his arrest when he disarmed a would-be attacker. It is clear from the record that the fact-finder explicitly rejected Appellant's testimony as incredible, instead crediting the testimony offered by the Commonwealth's witnesses. This testimony established the firearm in question was visible in the entry to Appellant's home inside of a child's stroller, and the serial number on that gun had been obliterated. Moreover, Appellant and his girlfriend both testified that he had placed the firearm there. As such, the trial court found Appellant had the ability and intent to control the firearm. "[C]onstructive possession exists if an individual has 'conscious dominion' over the illegal property." ***Commonwealth v. Carroll,*** 507 A.2d 819, 820 – 821 (Pa. 1995). Moreover, "constructive possession may be inferred if the contraband is located in an area under the joint exclusive control of the defendant and his spouse." ***Id***. We note that Appellant's girlfriend testified that she and Appellant were the only adults living in the home. Accordingly, we conclude the evidence was sufficient to support Appellant's conviction under section 6110.2(a).

In the same manner, Appellant argues that the evidence was insufficient to sustain his convictions, as the evidence he offered at trial established an affirmative defense of justification. As noted above, the trial court did not find Appellant credible when he testified that he had been subjected to a robbery attempt prior to his arrest. The trial court was free to disbelieve Appellant's account of the events in question, because "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. Lehman***, 820 A.2d 766, 772 (Pa. Super. 2003). Moreover, issues of credibility and conflicts in evidence are for the fact-finder to resolve, and we may not re-examine these determinations or substitute our judgment for the fact-finder. ***Id***. As such, we will not disturb the findings of the trial court on appeal, and we conclude that Appellant's claim is meritless.

In addition, Appellant claims that the verdict was against the weight of the evidence. Appellant concedes that this issue was not preserved in a post-sentence motion. Appellant cites to an unpublished memorandum opinion of this Court, ostensibly for the proposition that "[s]ince [] Appellant was not properly advised of his post-sentence rights, his noncompliance with Rules of Criminal Procedure is excusable." Appellant's Brief at 8. This is incorrect. It is well-established that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a).

In support of his claim that this issue is not waived, Appellant also cites to a case discussing the jurisdiction of this Court following the untimely filing of a notice of appeal, ***Commonwealth v. Patterson***, 940 A.2d 493 (Pa. Super. 2007). ***Patterson*** is inapposite to the situation in the instant case, in which the notice of appeal was timely filed, and there are no questions regarding this Court's jurisdiction.

Moreover, we note that Appellant concedes he was informed he had "ten days to ask the judge to reconsider [his] sentence." Appellant's Brief at 8. This statement is identical to language used by the trial judge in ***Patterson***, which this Court concluded was adequate to notify the defendant of the time in which to file his post-sentence motion.

Accordingly, this issue is waived, and we may not address it in the instant appeal.

Judgment of sentence ***affirmed***.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/10/2013