

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-797-2012
vs. :
:
CARLOS ACOSTA, : Post-Sentence Motion
Defendant : Motion in Arrest of Judgment

OPINION AND ORDER

By Criminal Complaint filed on September 23, 2012, Defendant was charged with one count of persons not to possess a firearm,¹ graded as a felony of the second degree. The charge arose out of an incident that allegedly occurred on September 23, 2012 at approximately 5:30 p.m. near 1118 Isabella Street in Williamsport in which a witness saw an individual, later identified as Defendant, pass a handgun to another individual. Police responded and eventually detained Defendant. The second individual, who had allegedly been handed the gun, fled when police arrived. A search of his flight path uncovered a handgun. The Criminal Complaint alleges that Defendant's previous escape conviction and juvenile adjudication for aggravated assault precluded him from possessing any weapons.

On June 11, 2013, the Commonwealth filed a motion to amend the Information to add Count 2, firearms not to be carried without a license,² a felony of the third degree. By Order dated June 13, 2013, the Court granted the Commonwealth's motion. By stipulation of the parties, the Court also amended the grading of Count 1 from

¹ 18 Pa.C.S. §6105.

² 18 Pa. C.S.A. § 6106

a felony of the second degree to a misdemeanor of the first degree.

A non-jury trial was held before this Court on June 13, 2013, July 5, 2013 and August 30, 2013. Following the trial, on August 30, 2013, the Court found the Defendant guilty of both charges. Sentencing was scheduled for January 21, 2014.

At the January 21, 2014 sentencing hearing, the parties disputed the Defendant's prior record score. Defendant indicated he was never adjudicated delinquent on a conspiracy to commit aggravated assault. Accordingly, the sentencing hearing was continued to March 21, 2014. At this scheduled hearing, the Defendant questioned "the propriety" of his conviction claiming that Count 1 was improperly graded. Defendant also disputed his prior record score. The sentencing was again continued, this time to March 26, 2014.

By Order dated March 26, 2014, following the sentencing hearing, the Court sentenced Defendant to a 3 ½ to 7 year period of incarceration in a state correctional institution on Count 2 and a concurrent 1 to 2 year sentence on Count 1. For purposes of the sentence on Count 2, the Court determined the offense gravity score to be a 9 and the Defendant's prior record score to be a 5.

Defendant filed a timely post-sentence motion on April 4, 2014. The Court held an argument on this motion on April 16, 2014.

Defendant asserted only one issue in his post-sentence motion, that is, the verdict with respect to Count 2 was against the weight of the evidence in that the testimony of other individuals present, namely Mary Stewart, was not given enough weight. Defendant argues that Ms. Stewart was closest to him and did not see any weapon

in his possession.

“Conflicts in the evidence and contradictions in the testimony of any witnesses are for the factfinder to resolve.” Commonwealth v. Lofton, 57 A.3d 1270, 1273 (Pa. Super. 2012), citing Commonwealth v. Tharp, 574 Pa. 202, 830 A.2d 519, 528 (2003). Indeed, the “weight of the evidence is exclusively for the finder of fact who is free to believe all, part or none of the evidence and to determine the credibility of the witnesses.” Commonwealth v. Small, 559 Pa. 423, 435, 741 A.2d 666, 672 (1999)(citation omitted).

A defendant is not entitled to relief on a weight claim merely because there is a conflict in testimony. Commonwealth v. Sanchez, 614 Pa. 1, 36 A.3d 24, 39 (2011). “Relief on a weight of the evidence claim is reserved for ‘extraordinary circumstances, when the verdict is so contrary to the evidence as to shock one’s sense of justice and the reward of a new trial is imperative, so that right may be given another opportunity to prevail.’” Id., quoting Commonwealth v. Blakeney, 596 Pa. 510, 946 A.2d 645, 653 (2008).

Simply put, the role of the court in a weight of the evidence claim is to determine whether “notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the other facts is to deny justice.” Lofton, supra, quoting Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745, 752 (2000).

Curt VanderVere testified at the June 13, 2013 proceeding. He resides at 1115 Isabella Street in Williamsport and was at his residence on Sunday, September 23, 2013. An incident across the street caught his attention. During the incident, he saw two individuals talking with each other. He heard the one individual tell the other individual

to give him “the piece or the heat.” At that time, the other individual, eventually identified as the Defendant, pulled “what appeared... to be a gun” from his right-front pocket of his hoodie sweatshirt. N.T., June 13, 2013, at 5-6. Mr. VanderVere confirmed that the “fella” who he saw with the green sweatshirt “who had handed the gun” to the other individual was “indeed the fella” that was detained by police.

