J. A44028/90

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
CURTIS JOHNSON, Appellant	:	No. 388 Philadelphia, 1990

Appeal from the Judgment of Sentence entered November 9, 1989, Court of Common Pleas, Philadelphia County, Criminal Division at No. 8901-1132.

BEFORE: MONTEMURO, JOHNSON and CERCONE, JJ.

MEMORANDUM: FILED DEC 19 1990

Curtis Johnson appeals from a conviction and sentence on a charge of aggravated assault. We affirm.

On November 27, 1988, Johnson, an off-duty police officer, was cleaning the cellar of the premises at 6759 Germantown Avenue, a building he owned and leased. Complainant James Cahill lived with his mother and sister in the third floor apartment which had been leased to Cahill's brother. Johnson knew Cahill, had spoken with him previously on several occasions, and had previously been at his place of employment to discuss a landlord-tenant grievance.

As a result of a dispute between Johnson and Cahill's mother the previous day, Cahill confronted Johnson in the basement of the building, and the two of them went to the first floor to address the matter. Eventually, Johnson picked up a

board and ordered Cahill from the building under threat of arrest. Cahill took a shovel handed to him by his sister.

Johnson testified that he attempted to place Cahill under arrest after Cahill began swinging the shovel at him. Cahill testified that he took the shovel from his sister to prevent her from attacking Johnson with it, but that he never used the shovel in an aggressive manner towards Johnson.

Cahill fled the building, dropping the shovel as he got outside. Johnson also left the building and began firing his weapon three or four times at Cahill, who had crossed the street. Cahill was struck once in the back and fell to the sidewalk where he stayed until medical assistance arrived. This incident has left Cahill paralyzed.

Following a two day jury trial before the Honorable Angelo A. Guarino, Johnson was convicted of Aggravated Assault. Johnson filed Post-Verdict Motions and Additional Post-Verdict Motions, all of which were denied on November 20, 1989, and the trial court sentenced Johnson to seven and one half to fifteen years' imprisonment. A Motion to Modify the Sentence was denied on December 5, 1989. Following an untimely Notice of Appeal, this Court denied Johnson's application to appeal out of time on January 8, 1990.

After acquiring new counsel, Johnson filed a petition for permission to appeal nunc pro tunc, pursuant to the Post Conviction Relief Act ("PCRA"), codified at 42 Pa.C.S. §9542 et.

seq. Permission to appeal nunc pro tunc was granted on January 30, 1990.

On appeal, Johnson presents six issues:

I. Whether the trial court properly instructed the jury regarding the circumstances under which a police officer may justifiably use deadly force in making an arrest.

II. Whether the trial court erred by permitting cross-examination of Johnson regarding the possibility of arresting Cahill at another time.

III. Whether the trial court improperly restricted cross-examination of Cahill concerning a prior inconsistent statement and prior threats.

IV. Whether the trial court properly instructed the jury as to reasonable doubt.

V. Whether the sentence exceeded the statutory maximum, was improperly based upon an inapplicable mandatory provision, or grossly exceeded the guidelines so as to make the sentence illegal.

VI. Whether the conviction is illegal where neither the verdict as stated nor as recorded identifies the count or degree of crime to which it relates.

Johnson contends that the trial court erred when it instructed the jury as to justification. The Commonwealth contends that, absent allegations of extraordinary circumstances, Johnson's failure to raise this objection at trial waived this issue. The issue is presented whether allegations of ineffectiveness made in a PCRA petition are sufficient, in and of themselves, to preserve an issue not

otherwise preserved. Our disposition of the substantive issue makes an investigation of waiver unnecessary.

Johnson argues that the trial court instructions to the jury improperly made "self-defense or the defense of others" a prerequisite to a finding of justification, and may have denied him his statutory defense. Johnson relies on the emphasized portions of the justification statute as stated herein:

> A peace officer ... need not ... desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary to effect the arrest and of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person, or when he believes both that:
>
> (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and
>
> (ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay.

18 Pa.C.S. §508(a)(1)(emphasis added). Johnson argues that, while attempting to arrest Cahill, Cahill was escaping, thereby satisfying element (i) above, and that an attack on him by Cahill constituted a forcible felony, satisfying element (ii). Johnson contends that, if the facts as he alleged them were proven at trial, he was entitled to this defense. He argues

further that errors in the jury instructions denied him the opportunity for proper consideration of this defense.

Johnson's claim of insufficient jury instruction as to justification must fail for several reasons. Primarily, the defense of justification which he seeks is unavailable to him. Subsection (ii) of the justification statute requires that the person to be arrested "possess a deadly weapon, or otherwise indicates that he will endanger human life or inflict serious bodily injury unless arrested without delay."

