

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-1106-2016
 LEANNE APPLGATE, :
 Defendant : Motion in Limine

OPINION AND ORDER

AND NOW, this 7th day of June 2018, the court GRANTS the Commonwealth's motion in limine and PRECLUDES Defendant from presenting any claim of self-defense or justification.

The court does not believe that there is any dispute that Defendant has a felony drug conviction but, in any event, the court would take judicial notice that Defendant was convicted of delivery of a controlled substance (heroin), on June 7, 2006, see Lycoming County case number CP-41-CR-0001543-2005. Although Defendant was not sentenced to incarceration,¹ this offense was punishable by up to 15 years of incarceration. Such a conviction precludes Defendant from possessing or using a firearm in this Commonwealth. 18 Pa. C.S. §6105(a)(1) and (c)(2).

The self-defense/justification proffer made by the defense is insufficient. Defense counsel claimed he wished to present a defense pursuant to sections 505, 506, and 507 of the Crimes Code. These sections are not applicable in this case, however, because during the incident in question neither the victim nor Defendant actually used any force. Defendant arguably threatened to use deadly force by waving a firearm around at the victim,

¹ Defendant was placed on the Intermediate Punishment Program for 24 months and directed to attend and

but she neither discharged the firearm nor struck the victim with it.

Defense counsel did not indicate that he intended to proceed with a defense pursuant to section 503; however, even if counsel did, such a defense is not available to Defendant.

In order to be entitled to an instruction on justification by necessity as a defense to a crime charged, [Defendant] must offer evidence to show:

(1) that (she) was faced with a clear and imminent harm, not one which is debatable or speculative;

(2) that (she) could reasonable expect that (her) actions would be effective in avoiding this greater harm;

(3) that there is no legal alternative which will be effective in abating the harm; and

(4) that the Legislature has not acted to preclude the defendant by a clear and deliberate choice regarding the values at issue.

Commonwealth v. Billings, 7793 A.2d 914, 916 (Pa. Super. 2002)(quoting *Commonwealth v. Capitulo*, 508 Pa. 372, 377, 498 A.2d 806 (1985). “When the proffered evidence supporting one element of the defense is insufficient to sustain the defense, even if believed, the trial court has the right to deny use of the defense and not burden the jury with testimony supporting other elements of the defense.” *Id.*

The proffer in this case was insufficient to establish multiple elements.

Defendant was not faced with a clear and imminent harm, but rather one that was debatable or speculative. It is undisputed that, whatever incidents may have occurred between Defendant and the victim in hours, days, or weeks prior, Defendant was inside her residence when the victim, the victim’s fiancé, and Defendant’s husband arrived in the driveways on Defendant’s property. The victim did not visibly possess any weapon, attempt

to enter Defendant's residence or attempt to use any force against Defendant before Defendant exited her residence with a handgun in her hand. Defendant simply was not faced with any clear and imminent harm which required her to possess a firearm. See *Commonwealth v. Merriweather*, 555 A.2d 906, 911 (Pa. Super. 1989)(despite allegedly receiving telephone threats by individuals against whom he testified in a murder trial, appellant was not justified in carrying a firearm as the alleged threats did not constitute clear and imminent harm and there was a legal alternative available to appellant, i.e., notifying the authorities and informing them of the threats).

Defendant also clearly had a legal alternative which would have been effective to abate the harm in that she could have remained inside her residence, locked her doors, and called 9-1-1 or the police. In addition to locking her doors and calling the police, Defendant could have armed herself with any weapon other than a firearm, such as a knife, a bow and arrows, or a baseball bat, to protect herself; she simply could not arm herself with a firearm under the facts and circumstances of this case.

Finally, the Legislature has acted to preclude the defense. Even if the victim visibly possessed a firearm or other weapon capable of lethal use, Defendant would have a duty to retreat because she was in illegal possession of a firearm. See 18 Pa.C.S. §505(b)(2.3). It is clear from the videotape provided to the police by Defendant that she could safely retreat to her residence as she did so on at least two occasions, one of which was to retrieve the firearm.

By The Court,

Marc F. Lovecchio, Judge

cc: Nicole Ippolito, Esquire (ADA)
George Lepley, Esquire
Gary Weber, Esquire, Lycoming Reporter
Work File