IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-1329-2007**
	:	
vs.	**:**	
	:	**CRIMINAL**
DERRICK ELLISON,	**:**	
Appellant	**:**	

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Judgment of Sentence entered on or about March 25, 2008. The relevant facts follow.

On July 15, 2007, at approximately 3:00 a.m., Shronda Clipper was at her residence at 1576 Randall Circle with her children, Annette Short, Annette Short's children, and acquaintance whose first name was Toya, and Toya's uncle. Ms. Clipper and Ms. Short were drinking and playing cards when Appellant arrived at the residence demanding that Ms. Short, who was his girlfriend at the time, go with him to her residence at 1708 Randall Circle. Ms. Clipper thought Ms. Short should stay there because Ms. Short was very intoxicated and her children were sleeping. She attempted to persuade Appellant to let Ms. Short stay, but Appellant hit her in the face, knocking her into a mirror, which fell to the floor and broke. When Ms. Clipper gained her composure, Appellant had a black handgun in his hand and said "I ain't fucking playing." Appellant then grabbed Ms. Short by the arm and dragged her from Ms. Clipper's residence. Ms. Clipper was concerned for Ms. Short's safety and called the police, gave them a brief description of what had occurred, and told them she believed Appellant took Ms. Short to 1708 Randall Circle.

The police responded to 1708 Randall Circle based on Ms. Clipper's call

about a disturbance with a weapon involved. They knocked on the door several times. Eventually, Ms. Short answered the door and stepped outside. The police asked Ms. Short if Appellant was in the residence. She replied that he was not. They asked where he was and she said she didn't know. The police asked Ms. Short if they could go inside the residence and look for Appellant. Ms. Short said she did not want the police to go inside because she was afraid they would disturb her children. The police contacted the Lycoming Housing Authority, the entity that owns the Randall Circle housing development. The police believed Appellant was inside the residence with a weapon and were concerned for the safety of the children. Beth Turner, the Executive Director and CEO of the Lycoming Housing Authority arrived approximately 15 minutes later. Ms. Turner spoke to Ms. Short. After speaking with Ms. Turner, Ms. Short gave them permission to enter the residence.

The police went into the residence looking for Appellant. They found Appellant hiding under a pink afghan in the closet in the children's bedroom. The master bedroom was perpendicular to the children's bedroom. Not knowing whether the children were hiding somewhere else in the house and concerned that they may come across the handgun, one of the officers looked into the master bedroom. The officer saw a hamper with the lid askew just inside the doorway. The officer lifted the lid of the hamper and saw a black handgun and magazine. The weapon was a 9 mm Glock. The magazine was next to the weapon, and it was fully loaded.

The police placed Appellant in the back of a cruiser. They advised him of his Miranda rights, which he claimed not to understand so they didn't talk to him at all except to get biographical information. On the way back to the station, Appellant told the police that two guys, both with the first name Derrick, jumped him outside Ms. Clipper's residence.

They demanded money. Appellant tried to talk to them, but they hit him on the side of the head with the gun, knocking him to one knee. Appellant then knocked the gun away from them and they got in their car and fled.[1]

The police charged Appellant with the following offenses: person not to possess a firearm, possession of a firearm without a license, recklessly endangering another person, and the summary offenses of harassment and criminal mischief. A jury trial was held on January 23, 2008. The jury acquitted Appellant of recklessly endangering another person, but convicted him of the firearm offenses. The Court found Appellant guilty of the summary offenses.

On March 25, 2008, the Court sentenced Appellant to undergo incarceration in a state correctional institution for 3 ½ to 7 years for person not to possess a firearm and a concurrent 2 to 5 years for possessing a firearm without a license.[2] Appellant made an oral request for arrest of judgment at the time of sentencing, which the Court denied.

