IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK SMOLKA, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	)))))))))))	No. 500, 2014

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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DATED: January 7, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

The Defendant was arrested in August 2013, and later indicted for the offense of possession of a firearm by a person prohibited and other offenses. He was found guilty after a jury trial only of possession of a firearm by a person prohibited, (A1-7).

Prior to trial, he moved for the suppression of evidence that the State intended to present against him at trial but is motion was denied. A10-42.

He was sentenced on the firearm offense to three years imprisonment at Level 5 suspended for six months at Level 4 Home Confinement and one year at Level 3 probation supervision. Exhibit A attached to Opening Brief.

A notice of appeal was docketed for the Defendant. This is the Defendant's Opening Brief on appeal.

SUMMARY OF THE ARGUMENTS

1. The Superior Court erred in ruling that by not personally appearing at the suppression hearing before trial the Defendant had waived his Fourth Amendment right to contest the admission at trial of the incriminating evidence against him that had been seized pursuant to a presumptively unreasonable warrantless search at nighttime of the home in which he resided.

2. The Superior Court erred when it denied the Defendant's request for the jury to be able to consider a defense of justification - choice of evils.

STATEMENT OF FACTS

An Operation Safe Streets team of New Castle County Police officers and Probation and Parole officers was looking for a man named Pablo Jackson when they went to a home in the Four Seasons development near Bear, Delaware on the night of August 26, 2013. They had information that Jackson had previously lived there. Officer Peter Stewart of the New Castle County Police Department testified that before knocking on the front door, he smelled an odor of marijuana. A woman named Kelly Long answered the door. A43-44, 48 (D.I. 45, 5/8/14, pp. 28-30, 45-47). He asked her about Jackson and she informed him that he no longer lived there. She informed Officer Stewart that her seven year old daughter was in the house and also a man named Marcus lived in the house and was downstairs. Officer Stewart entered the residence with Ms. Long in order to "clear" it, but he did not find Pablo Jackson. Instead, he found the Defendant in a downstairs room that had a bed in it. A44-45, 48-49 (D.I. 45, 5/8/14, pp. 30-35, 45-49). He testified that he also found an unloaded .38 cal. revolver in a gun box sitting on a shelf in a closet area. A45-46, 48-49 (D.I. 45, 5/8/14, pp. 36-38, 48-49). He questioned the Defendant about whose gun it was and why it was there. Officer Stewart testified that the Defendant admitted that he moved the gun there and put a lock on it so that Ms. Long's daughter did not play with it.

A46, 49 (D.I. 45, 5/8/14, pp. 39-40, 52). Officer Long testified that he advised the Defendant and Ms. Long of their *Miranda* rights. A49 (D.I. 45, 5/8/14, p. 50). Ms. Long told Officer Stewart that the gun belonged to her father who left it there when he moved out months beforehand. A50 (D.I. 45, 5/8/14, pp. 53). Officer Stewart explained that he and other officers had entered and searched the home because the odor of marijuana he smelled gave him probable cause, for the preservation of that evidence, and for officer safety. A48, 50 (D.I. 45, 5/8/14, pp. 47, 55).

Probation Officer Rick Negley testified that he examined the revolver and determined that the revolver hammer was locked by a set screw that had been screwed into the hammer mechanism by a separate hex pin type particular to that revolver. The revolver was not loaded but some ammunition was found in a second floor bedroom. A50-51 (D.I. 45, 5/8/14, pp. 56-60).

