

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

FRANCISCO FRANKLIN

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 566 EDA 2012

Appeal from the Judgment of Sentence of April 6, 2010
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0005171-2009

BEFORE: OLSON, J., WECHT, J., and COLVILLE, J.*

MEMORANDUM BY WECHT, J.:

Filed: February 26, 2013

Francisco Franklin ("Appellant") appeals his April 6, 2010 judgment of sentence. Appellant contends that the evidence at trial was insufficient to prove that he was in possession of a firearm. We affirm.

The trial court summarized the factual history of this case as follows:

On March 23, 2009, at around 10:30 p.m., Jeremy Evans was driving on Hunting Park Avenue in Philadelphia in his tow truck on his way to a towing job. As he approached the intersection of Hunting Park Avenue and Lycoming Street, from a distance of about 150 feet away, he saw the Appellant get out of a car and have a dispute with another man who had also gotten out of a car. The other man approached the Appellant "with his fist balled up," and the Appellant then pulled out a revolver and pointed it at the other man's torso. The other man then ran back to his car and drove away. The Appellant also got back into his car and began driving away. In his tow truck, Mr. Evans

* Retired Senior Judge assigned to the Superior Court.

followed Appellant's vehicle to an address on M Street, which the Appellant entered. Mr. Evans then called the police and gave them that address. Mr. Evans then left the scene.

At around 11:00 p.m., Philadelphia Police Officer Charles Buck received a radio call of a person with a gun in the area of Hunting Park Avenue and Maywood Street in Philadelphia. The flash information described a black male wearing a gray hoodie that had an emblem on its back. Officer Buck arrived at the location within five minutes of the radio call, and as soon as he got there he saw a black male with a gray hoodie with an emblem on the back, later identified as the Appellant, on Hunting Park Avenue walking eastbound toward Maywood Street. Officer Buck was in his vehicle following the Appellant down Hunting Park Avenue when he saw the Appellant turn onto Maywood Street and then drop an object to the sidewalk. Officer Buck then pulled up alongside the Appellant and rolled down his window to speak with him. The Appellant said, "I ain't got nothing. I have ID on me."

Officer Buck shined his flashlight in the area where he saw the Appellant drop the object and saw what he believed to be a gun. He then frisked the Appellant and put him in his police vehicle. When the Appellant was secured in the vehicle Officer Buck went to the spot where he saw the Appellant drop the object and recovered a black revolver. There was no other object on the street in that area. The weapon was operable, loaded with eight live rounds, and had gunshot residue in the barrel. In addition, the serial number had been scratched off and was not visible.

Officer Buck arrested the Appellant, brought him to East Detectives headquarters, and called Mr. Evans to come to the station. There, Mr. Evans positively identified the Appellant as the man he had seen pointing the firearm at the intersection of Hunting Park Avenue and Lycoming Street, and positively identified the firearm that Officer Buck recovered as the firearm that he saw the Appellant use. Before resting, the Commonwealth offered as evidence a certificate of non-licensure showing that the Appellant is not licensed to carry a firearm.

Trial Court Opinion ("T.C.O."), 3/30/2012, at 2-3 (citations to Notes of Testimony omitted).

Appellant was charged with possession of a firearm with an altered manufacturer's number, 18 Pa.C.S. § 6110.2; carrying a concealed firearm without a license, 18 Pa.C.S. § 6106; carrying a firearm in public in Philadelphia, 18 Pa.C.S. § 6108; and carrying a loaded weapon, 18 Pa.C.S. § 6106.1. After a bench trial on September 8, 2009, the trial court found Appellant guilty of all charges. On April 6, 2010, the trial court sentenced Appellant to an aggregate of three to six years' incarceration. T.C.O. at 1.

On January 14, 2011, Appellant filed a timely *pro se* petition under the Post Conviction Relief Act ("PCRA"). 42 Pa.C.S. §§ 9541-46. The court appointed counsel, who filed an amended petition alleging ineffective assistance of counsel for failing to file a timely and requested appeal. The Commonwealth did not oppose the petition. On January 20, 2012, the trial court reinstated Appellant's direct appeal rights *nunc pro tunc*. On February 7, 2012, Appellant filed a notice of appeal. Appellant thereafter submitted a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). T.C.O. at 1-2.

Appellant raises one issue for our consideration:

Whether there was insufficient evidence to find that Appellant possessed a firearm and the Commonwealth failed to prove this essential element of each of the crimes of the defendant's convictions that included Possession of Firearm with Manufacturer Number Altered, Etc. (18 Pa.C.S. § 6110.2), Firearms Not To Be Carried Without A License (18 Pa.C.S. § 6106), Carrying Firearms in Public (18 Pa.C.S. § 6108), and Carrying A Loaded Weapon (18 Pa.C.S. § 6106.1).

Appellant's Brief at 2.

