



FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

DAVID W. LANNETTI
JUDGE

150 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

May 10, 2018

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Re: Commonwealth of Virginia v. Steven A. Trace
Docket No.: CR16-3193-04

Dear Counsel:

Today the Court rules on the "First Amended Motion to Set Aside Verdict as Contrary to Law" (the "Motion") filed by Defendant Steven A. Trace, which seeks to set aside the Court's finding that he possessed a firearm as a convicted violent felon as contrary to law. The issues before the Court are as follows: (1) whether the evidence at trial was sufficient to find Trace guilty of the crime charged, (2) whether Trace's conviction of possessing a firearm as a convicted violent felon—after being found not guilty of using a firearm in the commission of robbery during the same incident—violates the constitutional prohibition against double jeopardy, and (3) whether—based on Trace previously being found not guilty of robbery, conspiracy to commit robbery, and use of a firearm in the commission of robbery during the same incident—the Commonwealth is collaterally estopped from pursuing a conviction for possession of a firearm by a convicted violent felon.

The Court finds as follows: (1) the evidence at trial was sufficient to find Trace guilty of possessing a firearm as a convicted violent felon, (2) Trace's conviction for possession of a firearm after being found not guilty of using a firearm in the commission of robbery does not violate double jeopardy because the crimes are separate, distinct crimes under the *Code of Virginia* that require different elements of proof, and (3) the Commonwealth is not collaterally estopped from pursuing a conviction for possession of a firearm by a convicted violent felon because Trace has not satisfied the burden of proving that the jury verdict in the prior proceeding was based only on identity. The Court therefore DENIES Trace's motion to set aside the verdict as contrary to law.

Background

On December 2, 2016, Trace was indicted for Robbery; Conspiracy to Commit Robbery; Use of a Firearm in Commission of Felony, Subsequent Offense; Conspiracy to Commit Use of a Firearm in Commission of a Felony, Subsequent Offense; and Possession of a Weapon by a Violent Felon. On November 27, 2017, prior to the start of trial, the Court granted Trace's motion to sever the weapon possession charge from the other charges. On the second day of trial, the Court granted the Commonwealth's motion to *nolle prosequi* the conspiracy charge. At the conclusion of the two-day jury trial, a jury acquitted Trace of Robbery, Conspiracy to Commit Robbery, and Use of a Firearm in the Commission of a Felony. Trace was then remanded to custody based on the remaining severed charge.

A bench trial on the remaining charge was held on February 20, 2018, at which Trace was found guilty of Possession of a Weapon by a Violent Felon. A sentencing hearing was held on March 2, 2018, and a related sentencing order was signed on March 20, 2018. Trace was sentenced to five years' imprisonment with the Virginia Department of Corrections—plus six additional months that were suspended, during which Trace is to be placed on post-release supervision—and ordered to pay all fines and court costs.

Trace filed a motion to set aside the Court's finding of guilt on March 14, 2018, and amended his motion on March 19, 2018. The Court held a hearing (the "Hearing") on the Motion on March 30, 2018. At the conclusion of the Hearing, the Court took the matter under advisement and subsequently issued an Order Suspending the Final Sentencing Order, tolling the twenty-one-day finality provision articulated in Rule 1:1.

The Court now rules as follows.

Position of the Parties

Trace's Position

Trace presents three arguments in the Motion. First, he alleges that there was insufficient evidence at the bench trial to prove that he was guilty of possessing a firearm as a violent felon because the conviction was "based on the uncorroborated description of an object as a 'Glock' by a lay witness unfamiliar with firearms, without being coupled with an actual or implied threat to do harm by Defendant, or even a direction to do *anything*." (Def.'s Mot. 3.)

Second, Trace alleges that the Court's application of the standards set forth in *Jordan v. Commonwealth*, 286 Va. 153, 747 S.E.2d 799 (2013), and *Redd v. Commonwealth*, 29 Va. App. 256, 511 S.E.2d 436 (1999), "eradicated the distinction between" a violent felon *possessing* a firearm and *using* that firearm to commit a felony. (*Id.*) Trace further contends that because a jury acquitted him of using a firearm to commit a felony, his subsequent trial and conviction on the possession charge violates the Double Jeopardy Clauses of the United States Constitution and the Virginia Constitution. (*Id.* at 4.)

