



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE'S ANSWERING BRIEF

ANDREW J. VELLA (ID No. 3549)
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

DATE: February 9, 2015

TABLE OF CONTENTS

	<u>PAGE</u>
NATURE AND STAGE OF THE PROCEEDINGS	1
SUMMARY OF THE ARGUMENT	3
STATEMENT OF FACTS	4
ARGUMENT	6
I. THE TRIAL COURT PROPERLY FOUND SMOLKA'S SUPPRESSION MOTION TO BE WITHDRAWN AND WAIVED WHEN HE FAILED TO APPEAR FOR THE SCHEDULED SUPPRESSION HEARING.	6
II. THE TRIAL COURT PROPERLY DENIED SMOLKA'S REQUEST FOR A JUSTIFICATION/CHOICE-OF-EVILS JURY INSTRUCTION.	10
CONCLUSION.....	14

TABLE OF CITATIONS

Cases

<i>Anderson v. R.A. Midway Towing</i> , 2008 WL 2415258 (Del. Mar. 28, 2008)	6
<i>Bodner v. State</i> , 752 A.2d 1169 (Del. 2000).....	12
<i>Coles v. State</i> , 959 A.2d 18 (Del. 2008)	10
<i>Edwards v. State</i> , 638 S.E.2d 347 (Ga. App. 2006)	8
<i>Floudiotis v. State</i> , 726 A.2d 1196 (Del. 1999).....	8
<i>Holmes v. State</i> , 2010 WL 5043910 (Del. Dec. 9, 2010)	10
<i>Jackson v. State</i> , 990 A.2d 1281 (Del. 2009)	10
<i>Jenkins v. State</i> , 2006 WL 1911096 (Del. July 10, 2006)	8
<i>Johnson v. State</i> , 2009 WL 3286107 (Del. Oct. 13, 2009).....	6
<i>Jones v. State</i> , 940 A.2d 1 (Del. 2007)	10
<i>Manna v. State</i> , 945 A.2d 1149 (Del. 2008)	10
<i>Moye v. State</i> , 2010 WL 376872 (Del. Jan. 20, 2010).....	11
<i>State v. Beal</i> , 1989 WL 51574 (Tenn. Crim. App. May 16, 1989).....	8
<i>State v. Ramos</i> , 2013 WL 4718104 (Del. Super. Aug. 22, 2013).....	11
<i>State v. Weber</i> , 1998 WL 517868 (Ohio Ct. App. Aug. 10, 1998).....	8
<i>Weber v. State</i> , 38 A.3d 271 (Del. 2012)	10
<i>Williams v. State</i> , 2014 WL 708445 (Del. Feb. 19, 2014).....	10
<i>Wright v. State</i> , 25 A.3d 747 (Del. 2011)	8
<i>Wright v. State</i> , 953 A.2d 144 (Del. 2008)	10

Statutes

11 Del. C. § 463.....	11
-----------------------	----

NATURE AND STAGE OF THE PROCEEDINGS

The New Castle County Grand Jury returned a four-count indictment against Mark Smolka alleging Possession of a Firearm by a Person Prohibited (“PFBPP”), Possession of Marijuana, Endangering the Welfare of a Child and Possession of Drug Paraphernalia. A-1. On October 16, 2013, the Superior Court issued a scheduling order which established the following dates:

First Case Review November 11, 2013

Final Case Review January 21, 2014

Trial January 28, 2014

A-1-2. On December 3, 2013, Smolka filed a Motion to Suppress, which the Superior Court subsequently scheduled for a hearing on January 17, 2014. Smolka was given written notice by both the Court and his counsel advising him of the date and time of the hearing. A-2. On January 15, 2014, the State filed its response to Smolka’s suppression motion. A-2. Smolka failed to appear at the January 17, 2014 hearing. A-2. The Superior Court deemed the suppression motion withdrawn due to Smolka’s non-appearance. A-2. The Superior Court denied defense counsel’s request to proceed with the motion notwithstanding Smolka’s absence, as well as Smolka’s subsequent Motion to Vacate the court’s order finding the suppression motion withdrawn. A-3.

After several reschedulings, Smolka's case proceeded to trial on May 9, 2014. A-4-5. A jury found Smolka guilty of PFBPP¹ and the Superior Court sentenced him to three years at Level V suspended for six months Level IV Home Confinement followed by one year at Level III. Exhibit "A" to *Op. Brf.* Smolka appealed his conviction. This is the State's answering brief.

