NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CHARLES L.A. HARRIS, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 553 WDA 2012

Appeal from the Judgment of Sentence October 3, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0015517-2008

BEFORE: FORD ELLIOTT, P.J.E., BOWES, & DONOHUE, JJ.

MEMORANDUM BY BOWES, J.: Filed: February 19, 2013

Charles L.A. Harris appeals from the judgment of sentence of ten to twenty years imprisonment that was imposed after he was found guilty at a bench trial of three counts of aggravated assault and one count of resisting arrest. We affirm.

The evidence adduced at Appellant's nonjury trial was as follows. On August 31, 2008, Joseph Bernie Jones was present at a cookout, which Appellant had been invited to attend, at a relative's house in Sharpsburg, Pennsylvania. Mr. Jones and Moe Williams were seated on the sidewalk in front of the house when Appellant started walking toward the event. Mr. Jones was looking down when Appellant approached him and started to say, "Do you have a problem?" N.T. Nonjury Trial, 7/18-19/11, at 44. Appellant stopped in front of Mr. Jones and repeated the question several

times. Mr. Jones responded with the identical inquiry. Appellant and Mr. Jones then engaged in a fistfight, which was stopped by Sean Williams after about thirty seconds.

After Sean interrupted the altercation, the unarmed Mr. Jones backed away from Appellant, who "pulled a gun out." ***Id***. at 46. Mr. Jones immediately started to run while Appellant fired four shots at him. One of the bullets struck Mr. Jones in the hip but did not slow his retreat. Appellant followed Mr. Jones, who managed to escape and was transported by ambulance to a local hospital where he underwent surgery to remove a bullet lodged in his abdominal muscle. At trial, Sean Williams, Moe Williams, and Mr. Jones's sister, Jennifer, confirmed the victim's version of events.

Aspinwall Police Sergeant James Peterson, who was in full uniform and driving a marked police cruiser, responded to a police call placed regarding the shooting. After a short search, Sergeant Peterson spotted Appellant walking along a street near the scene of the crime. At that time, the following occurred:

> A. I pulled up - - I was in an SUV. I pulled up, disengaged the shotgun from the vehicle, exited my vehicle, put myself between myself and the defendant, asked the defendant if could I see his hands, show me his hands.
>
> Q. What did the defendant do?
>
> A. At the time he continued to walk. He reached behind him to what appeared to be his right rear trouser pocket or waistline and pulled a black semiautomatic pistol out. I said - - I repeated again, yelled at him, "Let me see your hands." He turned his body towards me with the pistol pointed. At the same time he

> was walking. He made a right turn around the corner and headed westbound on Main Street in the 700 block.

Id. at 85. Sergeant Peterson delineated that Appellant "pointed the weapon" at him as Appellant was making a right-hand turn around the corner to avoid the officer. ***Id***. at 95.

Sergeant Peterson started to cautiously follow Appellant on foot while he radioed his position to fellow officers. After Appellant began to walk toward a high-rise apartment that housed senior citizens, Sergeant Peterson returned to his vehicle and proceeded to that area. When he arrived at the parking lot of the apartment, Sergeant Peterson was advised by fellow officers that Appellant was hiding in a shrub in a yard next to the apartment building. Sergeant Peterson positioned himself behind vehicles located in the parking lot.

Other officers already at the scene started to give Appellant "commands to show [police] his hands." ***Id***. at 87. Instead, Appellant "attempted to walk away like nothing occurred." ***Id***. at 88. Two Tasers were fired to subdue Appellant, who was arrested.

O'Hara Township Police Officer Michael Burda, who was also in full uniform and driving a marked police cruiser, testified that he arrived at the apartment complex after Sergeant Peterson radioed Appellant's whereabouts. Officer Burda and another uniformed officer located Appellant hiding in the shrubbery in the yard. Officer Burda started to demand that Appellant show him his hands, but Appellant refused. Officer Burda delineated:

> Q. When you noticed him in the shrubs, you said you could see the gun in this hand?
>
> A. Yes.
>
> Q. And where was the gun pointed?
>
> A. It was pointed towards myself.

Id. at 101. Appellant was three to four feet away from Officer Burda.

After Appellant pointed the gun at him, Officer Burda immediately took cover, retreated to the parking lot, and positioned himself behind parked cars with other responding police officers. Officer Burda confirmed that eventually Appellant lowered his gun and was apprehended after being tasered.