Kelly Long testified that she lived with her then eight year old daughter at the house on Worthy Down Drive. When the police knocked on her door that night, she told them that Pablo hadn't lived there for six years. When the officer asked who else lived there, she told him that her daughter and the Defendant lived there. She testified that the officers then entered her home and she followed them. She asked them if they had a search warrant

and she was told that they didn't need one because they smelled marijuana and were looking for Pablo. She testified that they searched the entire house, including drawers. A58-59 (D.I. 45, 5/8/14, pp. 86-90). She also testified that the gun in the house belonged to her father who had moved out previously and left it. She testified that she was concerned about her daughter finding and playing with the gun and that the Defendant showed her how to put the gun safety on but did not touch the gun himself and told her to make sure the gun was not around him. A59-61 (D.I. 45, 5/8/14, pp. 90-97). The Defendant stipulated at trial that he was prohibited from possessing a deadly weapon. A57 (D.I. 45, 5/8/14, pp. 81).

William Long, Kelly Long's father, also testified at trial that he had not lived in the house for months. He had bought the gun new several years earlier because he had been burglarized but had never tried to use it or fire it afterwards. He had discussed selling it with his daughter. He last saw the gun in a spare room closet several years before. A62-63 (D.I. 46, 5/9/14, pp. 5-10).

I. THE SUPERIOR COURT ERRED IN RULING THAT BY NOT PERSONALLY APPEARING AT THE SUPPRESSION HEARING BEFORE TRIAL THE DEFENDANT HAD WAIVED HIS FOURTH AMENDMENT RIGHT TO CONTEST THE ADMISSION AT TRIAL OF THE INCRIMINATING EVIDENCE AGAINST HIM THAT HAD BEEN SEIZED PURSUANT TO A PRESUMPTIVELY UNREASONABLE WARRANTLESS SEARCH AT NIGHTTIME OF THE HOME IN WHICH HE RESIDED.

Question Presented

The question presented is whether the Superior Court erred by ruling that the Defendant automatically waived his right to contest the seizure of evidence against him by virtue of his failing to appear at a scheduled suppression hearing. The issue was preserved by the request of the Defendant's counsel to either reschedule the suppression hearing or proceed in the Defendant's absence. A33-35.

Standard and Scope of Review

Ordinarily, a trial court's denial of a motion to suppress is reviewed for an abuse of discretion. "To the extent the claim of error implicates questions of law; however, the standard of review is *de novo*." *Holden v. State*, 23 A.3d 843, 846 (Del. 2011).

Argument

On the date of the Defendant's scheduled suppression hearing in the

Superior Court, the Defendant failed to appear in person. The Prothonotary had mailed a notice to the Defendant at his last known address advising him of the date of the suppression hearing. The Defendant's Counsel had also mailed correspondence to the Defendant at his last known address concerning the case but could not remember whether he had referenced the date of the suppression hearing. Counsel also tried to call the Defendant but could not reach him. and, although his Counsel requested that the hearing still proceed in the Defendant's absence, the Superior Court, by virtue of his non-appearance, denied his motion to suppress and ruled that the Defendant had waived his Constitutional right to seek the suppression of evidence that had been seized during the warrantless nighttime search of a residence where he resided.[1] A33-35 (D.I. 51, 1/17/14, pp. 2-10). Before trial, the Defendant's Counsel learned that the Defendant had recently moved from his last known address without notifying the Superior Court or Counsel and had therefore not received notice of the previously scheduled suppression hearing. Counsel requested that the suppression hearing be rescheduled but the Superior Court again denied the request on the ground that the Defendant had waived his right to seek the suppression of evidence by virtue of his failure to appear at the scheduled hearing. A38-42.

The Superior Court legally erred by deeming that the Defendant had

[1] A warrantless search is presumptively unreasonable. *Williams v. State*, 962 A.2d 210, 216 (Del. 1987).

waived his Constitutional right to contest the suppression of evidence by virtue of his non-appearance at his scheduled suppression hearing. In denying the Defendant's suppression motion, the Superior Court did not recognize the critical legal distinction between a defendant's waiver of his right to contest the suppression of illegally seized evidence and the waiver of his right to be personally present at the pre-trial suppression hearing. The Defendant's Counsel recognized this distinction when he requested that the suppression hearing still proceed in the Defendant's absence. Although this legal issue is rarely addressed, 'the few state appellate courts that have confronted this issue have concluded that a defendant's failure to appear at a suppression hearing does *not* constitute a waiver of the motion to suppress." *Robinson v. Commonwealth*, 837 N.E.2d 241, 246 (Mass. 2005) (emphasis in original). The Massachusetts Court recognized that

> a defendant's voluntary absence from a scheduled suppression hearing, like a defendant's failure to appear after trial has commenced, may constitute waiver of the defendant's right to be present at that hearing. This does not, however, constitute waiver of any other rights the defendant may have, including the right to the hearing itself.