A claim challenging the sufficiency of the evidence presents a question of law. *Commonwealth v. Widmer*, 744 A.2d 745, 751 (Pa. 2000). Our standard of review for a sufficiency of the evidence claim is well-established:

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 finder 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. Estep, 17 A.3d 939, 943-44 (Pa. Super. 2011) (citing *Commonwealth v. Brooks*, 7 A.3d 852, 856-57 (Pa. Super. 2010)).

Appellant claims that the evidence was insufficient to find him guilty of the following offenses:

18 Pa.C.S. § 6106. Firearms not to be carried without a license.

- (a) Offense defined.
- (1) Except as provided in paragraph (2), any person who 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 under this chapter commits a felony of the third degree.

18 Pa.C.S. § 6106.1. Carrying loaded weapons other than firearms.

- (a) General Rule. – Except as provided in Title 34 (relating to game), no person shall carry a loaded pistol, revolver, shotgun, or rifle, other than a firearm as defined in section 6102 (relating to definitions), in any vehicle. The provisions of this section shall not apply to persons excepted from the requirement of a license to carry firearms under section 6106(b)(1), (2), (5), or (6) (relating to firearms not to be carried without a license) nor shall the provisions of this section be construed to permit persons to carry firearms in a vehicle where such conduct is prohibited by section 6106.

18 Pa.C.S. § 6108. Carrying firearms on public streets or public property in Philadelphia.

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

18 Pa.C.S. § 6110.2. Possession of firearm with altered manufacturer's number.

- (a) General Rule. – No person shall possess a firearm which has had the manufacturer's number integral to the frame or receiver altered, changed, removed, or obliterated.

Specifically, Appellant challenges the sufficiency of evidence to prove the common element among these four crimes: possession. Appellant's Brief at 8. As shown above, possession is an essential element of each of these statutes. (**See** 18 Pa.C.S. §§ 6110.2, 6106, 6108, and 6106.1.)

The Commonwealth can establish legal possession of contraband by proving either actual or constructive possession. *Commonwealth v. Macolino*, 469 A.2d 132, 134 (Pa. 1983). When police find contraband on a defendant's person, the defendant is in actual possession. *Id.*

In the case of *In the interest of R.N.*, a police officer was attempting to pull over the car in which the defendant was a passenger because the driver failed to stop at a stop sign. 951 A.2d 363, 365 (Pa. Super. 2008). The driver lost control of the car when he attempted to make a sharp turn and crashed into a fence and the back porch of a house. As the car crashed, an officer witnessed, from an approximate distance of ten feet, the defendant throw a bag and a metal object out of the vehicle. The officer recovered a metal handgun from the area where he saw the defendant throw the metal object. *Id.* at 370.

Based on the police officer's testimony, actual possession of the firearm by the defendant was proven. The defendant was physically holding the firearm when he threw it out of the vehicle. The police officer following the vehicle witnessed the toss by the defendant. This testimony was sufficient to show beyond a reasonable doubt that the defendant was in physical possession of the firearm. Thus, we affirmed the defendant's conviction. *Id.*

Similarly, the two witnesses that the Commonwealth presented in this case, Jeremy Evans and Officer Charles Buck, both testified to seeing Appellant holding the firearm.

Mr. Evans testified that he witnessed Appellant engage in an argument with a white male. N.T. at 8. Mr. Evans witnessed Appellant take out a gun and point it at the white male. *Id.* After the white male fled to his car, Appellant left the scene with Mr. Evans following. N.T. at 13-14. Mr. Evans called 911 and provided a description of Appellant and an approximate location. N.T. at 13-15. Following Appellant's arrest, Mr. Evans came to the police station and identified Appellant as the man that he saw pointing the gun earlier that evening. N.T. at 15-16.

Following the 911 call, Officer Buck located Appellant, who was walking in the general location and wearing the same clothing that Mr. Evans reported. N.T. at 26-27. From a distance of ten to fifteen feet, Officer Buck witnessed Appellant drop an object onto the street beside a parked car. N.T. at 27-28, 37. When Officer Buck approached the parked car, he observed a gun laying on the street where he had just observed Appellant drop an item. N.T. at 30. Officer Buck testified that he found no other objects in that general location. N.T. at 31. As in *R.N.*, the testimony of the witnesses here is sufficient to establish that Appellant had possession of the gun.

Viewing the evidence in the light most favorable to the Commonwealth as verdict winner, the testimony of Officer Buck and Mr. Evans was sufficient to prove that Appellant was in actual possession of the firearm immediately before Officer Buck stopped and arrested him.

Appellant included a separate challenge to the charge of carrying a loaded weapon in a vehicle (18 Pa.C.S. § 6106). Appellant claimed there

was insufficient evidence to establish that he was in a vehicle. Appellant waived this claim because he did not raise it in his Pa.R.A.P. 1925(b) statement of errors complained of on appeal. ***Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998)(stating any issue not raised in a 1925(b) statement will be deemed waived).

Judgment of sentence affirmed. Jurisdiction relinquished.