On April 4, 2008, Appellant filed a post sentence motion in which he claimed: (1) the Court erred in not granting Appellant's motion to suppress evidence; (2) the evidence was insufficient to support the jury's verdict; and (3) the verdict was against the weight of the evidence. The Court summarily denied the motion on April 11, 2008.

On April 14, 2008, Appellant filed a notice of appeal. In this appeal,

---

1At trial, Appellant testified that Ms. Short called him to come over the Ms. Clipper's residence and to help her carry the children home. When he got to Ms. Clipper's door, he was jumped by two individuals. He claimed that he gave the police the names of Derrick Friday and Derrick Boom as the people who jumped him. He knocked the gun away from them and they fled with a third individual who was driving a car. He also testified that after they fled, he took the magazine out of the weapon and put it in his pocket and held the gun in his hand behind his back when he was at Ms. Clipper's residence. The only way he could figure she knew he had a weapon is she was part of the set up to have him jumped because he was cheating on Ms. Short. When he got to Ms. Short's residence, he allegedly gave the gun to her and told her to call the police after he left the residence and tell them she found the gun or something.

2 The Court imposed a fine of $75 for harassment and a fine of $50 for criminal mischief.

Appellant claims the Court erred in denying his motion to suppress evidence, the evidence was insufficient to support the verdict, the verdict was against the weight of the evidence and the sentence imposed was excessive.

Appellant first contends the Court erred in denying his motion to suppress evidence. This issue was fully addressed by the Honorable Dudley N. Anderson in his Opinion and Order docketed December 7, 2007.

Appellant next asserts the evidence was insufficient to support the jury's verdict on the firearms charges. In his post sentence motion, Appellant specified that evidence was insufficient because it failed to establish beyond a reasonable doubt that Appellant possessed the firearm with the intent to employ it criminally[3] and/or that Appellant concealed the firearm on his person. This Court cannot agree.

In reviewing the sufficiency of the evidence, the court considers whether the evidence and all reasonable inferences that may be drawn from that evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt. *Commonwealth v. Davido*, 582 Pa. 52, 60, 868 A.2d 431, 435 (Pa. 2005); *Commonwealth v. Murphy*, 577 Pa. 275, 284, 844 A.2d 1228, 1233 (Pa. 2004); *Commonwealth v. Ockenhouse*, 562 Pa. 481, 490,

3 The Court believes Appellant and his counsel are confusing the elements of the firearms offenses Appellant was charged with and possessing an instrument of crime. The possessing a firearm with the intent to employ it criminally is an element of possessing an instrument of crime under 18 Pa.C.S. §907(b), but it is not an element for person not to possess or possessing a firearm without a license.

756 A.2d 1130, 1135 (Pa. 2000); *Commonwealth v. May*, 540 Pa. 237, 246-247, 656 A.2d 1335, 1340 (Pa. 1995). Circumstantial evidence can be as reliable and persuasive as eyewitness testimony and may be of sufficient quantity and quality to establish guilt beyond a reasonable doubt. *Commonwealth v. Tedford*, 523 Pa. 305, 322, 567 A.2d 610, 618 (Pa. 1989)(citations omitted). Circumstantial evidence alone may be sufficient to convict one of a crime. *Commonwealth v. Davido*, 868 A.2d 431, 435 (Pa. 2005); *Commonwealth v. May*, 540 Pa. at 246, 656 A.2d at 1340; *Commonwealth v. Gorby*, 527 Pa. 98, 107, 588 A.2d 902, 906 (Pa. 1991).

For the person not to possess a firearm charge, the Commonwealth must prove the defendant had a prior conviction of an offense listed in 18 Pa.C.S. §6105(b) and he or she possessed a firearm more than 60 days after that conviction. See 18 Pa.C.S. §6105(a)(1) and (a)(2)(i); PaSSJI(Crim) 15.6105; *Commonwealth v. Williams*, 911 A.2d 548, 550-551 (Pa. Super. 2006). The definition of firearm for this offense includes any weapons which are designed to or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of such weapon. 18 Pa.C.S. §6105(i); PaSSJI(Crim) 15.6105.