Johnson would have us read § 508 disjunctively, thereby negating the element of endangerment where a "forcible felon" is pursued. This we cannot do. The phrase "committed or attempted a forcible felony or is attempting to escape" has, as a necessary condition, the requirement of "[possession of] a deadly weapon, or [other indication] that he will endanger human life or inflict serious bodily injury unless arrested without delay." The statute is not to be read to allow deadly force to be used against a person who poses no threat to human life or safety; therefore, a jury instruction which may have deprived the defendant of this defense would constitute harmless error.

In any event, a review of the record indicates that the jury instruction on the point of justification, was sufficient to allow a jury to conclude as Johnson would have asked. The jury was instructed as follows:

> The Defendant has presented a defense of justification stating that he was justified in shooting the

> individual because he was attempting to make an arrest, that's his defense. And true, a piece (sic) officer is justified in using any force which he believes to be necessary to effect an arrest. Any force, or course, that he believes necessary to defend himself from bodily injury. So a police officer generally has the right to use that force which he deems and believes to be necessary in order to effectuate the arrest, and he may use that kind of force that is necessary to effectuate for that purpose. However, he is justified using deadly force only when he believes that such force is necessary to prevent the death or serious bodily injury to himself or another or when he believes that both are present, these two factors are present and such force is necessary to prevent the arrest from being defeated by resistance or escape, and the person to be arrested has committed or attempted to commit a forcible felony under the act.

N.T., May 15, 1989, at 156. Johnson contends that this instruction prevented the jury from properly considering the defense of justification. He argues:

> [T]he instruction is clearly and fundamentally erroneous since it demands that the force can be used only where the elements of self-defense are present. As the Trial Court described it, any use of deadly force is justified only where necessary to prevent death or serious bodily injury.
>
> By converting the statutory "or" into an "and" the court effectively eliminated use of force in arrests and confined it solely to situations of self-defense. Inasmuch as defendant's entire case was based upon his right to shoot at a fleeing felon, the mis-instruction totally deprived him of his statutory defense.

Appellant's Brief at 9.

On this point, the Commonwealth argues that the instructions given the jury properly addressed either of two different justifications for the use of deadly force, self-defense or when necessary to arrest a fleeing felon who would otherwise escape.

"Our standard of review in determining whether a jury instruction is proper is well documented. A court's charge to the jury will be upheld if it adequately and accurately reflects the law and was sufficient to guide the jury properly in its deliberations." Commonwealth v. Person, 345 Pa.Super. 341, 498 A.2d 432 (1985). Appellate review of jury instructions for prejudicial and reversible error requires that we read the charge as a whole; error cannot be predicated upon an isolated excerpt. Commonwealth v. Woodward, 483 Pa. 1, 394 A.2d 508 (1978). We note that, in response to an inquiry by the jury, the trial court gave further instructions as follows:

> All right, we said that an officer is justified in using any force which he believes to be necessary to effectuate an arrest, any force generally, that's the general rule but he must use only that amount of force that is necessary to accomplish the arrest. Now, when it comes to the use of deadly force, deadly force being force that is likely to cause serious bodily injury or death, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person or when he believes both, one, that such force is necessary to prevent the arrest from being defeated. An arrest being defeated meaning that, being not effectuated, that he could not make the arrest otherwise, and the person to be arrested has committed or attempted a forcible felony, and is fleeing therefrom.

N.T., May 15, 1989, at 182-3. This later clarification does not suffer from the ambiguity alleged to exist in the earlier instruction: The justifications of (1) defense of self or another, and (2) apprehension of a fleeing forcible felon, are clearly disjunctive. Therefore, even though Johnson was not entitled to the defense of justification, the charge, read as a

whole, would have allowed a jury to find justification on defendant's theory. The jury did not however find justification on the theory proffered by the defense, and no reversible error resulted.

Any issue regarding any possible impropriety of allowing questioning of Johnson regarding possible later arrest of Cahill is necessarily disposed of as a result of our resolution of the issue above. As we hold that the defense of justification was unavailable to Johnson, any testimony which was admitted which might have negated this defense would constitute harmless error. This issue, therefore, is without merit.

Johnson next argues that he was improperly restricted on cross-examination of Cahill while attempting to make use of Cahill's prior inconsistent statements. During cross-examination, defense counsel attempted to show inconsistencies between Cahill's trial testimony and what Cahill had told police regarding his awareness of Johnson's gun and several prior events. Where the witness could not recall making a particular statement to police or was otherwise unable to verify the accuracy of the police summary, Judge Guarino sustained objections to the use of a police summary as a prior inconsistent statement. Johnson contends that this was error.