Lastly, Trace argues that his trial on the possession charge should have been precluded by the doctrine of collateral estoppel because the jury must have based its prior acquittal on the use of a firearm charge by concluding that Trace was not present during the robbery. (*Id.* at 6.) In support thereof, Trace asserts that a judge of this court previously found—in a related case against his co-defendant—that a robbery occurred, so the only remaining issue for the jury in Trace’s first trial was whether Trace was a participant in that robbery. (*Id.* at 6.) Trace contends that the Commonwealth therefore improperly tried Trace on an issue that had already been litigated. (*Id.* at 7.)

The Commonwealth’s Position

The Commonwealth first disagrees with Trace’s insufficiency-of-evidence argument. It asserted at the Hearing that the Court considered this issue as part of Trace’s motion to strike at trial, and the Court ultimately rejected this argument.

The Commonwealth further opposes the Motion regarding both Trace’s double jeopardy and collateral estoppel arguments. It first argues that the double jeopardy claim was rejected by this Court at the conclusion of the trial. (Br. in Opp’n 1–2.) On the collateral estoppel issue, the Commonwealth asserts that the doctrine is inapplicable because the possession charge was severed based on Trace’s own motion. (*Id.* at 1, 3–4.) It further argues that “Trace has failed to meet his burden to show that the general verdict of acquittal in the previous trial court could only have rested on the issue of whether . . . Trace possessed a firearm.” (*Id.* at 1, 4–5.) At the Hearing, the Commonwealth relied on the Virginia Court of Appeals’s decision in *Currier v. Commonwealth*, 65 Va. App. 605, 779 S.E.2d 834 (2015), *aff’d*, 798 S.E.2d 164 (Va. 2016), for the proposition that collateral estoppel is not applicable to matters in which the case has been severed for the benefit of the defendant.

Analysis

Legal Standard

According to the *Rules of Supreme Court of Virginia*, “[t]he court may direct that an accused be tried at one time for all offenses then pending against him, if justice does not require separate trials and (i) the offenses meet the requirements of Rule 3A:6(b) or (ii) the accused and the Commonwealth’s attorney consent thereto.” Va. Sup. Ct. R. 3A:10(c). The Court of Appeals has opined that “under Rule 3A:10(c), unless the Commonwealth and defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction.” *Hackney v. Commonwealth*, 28 Va. App. 288, 295, 504 S.E.2d 385, 389 (1998).

The Double Jeopardy Clause of the United States Constitution is enforceable against the states via the Fourteenth Amendment. The clause provides that “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.” *U.S. Const.* amend. V. Similarly, the Constitution of Virginia contains its own Double Jeopardy Clause, which states that “[a man] shall not . . . be put twice in jeopardy for the same offense.” *Va. Const.* Art. I, § 8.

The prohibition of double jeopardy is intended to bar “a certain *type of* ‘multiple prosecution’” in which there is “prosecutorial overreaching,” rather than to act as a “bar to retrials or separate retrials across the board.” *Currier v. Commonwealth*, 65 Va. App. 605, 612, 779 S.E.2d 834, 837 (2015), *aff’d*, 798 S.E.2d 164 (Va. 2016) (citations omitted).

Collateral estoppel is one component of the Double Jeopardy Clause. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970) (holding that collateral estoppel “is embodied in the Fifth Amendment guarantee against double jeopardy). “It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *Id.* at 443. The purpose behind the constitutionalization of the collateral estoppel doctrine is to “prevent[] prosecutorial abuse and overreaching.” *Currier*, 65 Va. App. at 611, 779 S.E.2d at 836. For collateral estoppel to apply, the following requirements must be met:

(1) the parties to the two proceedings must be the same, (2) the issue of fact sought to be litigated must have been actually litigated in the prior proceeding, (3) the issue of fact must have been essential to the judgment, and (4) the prior proceeding must have resulted in a valid, final judgment against the party against whom the doctrine is sought to be applied.