¹ The State entered a *nolle prosequi* on the Possession of Marijuana, Possession of Drug Paraphernalia, and Endangering the Welfare of a Child charges prior to trial. A-5.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court properly deemed Smolka's motion to suppress withdrawn when he failed to appear at the scheduled suppression hearing. Smolka was absent from the court proceeding and thereby failed to prosecute his suppression motion. As a result, the trial judge correctly determined that Smolka waived the arguments presented in his Motion to Suppress.

II. Appellant's argument is denied. The trial judge properly instructed the jury in Smolka's case. The "choice of evils" instruction was neither applicable nor available to Smolka given the evidence presented in the case.

STATEMENT OF FACTS

On August 26, 2013, officers from New Castle County Police Operation Safe Streets were attempting to locate a probationer named Pablo Jackson (“Jackson”) who was wanted by the police for thefts, including theft of a firearm. A-43-44. The officers’ investigation led them to 5 Worthy Down Avenue in Bear, Delaware, which was an address that Jackson had previously provided. A-44. When the officers approached the residence, they smelled marijuana. A-44. After the officers knocked several times, Kelly Long (“Kelly”) opened the door, stepped out of the house and quickly closed the door behind her. A-44. Officers asked Kelly about Jackson and she told them that he had lived there and had been there recently. A-45. When asked who was inside the residence, Kelly initially told officers that only she and her daughter were in the home. A-45. She later admitted that she was lying and told the officers that Mark Smolka was inside. A-45.

Kelly directed the police to the basement of the home, where officers found Smolka “tucked up” in a corner next to a bed. A-45. As they continued to search the residence for Jackson, the officers observed a Taurus firearms box on the shelf of a desk next to the bed. A-45, A-49. Inside the box was a .38 special. A-46. Officers asked Smolka about the firearm and he told them that he had moved it and placed a lock on it. *State’s Trial Exhibit 5*, A-46. The officers performed a trace on the firearm and learned that it was purchased at Miller’s Gun Center in New

Castle, Delaware by William Long, Kelly Long's father. A-54, A-59. William Long testified that he purchased the gun in 2004, but he never loaded or shot the gun. A-62. Kelly testified that Smolka showed her how to lock the gun, but he did not touch the gun when showing her. A-59. Kelly was aware that the gun was not loaded, but stated that she wanted it locked. A-59. At trial, Smolka stipulated to being a person prohibited from owning or possessing a firearm. A-57.

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND SMOLKA'S SUPPRESSION MOTION TO BE WITHDRAWN AND WAIVED WHEN HE FAILED TO APPEAR FOR THE SCHEDULED SUPPRESSION HEARING.

Question Presented

Whether Smolka's unexcused absence from a scheduled hearing waived the issues raised in his suppression motion.

Standard and Scope of Review

This Court reviews the dismissal of a motion for failure to prosecute under an abuse of discretion standard.²

Merits of the Argument

Smolka filed a suppression motion with the Superior Court on December 3, 2013.³ On December 23, 2014, the Superior Court sent Smolka written notice in the form of a subpoena, informing him of the hearing date and time – January 17, 2014 at 10:00 am.⁴ Despite the notice, Smolka failed to appear in Superior Court on January 17, 2014 to prosecute the suppression motion.⁵ At that time, Smolka's counsel, at the request of the hearing judge, made a record of his communications

² *Johnson v. State*, 2009 WL 3286107, at *1 (Del. Oct. 13, 2009); *Anderson v. R.A. Midway Towing*, 2008 WL 2415258, at *1 (Del. Mar. 28, 2008).

³ A-2.

⁴ A-2.

⁵ A-33.

with Smolka.⁶ Counsel stated that on November 12, 2013 he discussed the filing of a suppression motion with Smolka, on December 4, 2013 he sent Smolka a copy of the suppression motion, and he unsuccessfully attempted to contact Smolka by phone several times.⁷ All of the correspondence and the subpoena notifying Smolka of the hearing date were sent to the address he provided to the Superior Court and counsel.⁸ The Superior Court determined Smolka “waived his right to suppress the evidence” through his non-appearance.⁹ The court also denied defense counsel’s request to proceed without Smolka present stating, “in the exercise of my discretion, I’m going to deny [defense counsel’s] request that the hearing proceed in [Smolka’s] absence.”¹⁰ On January 24, 2014, Smolka moved the Superior Court to vacate its order deeming his motion waived by his unexcused absence.¹¹ The court denied that motion finding that (1) Smolka was sent notice; (2) he had a duty to inform the court and counsel of any changes in address; (3)

⁶ A-33.