Based on this evidence, Appellant was convicted of one count of aggravated assault as to Mr. Jones, and two counts of aggravated assault of a police officer as to Sergeant Peterson and Officer Burda, and one count of resisting arrest. After sentencing, Appellant filed a post-sentence motion and a supplemental post-sentence motion. Appellant successfully petitioned for an extension of time for the trial court to decide those motions, and he filed the present appeal after those motions were denied.

Appellant presents this contention on appeal: "Was the evidence insufficient to support the two convictions of aggravated assault-serious injury police/transit/fire/others (18 Pa.C.S. [§] 2702 (a)(2)) insofar as [Appellant's] alleged acts of pointing a gun at the two officers could

constitute simple assault, but could not constitute aggravated assault based on a totality of the circumstances?" Appellant's brief at 6.

We first set forth our settled standard for reviewing Appellant's claim:

> The standard we apply in reviewing the sufficiency of 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 that of 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. Helsel, 53 A.3d 906, 917-18 (Pa.Super. 2012) (quoting ***Commonwealth v. Bricker***, 41 A.3d 872, 877 (Pa.Super. 2012)).

Appellant was convicted of aggravated assault of a police officer pursuant to 18 Pa.C.S. § 2702 (a)(2), which provides that a "person is guilty of aggravated assault if he . . . attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c) or to an employee of an agency, company or other entity engaged in public transportation,

while in the performance of duty[.]" A police officer is one of persons referenced in subsection (c) of that provision. 18 Pa.C.S. § 2702 (c)(1).

Appellant claims that the evidence fails to support that he intended to cause serious bodily injury to Sergeant Peterson and Officer Burda because he merely pointed a weapon at them. He posits that since he never verbally threatened the officers or fired the weapon, the evidence was insufficient to sustain a finding that he attempted to cause serious bodily injury to the officers and that his actions toward the officers should be considered simple assaults.

The singular act of pointing a gun at a victim, standing alone, cannot prove an intent to cause serious bodily injury. ***See Commonwealth v. Savage****,* 418 A.2d 629, 632 (Pa. 1980) (jury incorrectly instructed that simply pointing a gun at a civilian can constitute an attempt to inflict serious bodily injury). However, pointing a gun at a person can be sufficient to sustain a finding of intent to cause serious bodily injuries if other facts and circumstances support the existence of such an intent. ***Commonwealth v. Gruff***, 822 A.2d 773, n.5 (Pa.Super. 2003).

We conclude that the rationale espoused in ***Commonwealth v. Stevenson***, 894 A.2d 759 (Pa.Super. 2006), is instructive herein. In ***Stevenson***, the defendant was convicted of violating 18 Pa.C.S. § 2702(a)(2) after he unsuccessfully tried to retrieve a gun hidden on his person while he was being arrested and then informed police that they were

fortunate that he had not obtained his weapon. We noted that under § 2702(a)(2), "To sustain a conviction for aggravated assault, the Commonwealth need not show that serious bodily injury actually occurred, but only that the defendant attempted to cause serious bodily injury to another person." ***Id***. at 774. We observed that an attempt is present under the law whenever "the accused intentionally acts in a manner which constitutes a substantial or significant step toward perpetuating serious bodily injury upon another." ***Id***. (citation and quotation marks omitted). We concluded that the defendant therein attempted to inflict serious bodily injury on the officers by his simple action of trying "to reach into his pocket where he had a loaded handgun." ***Id***. We reiterated that "the totality of the evidence does show that [the defendant], by attempting to take hold of his handgun during the arrest struggle, took a significant and substantial step towards inflicting serious bodily injuries upon the officers." ***Id***.

In the present case, Appellant did not merely try to secure a handgun during his interaction with police, he had a loaded gun in his possession and deliberately pointed that weapon directly at uniformed police officers after being repeatedly told to drop the weapon and display empty hands. He took this action in order to evade an arrest. In both instances, Appellant's actions were temporarily successful since the officers immediately retreated to avoid being shot. The facts demonstrate that Appellant was willing to utilize the weapon since he had just shot an unarmed fleeing man. Given Appellant's

recent use of his loaded weapon on a helpless victim, his calculated aim of his weapon at the officers after being repeatedly told to drop the weapon, and his evasion of police through the use of that weapon, we conclude that the surrounding circumstances support Appellant's intent herein. Hence, we must reject Appellant's challenge to the sufficiency of the evidence supporting his convictions under § 2702 (a)(2).

Judgment of sentence affirmed.