Glasco v. Ballard, 249 Va. 61, 64, 452 S.E.2d 854, 855 (1995).

“[W]hether the rule of collateral estoppel applies in a given case is to be approached with ‘realism and rationality,’” which requires that

[w]here a previous judgment of acquittal was based upon a general verdict, as is usually the case, . . . a court [is required] to “examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.”

Jones v. Commonwealth, 217 Va. 231, 233, 228 S.E.2d 127, 129 (1976) (quoting *Ashe*, 397 U.S. at 444). Thus, “[i]n order to establish that the present prosecution is barred by the previous acquittal . . . the burden is on the appellant to show that the verdict there *necessarily* decided the issues now in litigation.” *Id.* (quoting *United States v. Tramunti*, 500 F.2d 1334, 1346 (2d Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974)).

Discussion

The Court has considered the pleadings, evidence and oral argument presented at the Hearing, and applicable authorities. The Court now rules as follows.

A. *The Evidence at Trial Was Sufficient to Find Trace Guilty of Possessing a Firearm as a Convicted Felon.*

Section 18.2-308.2 of the *Code of Virginia* states that it is “unlawful for . . . any person who has been convicted of a felony . . . to knowingly and intentionally possess or transport any firearm or ammunition for a firearm.” *Va. Code* § 18.2-308.2 (2014 Repl. Vol.). This crime “involves no perception element by the victim”; rather, “[t]he crime is complete by the felon’s possession of the weapon.” *Armstrong v. Commonwealth*, 36 Va. App. 312, 317–18, 549 S.E.2d 641, 643–44 (2001). Additionally, the firearm does not have to be operational for a defendant to be found guilty under this statute. *Id.* at 320–22, 549 S.E.2d at 645–46.

When a firearm is not recovered, a victim’s description of the weapon combined with a verbal or implied threat by a defendant to shoot the victim may be sufficient to find that the defendant possessed a firearm.¹ *See Jordan v. Commonwealth*, 286 Va. 153, 747 S.E.2d 799 (2013) (holding that pointing a firearm at a victim while directing him to exit a vehicle impliedly asserted that if he did not comply, the assailant would shoot him, which—combined with the victim’s description of the firearm—was sufficient to find that the assailant possessed a firearm); *Redd v. Commonwealth*, 29 Va. App. 256, 511 S.E.2d 436 (1999) (holding that the defendant’s verbal threat to kill a store clerk if the clerk set off the silent alarm constituted an implied assertion that the object the defendant held was a firearm and—in conjunction with the clerk’s description of the object as “a long black gun”—was sufficient for the court to find that the defendant possessed a firearm). The weight to be given to a victim’s identification of an object as a firearm is a matter for the factfinder, and “[t]he trier of fact [is] entitled to consider the totality of the evidence.” *Jordan*, 286 Va. at 158, 747 S.E.2d at 801.

In this case, the Court considered the totality of the evidence, including the victim’s testimony that although he was unfamiliar with handguns at the time of the incident, he subsequently conducted research and determined that the firearm he observed Trace brandishing was a “Glock.” The victim further testified that Trace pointed the weapon directly at him, implying that Trace might shoot him. In evaluating the evidence presented at trial, the Court found the facts analogous to those in *Jordan*, where the victim sufficiently identified the weapon and found that the defendant pointing it directly at the victim “was an implied assertion that the object was a firearm.” *Jordan*, 286 Va. at 158, 747 S.E.2d at 801.

The Court therefore finds that the evidence at trial was sufficient to find Trace guilty of possession of a firearm by a convicted felon.