On cross-examination, Mr. VanderVere conceded that he called the police because he saw what he “believed to be the gun”. N.T., at 11. He described the gun as a “very large handgun.” N.T., at 16. He explained that he was approximately 75 feet away and that there was no obstruction between himself and his view of the gun. *Id.* While he wasn’t positive it was a gun, his “assumption was so strong” that he called emergency services. *Id.*

The 911 tape was also played by the Commonwealth. It was marked as Commonwealth’s Exhibit No. 1. Mr. VanderVere described the actors as on the street trying to “call out” somebody who is inside. He specifically noted that the one individual with a green sweatshirt just handed a very large handgun to the individual in a grey sweatshirt and Chicago Bulls baseball cap and he stuck it down his pants. He noted in response to a question regarding the gun that the guy in the grey sweatshirt has it “now.” He further noted that they were still standing in the street. He noted that at the time they were “just” talking to each other, another “white” guy was standing around, and the one guy handed the other guy a very large gun. He noted he was “watching it from across the street.” He described as well what the actors were wearing. He specifically noted that he did not want to get involved. As the events were unfolding and police were arriving he

described the individual with the gun as going to the left side of the house and as “going to ditch the gun.”

Officer Nathan Moyer, of the Williamsport Bureau of Police, also testified on behalf of the Commonwealth. He was dispatched to 1118 Isabella Street because of a “disturbance involving a gun.” When he arrived on the scene, he detained Defendant. When he asked Defendant what had happened, Defendant indicated that he was just walking by, the police showed up and he was handcuffed. N.T., June 13, 2013, at 23, 24. He subsequently spoke with Mr. VanderVere and then searched the flight path of the other individual. He found “a Smith & Wesson black and silver, black and grey handgun semiautomatic under a parked vehicle, and that parked vehicle would have been in the direct flight path of the male in the grey hoodie.” N.T., at 25. When he recovered the handgun, he found that there was a round in the chamber. N.T., at 28.

Officer Moyer took possession of the handgun, the magazine and the one round and eventually gave the items to Lieutenant Arnold Duck of the Williamsport Bureau of Police.

Through varied witnesses, the Commonwealth established a chain of custody for the gun, the magazine with 13 rounds and one loose round. The Commonwealth also established a chain of custody with respect to DNA swabs that were taken from the pistol, magazine and cartridges.

Jill Cramer, a Forensic DNA Analyst with the Pennsylvania State Police tested the samples. On some of them, she detected human DNA. With respect to a swab from the handgun, she concluded that Defendant could not be excluded as a possible

contributor.

Mary Stewart testified as well on behalf of the Commonwealth. On the date in question, she was visiting her parents at their home on 1118 Isabella Street. Her son was with her during the visit. At some point after she arrived, her son's friend showed up looking for her son. Soon thereafter, an individual who she knew as "Shy" and Defendant showed up at the house. She was in the kitchen while all three young men were at the bottom of the steps leading to the second floor talking amongst themselves.

Eventually, she instructed the young men to leave as they were being too loud. They left the residence. As they left she saw them outside. She then returned to the house preparing to leave to get pizza. As she left approximately three or four minutes later, she again saw the young men outside. Defendant and Shy were leaning on a car near an adjacent property while the other young man, not with them, was walking back and forth on the street.

She left to get the pizza and was gone for approximately 15 to 20 minutes. She returned and saw Defendant in a police car. Shy was not there.

On cross, she noted that at no time when she saw Defendant did she see any guns or hear any commotion.

The verdict is clearly not against the weight of the evidence. Mr. VanderVere was a disinterested, unbiased individual who had no reason whatsoever to make up his story. He was definitive in his testimony and even noted that he did not want to get involved. He was consistent in connection with his cross-examination answers and his demeanor demonstrated that he was being credible.

The uncontested facts corroborated his version of the story. The individuals were clothed in the items that he described and a gun was found in the flight path of the individual who was given the gun by Defendant. As well, the DNA evidence to some extent corroborated Mr. VanderVere's version. At the very least, it is an additional piece of evidence implicating Defendant.

Defendant's statement that he was just walking by and was handcuffed was refuted by the testimony of Mr. VanderVere, Officer Moyer and Ms. Stewart who all saw Defendant on the scene. Mr. VanderVere and Ms. Stewart saw Defendant there for quite some time.

Mr. VanderVere had a good vantage point, he related the incident with details, and the 911 call was definite. He was relating it immediately, which lends to his credibility and as indicated previously, he had no reason to fabricate a story.

Finally and as referenced above, Mr. VanderVere's version was corroborated by many circumstantial facts. The gentleman in the grey sweatshirt, who was given the gun, ran evidencing consciousness of guilt. Defendant lied to the police about what he was doing, further evidencing his guilt. The gun was found directly in the flight path within minutes of the incident and within 100 to 125 feet of the incident. The size of the gun also was such that it would easily fit into the pouch of a sweatshirt. Additionally, the gun was swabbed for DNA and Defendant could not be excluded as the contributor of the DNA.

ORDER

AND NOW, this ____ day of April 2014, following a hearing and argument,
Defendant's post-sentence motion is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: DA (AC)
PD (KB)
Gary Weber, Lycoming Reporter
Work File