The evidence presented at trial showed beyond a reasonable doubt that Appellant was guilty of the offense of person not to possess a firearm. First, all the testimony presented at trial, including Appellant's own testimony, established that Appellant possessed a firearm on July 15, 2007. Shronda Clipper and Annette Short both testified that, after Appellant struck Ms. Clipper, he had a handgun in his hand. Appellant testified that he had a gun in his hand, but it was behind his back and the magazine was in his pocket. Under the definition set forth above, the handgun was a firearm regardless of whether the magazine was in the weapon or in Appellant's pocket. Second, on November 30, 2007, Trooper John

Whipple test fired four 9 mm rounds from the Glock handgun seized from the hamper located in the master bedroom of 1708 Randall Circle, proving that the weapon was designed to expel a projectile by the action of an explosive. Finally, robbery is an offense listed in section 6105(b). The Commonwealth and defense stipulated that Appellant had a conviction for strong arm robbery from South Carolina on May 3, 2000. Since this conviction occurred more than 7 years prior to incident in question, the evidence presented clearly established Appellant's guilt beyond a reasonable doubt.

To establish the possession of a firearm without a license charge in this case, the Commonwealth had to prove: (1) Appellant carried a firearm; (2) Appellant was not licensed to carry the firearm; and (3) the firearm was concealed on Appellant's person outside his home or place of business. *Commonwealth v. Bavusa*, 750 A.2d 855, 857 (Pa. Super. 2000), affirmed 574 Pa. 620, 832 A.2d 1042 (Pa. 2003); see also 18 Pa.C.S.A. §6106; Pa.SSJI (Crim) 15.6106. A firearm includes any pistol or revolver with a barrel less than 15 inches or any overall length of less than 26 inches, which is operable or, if inoperable, the defendant had under his control the means to convert the object into one capable of firing a shot. 18 Pa.C.S.A. §6102; PaSSJI (Crim) 15.6106.

The firearm the police seized from the hamper was introduced into evidence and displayed in open court. Just by looking at the firearm, one could tell the barrel was less than 15 inches, and the overall length was less than 26 inches. Trooper Whipple test-fired the weapon, proving it was operable. As previously discussed, all the testimony, including Appellant's own testimony, proved that he carried the firearm. The Commonwealth and defense stipulated that Appellant did not have a license to carry the firearm.

The only issue for this charge was whether the firearm was concealed or not.

Both Ms. Clipper and Ms. Short testified that Appellant came to Ms. Clipper's residence at around 3:00 a.m. demanding Ms. Short go home with him. Neither Ms. Clipper nor Ms. Short observed a handgun at this point. When Ms. Clipper tried to talk Appellant into letting Ms. Short stay and stepped between Appellant and Ms. Short, Appellant hit her in the face with a closed fist. The blow knocked Ms. Clipper back into a mirror, which fell and broke. When Ms. Clipper gained her composure, Appellant had a gun in his hand and said, "I ain't fucking playing." Viewed in the light most favorable to the Commonwealth as the verdict winner, the jury could infer from this evidence that Appellant had the weapon concealed on his person when he initially arrived at Ms. Clipper's residence and he pulled it out and displayed it after he struck Ms. Clipper in the face. Therefore, the Commonwealth proved all the elements of possessing a firearm without a license.

Appellant next contends the verdict was against the weight of the evidence. An allegation that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court. *Commonwealth v. Sullivan*, 820 A.2d 795, 805-806 (Pa.Super. 2003). A new trial is awarded only when the evidence is so tenuous, vague and uncertain that the verdict shocks the conscience of the court. *Id*. at 806. The issue is not whether there was evidence to support the verdict, but rather whether, notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or give them equal weight with all the facts is to deny justice. *Id*.