Prior inconsistent statements may be used to impeach a witness, Commonwealth v. Hensley, 295 Pa.Super 225, 233, 441 A.2d 431, 435 (1982); however, in order to impeach a witness through the use of prior inconsistent statements, there must be

evidence that the statement sought to be introduced was made or adopted by the witness whose credibility is being impeached. Commonwealth v. Baez, 494 Pa. 388, 431 A.2d 909 (1981). The statement sought to be introduced in the instant case was not made by the witness, but by a police officer while filling out a report. There is no evidence that the information contained therein was, in fact, a statement by the witness. Indeed, the witness stated that he had no memory of making the statements which defense counsel sought to introduce as inconsistent.

We encountered this issue in Commonwealth v. Brown, 302 Pa.Super. 391, 448 A.2d 1097 (1982). There, the witness explicitly stated that she did not recall telling police whether or not appellant wore glasses during the robbery. Thus counsel had not yet presented evidence that the witness made or adopted a prior statement inconsistent with her trial testimony. Under these circumstances, the court properly disallowed the use of the statement in counsel's cross-examination of [the witness.] Id. at 302 Pa.Super. 400, 448 A.2d at 1102. We have stated similarly:

> The police reports were not "statements" of the witnesses. They were summaries prepared by investigating police officers. They were not shown to be verbatim recordings of the victims' accounts and descriptions, and, except where a witness adopted and verified the reported statement during trial, there was no evidence that the victims had read, signed or approved the accuracy of the police summaries. "It would have been unfair to permit impeachment of the witnesses through use of an officer's interpretation of what they had said, not their own earlier recollections." Commonwealth v. Hill, 267 Pa.Super 264, 270, 406 A.2d 796, 799 (1979).

Commonwealth v. Pinder, 310 Pa.Super. 56, 456 A.2d 179 (1983). We therefore conclude that the trial court properly ruled against the admission of the police reports for the purpose of impeachment as they did not constitute prior statements of the witness, inconsistent or otherwise. In any event, the substance of the reports was both read by defense counsel and incorporated into the questions asked of Cahill. Clearly, the jury was made aware of what defense counsel sought to show, and defense counsel cannot now be heard to contend that prejudicial error occurred.

Next, Johnson complains of the trial court's instruction as to reasonable doubt. He cites the following passage from the jury instructions in support of this argument.

> I tried to conceptualize that thought for you when I gave to you the example when you were first inducted into jury service, you will recall the example about purchasing a home. It's not an exclusive example, it's just one of many, many examples, a problem of importance. You will recall that inquiry that we made, the agony of decision, what we evaluated, how we evaluated using our common sense and human experience. Did we buy that house? Even though we might have had some doubt here and there, then we didn't have a reasonable doubt. If we didn't buy it, then we had a reasonable doubt. So you see, you are familiar with the standard because the standard comes and is arrived at by law because it is a standard that you use whenever you are deciding matters of importance in your own affairs.

N.T., May 15, 1989, at 152-53. Johnson contends that the "court's clearest, indeed only, affirmative message as to reasonable doubt is contained in its example of the agonizing home-buyer," and that it was improper for the trial court to "devote its entire efforts to the negative aspects of reasonable

doubt ... [and] essentially defin[e] a standard of proof tantamount to a preponderance of evidence." Appellant's Brief at 16. This is simply wrong. The trial court's explanation to the jury of reasonable doubt, which preceded the above discussion, was at least as full and detailed as in cases within our jurisdiction have required on this point.

The trial court defined for the jury the meaning of a reasonable doubt as follows:

> A reasonable doubt must arise out of the evidence or lack of evidence, not out of any extraneous matter. It must be more than a mere possible doubt because you can have a doubt about almost anything in life. It must be more than a fanciful doubt, a caprice or a whim that you would want to conjure up in your own mind in order to avoid the unpleasant task of determining guilt. So a reasonable doubt is a real doubt. It must be a doubt of such substance that if it occurred in connection with a matter of importance in your own affairs, it would restrain you from acting.
>
> Briefly, a reasonable doubt is that kind of doubt that would restrain you, a reasonable person, from acting in a matter of importance in your own affairs. So it's a real doubt. It is that same doubt, or that same standard that you use whenever you are making decisions of importance in your own affairs. It is a human doubt, a doubt that experience has taughter (sic) you. It's not just beyond all doubt.

N.T., May 15, 1989, at 151-52. We recognize that, where an omission of an essential portion of a charge on reasonable doubt deprives a defendant of a fair trial, the conviction must be reversed. Commonwealth v. Young, 456 Pa. 102, 317 A.2d 258 (1974). However, the instructions given in this case appear to us to fully comport with Commonwealth v. Donough, 377 Pa. 46, 103 A.2d 694 (1954). There, our Supreme Court approved of

the following language:

> A reasonable doubt cannot be a doubt fancied or conjured up in the minds of the jury to escape an unpleasant verdict; it must be an honest doubt arising out of the evidence itself, the kind of doubt that would restrain a reasonable man (or woman) from acting in a matter of importance to himself (or herself.)"