⁷ A-33.

⁸ The notices and correspondence were mailed to 5 Worthy Down Avenue, Bear, DE. A-33. One week after the scheduled hearing date, defense counsel advised the Superior Court that Smolka contacted his office and indicated that he did not receive notice of the hearing date. A-38. Defense counsel also advised the court that Smolka provided him with a new address of 303 Manlove Avenue, Wilmington, DE. A-38.

⁹ A-34.

¹⁰ A-34.

¹¹ A-38-39.

Smolka did not inform the court or counsel of any change in address; and (4) Smolka had an extensive history of failing to appear in court.¹²

On appeal, Smolka contends that the Superior Court erred by deeming the suppression motion withdrawn and waived. He claims that “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.”¹³ Smolka is mistaken.

An abuse of discretion occurs “when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice to produce injustice.”¹⁴ Here, the Superior Court did not abuse its discretion by determining that Smolka’s suppression motion was withdrawn and waived by his unexcused appearance.¹⁵ Smolka was sent notice and his counsel

¹² A-40.

¹³ *Op. Brf.* at 8.

¹⁴ *Wright v. State*, 25 A.3d 747, 752 (Del. 2011) (quoting *Floudiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999) (internal quotation marks omitted)).

¹⁵ See *Jenkins v. State*, 2006 WL 1911096, at *1 (Del. July 10, 2006) (defendant who absented himself from hearing on suppression motion at a violation of probation hearing and for whom Superior Court issued a bench warrant, denying the suppression motion for failure to prosecute, waived the motion and never requested to renew the motion); *Edwards v. State*, 638 S.E.2d 347, 348 (Ga. App. 2006) (finding “no error in the trial court’s refusal to go forward with the suppression hearing in [defendant’s] absence” and subsequent dismissal of the motion to suppress); *State v. Weber*, 1998 WL 517868, at *4 (Ohio Ct. App. Aug. 10, 1998) (trial court did not abuse its discretion dismissing defendant’s motion to suppress after he failed to appear on the scheduled hearing date); *State v. Beal*, 1989 WL 51574, at *2 (Tenn. Crim. App. May 16,

attempted to contact him. It is apparent that Smolka changed his address without notifying the court or his counsel. The obligation to notify the court and counsel of his change of address belonged to Smolka. He failed to do what was required. Smolka, through his own fault, failed to prosecute the motion when he did not appear on the scheduled hearing date, and the Superior Court correctly determined that Smolka's non-appearance acted as a waiver.

1989)(trial court did not err by determining that the defendant's absence on the date set for a suppression hearing acted as a waiver of the issue).

II. THE TRIAL COURT PROPERLY DENIED SMOLKA'S REQUEST FOR A JUSTIFICATION/CHOICE-OF-EVILS JURY INSTRUCTION.

Question Presented

Whether Smolka was entitled to a justification/choice-of-evils jury instruction.

Standard and Scope of Review

This Court reviews a trial court's refusal to instruct on a defense theory *de novo*.¹⁶ On appeal, this Court must determine "(1) whether the 'defense' was available as a matter of law, and, (2) if so, whether the evidence presented at trial was sufficient to support the instruction."¹⁷

Merits of the Argument

At the close of evidence, Smolka requested a choice-of-evils instruction arguing that Kelly had him show her how to lock the firearm because she had safety concerns for her 8 year-old daughter who was living in the house.¹⁸ The

¹⁶ *Williams v. State*, 2014 WL 708445, at *2 (Del. Feb. 19, 2014) (citing *Coles v. State*, 959 A.2d 18, 24 (Del. 2008); *Manna v. State*, 945 A.2d 1149, 1153 (Del. 2008); *Jackson v. State*, 990 A.2d 1281 (Del. 2009); *Weber v. State*, 38 A.3d 271 (Del. 2012); *Jones v. State*, 940 A.2d 1, 9–10 (Del. 2007)).