The jury's verdict did not shock the conscience of the Court. For the person not to possess charge, Appellant stipulated that he had a conviction which precluded him from possessing a firearm and his own testimony established that he possessed a firearm on July 15, 2007. With respect to the possessing a firearm without a license charge, although

Appellant claimed the held the gun in his hand the entire time and he argued that it was not concealed on his person, the jury did not have to accept the credibility of Appellant's testimony. The credibility of a witness is within the sole province of the jury who is free to believe all, part or none of any witness's testimony. *Commonwealth v. Spotz*, 552 Pa. 499, 510, 716 A.2d 580, 585 (Pa. 1998); *Commonwealth v. Gibson*, 553 Pa. 648, 664, 720 A.2d 473, 480 (Pa. 1998). Appellant's testimony about being jumped by two guys outside Ms. Clipper's residence simply was not credible. Instead, it came across as a story that he made up and told to the police while he was in the back of the police cruiser on the way to the barracks. If Appellant had done nothing wrong and wanted Ms. Short to call the police to give them the weapon, there was no reason for him to be hiding in the children's bedroom closet when the police arrived.

Appellant's final issue on appeal is that his sentence was excessive. The Court cannot agree. Appellant had a prior record score of two. For the person not to possess charge, if the firearm is loaded or ammunition is within the possession or control of the defendant, the offense gravity score (OGS) is ten. The evidence clearly showed ammunition was within the possession or control of Appellant. When the police located the firearm in the hamper, a magazine full of 9mm bullets was right next to it. Even if Appellant's version of the events was credited, the firearm was loaded and the ammunition was within Appellant's possession or control. Appellant testified that when he picked up the weapon the magazine was in it. He then took the magazine out of the gun and put it in his pocket. With a prior record score of two and an OGS of ten, the standard minimum guideline range was 36 to 48 months. The Court sentenced Appellant to a minimum term of 3 ½ years or 42 months, which was right in the middle of the standard guideline range. In choosing the middle of the

standard range, the Court considered the fact that Appellant did not shoot the weapon or point it at anyone, but he did show it to Ms. Clipper and Ms. Short, which frightened them. N.T., March 25, 2008, at p. 35-38. Furthermore, Appellant's statement "I ain't fucking playing" carried the implicit threat that if Ms. Clipper and Ms. Short did not cooperate and have Ms. Short return to her apartment with him that he would use the gun. The Court also considered Appellant's character. The Court noted that the jury did not accept Appellant's testimony that he came into possession of the gun because he was jumped by two individuals outside Ms. Clipper's apartment. As noted previously, this testimony came across as a story Appellant made up in the back of the cruiser on the way to the barracks. Even after the jury rejected this story and convicted him, Appellant continued to argue that he was assaulted and defended himself and the police did not appropriately investigate his assault claim. N.T., March 25, 2008, at pp.28-29. A weapon also was involved in the strong arm robbery in Appellant's prior record. N.T., March 25, 2008, at pp. 14, 21. Finally, Appellant was involved in an incident at the county jail while he was awaiting sentencing. N.T., March 25, 2008, at pp. 16-17. Given the nature of the current crime and Appellant's character (including his possession of a firearm in his prior conviction, the story Appellant told the jury, and the incident at the county jail), the Court found a sentence at the low end of the range would not be appropriate, but one in the middle of the standard range would be reasonable. With a minimum sentence of 3 ½ years, the Court had to impose a maximum sentence of at least 7 years. See 42 Pa.C.S.A. §9756(b)("The court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed").

The Court imposed a concurrent two to five years for the possession of a

firearm without a license conviction. Although the offenses did not merge for sentencing purposes, the Court agreed with Appellant's counsel that it was a single possession of a firearm and did not warrant consecutive incarceration. N.T., March 25, 2008, at pp. 36-37.

DATED:_____

By The Court,

_____
Kenneth D. Brown, P.J.

cc: Robert Cronin, Esquire (APD)
Henry Mitchell, Esquire (ADA)
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)
Work File