Id., 377 Pa. 46, 103 A.2d 694 (1954). The instruction given the jury in the instant case can not be said to differ from the language in Donough in any material way, and we therefore conclude that the instruction was proper.

We proceed to determine whether Johnson's conviction of Aggravated Assault was a legal conviction. A person is guilty of Aggravated Assault if he:

> (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; [or]
>
> (4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon[.]

18 Pa.C.S. 2702(a). Johnson argues that, as § 2702(a)(1) is designated a felony of the first degree, and § 2702(a)(4) is a designated a felony of the second degree, the verdict slip was fatally flawed for failure to designate to which of the two counts in the indictment it referred. For this proposition, he relies on Commonwealth v. Dzvonick, 450 Pa. 98, 297 A.2d 912 (1972), Commonwealth v. Blatstein, 231 Pa. 306, 332 A.2d 510

(1974), and Commonwealth v. Huett, 462 Pa. 363, 341 A.2d 122 (1975).

In Dzvonick, our Supreme Court held that insufficient evidence supported a conviction of Assault with Intent to Maim where the accused did not "cut, stab, or wound" the victim. In dicta, the court stated that it would have been improper for the trial court to have "molded" the conviction of "Assault with Intent to Maim" to the inchoate offense of attempt, once the verdict was recorded and the jury dismissed. Even were we bound by the dicta of Dzvonick, it is inapposite to this case. Johnson was not found guilty of a crime other than Aggravated Assault. The trial court here has not altered the conclusion of the jury to fit the facts, as the trial court in Dzvonick was alleged to have done. Judge Guarino entered judgment of sentence for the crime of Aggravated Assault, a crime which, unlike Dzvonick, both appeared in the information and was addressed by the verdict slip.

In Blatstein, supra., our Supreme Court relied on Dzvonick to conclude that a trial court properly arrested judgment where an indictment charged the defendant with Extortion, and the jury so convicted, although an element of the crime, actual acceptance of a bribe, was never proven at trial. For the same reasons that the dicta of Dzvonick fails to support Johnson's position, Blatstein also fails. The trial court has not imposed a conviction for a crime not found by the jury.

In Huett, supra., a trial judge pronounced the defendant guilty of Murder in the Second Degree, and signed the indictment. The indictment, however, charged the defendant with Voluntary Manslaughter. At sentencing, a substitute judge was told by a clerk that the indictment for Voluntary Manslaughter could have been wrong, and the judge ordered the indictment "corrected" to read Murder in the Second Degree. He then sentenced the defendant. On appeal to our Supreme Court, the conviction was reversed. Noting that neither the trial judge nor the court stenographer had been called to testify, the court held that there was insufficient evidence in the record for the sentencing judge to have properly changed the verdict as signed. Again, we find this case fails to support Johnson's proposition that a crime charged in the information and considered by the jury cannot serve as the basis for a valid conviction.

As Johnson has failed to cite us to any authority for his position, and has failed to articulate any compelling reason for the result he seeks, we hold that the conviction of Aggravated Assault was proper and effective as to all those counts of Aggravated Assault found in the indictment. Commonwealth v. Grosso, 192 Pa.Super. 513, 162 A.2d 421 (1960), aff'd, 401 Pa. 549, 165 A.2d 73 (1960), cert. denied, 365 U.S. 835, 81 S.Ct. 747 (1961).

Finally, we consider whether the sentence of seven and one-half to fifteen years was illegal. Johnson argues that this

sentence was in excess of the sentencing judge's statutory authority; however, his position is premised upon the erroneous presumption that his conviction of Aggravated Assault constituted a felony of the second degree. As discussed above, it does not.

As properly stated by the Commonwealth, where a verdict of guilty on a multi-count indictment is recorded as a general verdict, the court may sentence upon any count in the indictment. Commonwealth v. Grosso, 192 Pa.Super. 513, 162 A.2d 421 (1960), aff'd, 401 Pa. 549, 165 A.2d 73 (1960), cert. denied, 365 U.S. 835, 81 S.Ct. 747 (1961). It is clear that Judge Guarino sentenced Johnson for the conviction under § 2702(a)(1), not § 2702(a)(4).

A conviction of Aggravated Assault under § 2702(a)(1), as it is a felony in the first degree, § 2702(b), permits a sentence of up to 20 years. 18 Pa.C.S. § 1103. For this reason alone, the sentence imposed by the trial court was permissible. Furthermore, under § 2702(a)(1), where a person visibly possesses a firearm during the commission of the crime, that person shall be sentenced to a minimum of at least five years. 42 Pa.C.S. § 9712(a). There is no merit to the contention that the sentence imposed in this case was beyond the statutorily permitted range.

For the foregoing reasons, we affirm the Judgment of Sentence imposed.

Judgment of Sentence Affirmed.

Montemuro, J. concurs in the result.