¹⁷ *Holmes v. State*, 2010 WL 5043910, at *5 (Del. Dec. 9, 2010) (citing *Wright v. State*, 953 A.2d 144, 148–49 (Del. 2008)).

¹⁸ A-67.

Superior Court denied Smolka's request finding that there were no "immediate events" requiring a choice to handle the weapon.¹⁹

Title 11, section 463 of the Delaware Code provides for a choice-of-evils defense under the following circumstances:

[C]onduct 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.²⁰

In other words, the choice-of-evils defense is available "when someone responds to an emergency by doing something that otherwise would be a crime, 'to avoid an imminent public or private injury which is about to occur ... through no fault of the defendant.'"²¹ Applying the analysis to this case, it is clear that the Superior Court correctly found that the choice-of-evils defense was not available to Smolka.

Here, the evidence did not support a finding that imminent injury was about to occur. At trial, the evidence presented demonstrated that Kelly's daughter was

¹⁹ A-65.

²⁰ 11 Del. C. § 463 (emphasis added).

²¹ *Moye v. State*, 2010 WL 376872, at *2 (Del. Jan. 20, 2010) (quoting 11 Del. C. § 463). See also *State v. Ramos*, 2013 WL 4718104, at *4 (Del. Super. Aug. 22, 2013) (stating "'choice of evils' defense is only available in this jurisdiction to a defendant when the evidence supports a finding that the defendant's conduct was in response to an emergency situation to avoid imminent physical injury, caused by no fault of the defendant").

living in the home and that Kelly was aware that the unloaded and locked gun was in the house. According to both Kelly and her father, the gun had been in the house for a number of years. There was no evidence that Kelly's daughter was aware of the gun. There was no evidence that she attempted to access it, load it or fire it at any time. This was not an emergent situation in which Smolka was forced to make a decision to handle the gun in order to prevent Kelly's daughter from accessing or using it. As a matter of law, Smolka was not entitled to present the choice-of-evils defense.²²

Moreover, the evidence adduced at trial did not support a choice-of-evils instruction. As part of the State's case-in-chief, the jury heard Smolka's statement to police, wherein Smolka admitted moving the gun from one part of the house to the basement and placing a lock on it.²³ He said the gun was moved because the entire house was being "redone" and everything in the house was being moved from one room to another.²⁴ Smolka did not mention any concern over Kelly's daughter accessing the gun, nor did he state that Kelly had that concern.

²² Cf. *Bodner v. State*, 752 A.2d 1169, 1174 (Del. 2000) (holding that "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" thus warranting a choice-of-evils instruction in a driving under the influence case in which the defendant claimed that she was justified in moving a disabled vehicle from the railroad tracks).

²³ *State's Trial Exhibit 5*.

²⁴ *State's Trial Exhibit 5*.

Inconsistent with a choice-of-evils defense, Smolka’s defense was that he never touched the gun. When cross examining the State’s police witnesses, Smolka highlighted the lack of forensic evidence (i.e. fingerprints and DNA) which could have linked him to the gun.²⁵ When he presented his defense, Smolka called Kelly Long. Kelly was aware that there was a gun in the home and she had last seen it about one month prior to the police searching her home. The gun was originally in a closet but she moved it under a mattress to prevent her daughter from accessing it. Kelly knew the gun was unloaded and locked. She testified that Smolka “showed” her how to place the safety lock on the gun by verbally instructing her. According to Kelly, Smolka never touched the gun.

The evidence at trial demonstrated that (1) Smolka moved and locked the gun in the process of the house being “redone;” (2) Kelly locked and hid the gun because she did not want her daughter to access it; and (3) Kelly never saw Smolka touch the gun. Taking any one of these inconsistent statements as true would still not lead any rational trier of fact to conclude that Smolka touched the gun in an emergency in order to prevent imminent injury. The Superior Court correctly determined that the choice-of-evils defense was not available to Smolka.

²⁵ A-55.

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be affirmed.

/s/ Andrew J. Vella

ANDREW J. VELLA (ID No. 3549)
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

DATE: February 9, 2015

CERTIFICATE OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on February 9, 2015, he caused the *State's Answering Brief* to be served electronically upon the following:

Bernard J. O'Donnell, Esq.
Office of Public Defender
Carvel State Office Building
820 N. French Street
Wilmington. DE 19801

/s/ Andrew J. Vella
ANDREW J. VELLA (ID No. 3549)
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500