Id. at 250.

The Superior Court thereby erred by not recognizing this critical distinction. Further fact finding may have warranted a finding that the Defendant had waived to be personally present at his pre-trial suppression

hearing, but it did not warrant the Superior Court's conclusion that he had thereby waived his Constitutional right to challenge illegally seized evidence. Superior Court's own rule comports with the distinction drawn by Supreme Judicial Court of Massachusetts on this unusual question. The defendant "shall be present" at critical trial proceedings, but the defendant may waive his right to be present at trial proceedings if he flees after trial has commenced, by disruptive, persistent misconduct at trial, or at non-critical pre-trial or trial proceedings. Superior Court Rule of Criminal Procedure 43.

II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S REQUEST FOR THE JURY TO ABLE TO CONSIDER A DEFENSE OF JUSTIFICATION - CHOICE OF EVILS.

Question Presented

The question presented is whether the Trial Court erred by refusing to give the Defendant a justification - choice of evils defense jury instruction. The question was preserved for review by the Defendant's request for that instruction. A65-68.

Standard and Scope of Review

The standard and scope of review is *de novo* as to the Superior Court's denial of a defendant's requested jury instruction. *Wonnum v. State*, 942 A.2d 569, 573 (Del. 2007); *Gutierrez v. State*, 842 A.2d 650, 651 (Del. 2003); *see also Wright v. State*, 953 A.2d 144, 147-149 (Del. 2008).

Argument

At the Defendant's trial, he requested a justification - choice of evils defense instruction on the ground that if there was evidence from which the jury could believe that he constructively possessed the prohibited weapon, the evidence also supported an inference that his brief contact with the weapon was limited to reducing its lethal threat to a young child living in the household by

locking the safety mechanism.[2] A66-68. The Superior Court denied the Defendant's request for the instruction on the ground, *inter alia*, that the choice of evils defense requires "an immediacy or emergency event, that in which the defendant had a bad choice to make at a moment [and] I just don't think it applies to the facts of this case." A65 (D.I. 46, 5/9/14, pp. 33-34).

A defendant is entitled to a defense instruction "if the defendant's rendition of events, *if taken as true,* would entitle him to the instruction." *Guitierrez*, 842 A.2d at 652 (emphasis in original). The Court's emphasis in G*uiterrez* reflects the Court's recognition that a trial judge's assessment of the credibility of the proffered defense or of the defendant or his possible witnesses should play no part in determining whether a defense is permissible at trial: "Our holding recognizes the differing roles of judge and jury in a jury trial. As an arbiter of the law, the judge should consider the evidence and determine whether, if the jury believes it, the evidence could support the [defense]." *Id*. In

[2] A choice of evils defense is permitted by statute. 11 *Del. C.* § 463. Unlike an affirmative defense that a defendant must prove by a preponderance of the evidence, 11 *Del. C.* § 304, in order for a jury to find a defendant not guilty, a choice of evils defense need only raise a reasonable doubt as to the Defendant's guilt of the charged offense and the jury must be instructed accordingly. 11 *Del. C.* § 303(c). Under the choice of evils defense, "conduct which would otherwise constitute an offense is justifiable when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the defendant, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue." 11 *Del. C.* § 463.

Guiterrez, the Court further explained that the trial judge's role as gate-keeper is to ensure that the defense describes a situation "that is within the realm of possibility," and that "[o]nce a judge determines that the defense is 'credible' in the sense of being possible, he or she should submit to the jury the question of which version of the facts is more believable and supported by the evidence as a whole." *Id*. at 653. *See also Wonnum v. State*, 942 A.2d at 574 ("[W]hen the defendant presents some evidence capable of being believed, on each of the elements of an affirmative defense, whether the defendant has proved the affirmative defense by a preponderance of the evidence is a jury question").

In this case, Kelly Long testified that the Defendant explained to her how to disable the weapon by engaging the safety mechanism, but that he did not touch or have control of the weapon. Based on her testimony, the jury could have reconciled the evidence by disbelieving as unrealistic her testimony that the Defendant did not touch the weapon in order to help her to disable it, but still believed that the Defendant helped her in disabling the weapon although his physical contact with the weapon was brief and limited only to disabling it in the event that Kelly Long's eight year old daughter later found it. Under *Guiterrez*, the jury's reconciliation of the evidence in this manner was certainly "within the realm of possibility" *Id*. at 653. If the jury believed the latter scenario, however, by reason of the Superior Court's denial of a choice of evils

defense instruction, the jury would have been deprived of being able to consider whether the Defendant's limited contact with the weapon was legally excusable because he sought only to "avoid imminent … private injury … which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh[ed], "11 *Del. C.* § 463, the Defendant's temporary and limited contact with the weapon in order to prevent it from potentially causing egregious harm to a child.

The Superior Court rejected a choice of evils instruction for the Defendant on the ground that there was no "immediacy or emergency event" that would excuse the Defendant for engaging the safety on the weapon regardless of how brief or limited that contact was in order to protect a child. A65. The Superior Court imposed too strict a standard of emergency, however, because the presence of a firearm in a home where a child lives can realistically present an emergency at any time, even at an unexpected time. Very recently in Claymont, a two year old child accidently shot himself in the head with a handgun that his father had left in a table drawer in the father's bedroom. Exhibit C attached to Brief.[3]

[3] http://www.delawareonline.com/story/news/crime/2014/12/05/man-charged-toddler-shoots-self-head/19942167/ ; http://www.delawareonline.com/story/news/crime/2014/09/30/two-year-old-shot-in-valley-run-in-delaware/16472909/ .

The jury should have been permitted to decide in this case based on the evidence at trial whether the Defendant's limited contact with the gun in order to reduce the possibility of serious or fatal harm to a child was legally excusable under the circumstances presented at trial.[4] Even if the Trial Judge did not believe there was an emergency which warranted the Defendant's brief and limited contact with the weapon, the jury may have viewed the evidence differently. There appears to be no reason why a properly instructed jury was not capable of evaluating whether a defense of choice of evils presented a credible defense and raised a reasonable doubt as to the Defendant's guilt.[5] A jury possessed of "ordinary standards of intelligence and morality" was not incapable of deciding whether the evidence that has been presented to them supported the statutory criteria of a choice of evils defense. A properly instructed jury should have been permitted to consider a choice of evils defense

[4] "A rational trier of fact could conclude that a disabled vehicle on a railroad track constitutes an imminent danger even when no moving train is in sight. The credibility of Bodner's testimony that she did not cause the vehicle to become lodged on the railroad tracks was for the jury to determine." *Bodner v. State*, 752 A.2d 1169, 1175 (Del. 2000).

[5] A choice of evils defense is permissible if it is "within the realm of possibility" that a jury could have believed that the defendant's conduct was "necessary as an emergency measure to avoid an imminent … private injury which is about to occur by reason of a situation occasioned or developed through no fault of the defendant, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue." 11 *Del. C.* § 463.

in this case.[6]

[6] *Wonnum v. State*, 942 A.2d at 575 ("It should have been they, and not the trial judge, who answered the questions of whether a reasonable person in Wonnum's situation would have been able to find legal alternatives to robbing and shooting the victim").

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's conviction and sentence should be reversed.

Respectfully submitted,

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