¹ The Court nevertheless recognizes that if an alleged firearm is recovered and discovered not to meet the statutory definition of a firearm—*i.e.*, an object made to “expel a projectile by gunpowder or other explosion,” such as a toy gun—the defendant cannot be found guilty of possession of a firearm. *See Armstrong v. Commonwealth*, 36 Va. App. 312, 322, 549 S.E.2d 641, 646 (2001) (interpreting *Va. Code* § 18.2-308.2).

B. Trace's Possession Conviction Does Not Violate Double Jeopardy.

A defendant cannot be tried for the same criminal offense twice. *U.S. Const.* amend. V; *Va. Const.* Art. I, § 8. However, both the Virginia Supreme Court and the United States Supreme Court have noted that a defendant is not allowed “to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges.” *Currier v. Commonwealth*, 65 Va. App. 605, 612, 779 S.E.2d 834, 837 (2015), *aff'd*, 798 S.E.2d 164 (Va. 2016) (quoting *Ohio v. Johnson*, 467 U.S. 493, 502 (1984)). Here, Trace was tried on two separate and distinct offenses, *i.e.*, use of a firearm in the commission of a felony and possession of a firearm by a convicted felon.

Virginia Code section 18.2-53.1 provides that it is “unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit . . . robbery.” *Va. Code* § 18.2-53.1 (2014 Repl. Vol.). The Virginia Supreme Court has opined that “[t]he statute not only is aimed at preventing actual physical injury or death but also is designed to discourage criminal conduct that produces fear of physical harm.” *Holloman v. Commonwealth*, 221 Va. 196, 198, 269 S.E.2d 356, 358 (1980). “Such fear of harm results just as readily from employment of an instrument that gives the appearance of having a firing capability as from use of a weapon that actually has the capacity to shoot a projectile.” *Id.* at 198, 269 S.E.2d at 358. For purposes of this crime, it therefore is irrelevant whether a defendant in fact had a firearm if his victim rationally believed he had one. *Cromite v. Commonwealth*, 3 Va. App. 64, 67, 348 S.E.2d 38, 40 (1986).

Trace argues that the *Redd* and *Jordan* decisions eradicated any distinction between the charges of possession of a firearm by a felon (the “Firearm Possession Statute”) and use of a firearm in the commission of a felony (the “Firearm Use Statute”). Although the Court notes that the two opinions demonstrate that common evidence may be used to prove the two crimes, the opinions also serve to clarify how the Firearm Possession Statute differs from the Firearm Use Statute.

In *Redd*, the Court held that to convict under the Firearm Possession Statute, section 18.2-308.2 of the *Code of Virginia*, the Commonwealth must prove—in addition to establishing that the defendant is a convicted felon—“that the accused possessed an actual firearm, not merely an object of similar appearance” and that possession can be proved by a description of the firearm combined with a verbal threat to kill. 29 Va. App. 256, 258, 511 S.E.2d 436, 437 (1999). The Supreme Court of Virginia subsequently confirmed the ruling in *Redd* and went on to hold that pointing a firearm at the victim—without a verbal threat—can constitute the requisite threat to kill under the Firearm Possession Statute. *Jordan v. Commonwealth*, 286 Va. 153, 157–159, 747 S.E.2d 799, 801 (2013). Read together, the two opinions stand for the proposition that although the Firearm Possession Statute prohibits felons from possessing actual firearms, a witness observing a weapon—combined with an indication that the firearm might be used—can be sufficient to prove that a defendant possessed an actual firearm. The Firearm Use Statute, by contrast, only requires that the victim reasonably believed that the defendant had an actual firearm while committing the felony.

Importantly, a conviction under the Firearm Use Statute, section 18.2-53.1, requires that the Commonwealth prove, in addition to the defendant's possession of a firearm, that the defendant committed one of the felonies listed in the statute. Conversely, a conviction for possession of a firearm by a felon under the Firearm Possession Statute, section 18.2-308.2, does not require that a felony be committed while possessing the firearm but does require that the defendant be a convicted felon. As such, although a defendant acquitted of an underlying felony enumerated in the Firearm Use Statute cannot be convicted using a firearm in the commission of a felony, he may nevertheless be convicted under the Firearm Possession Statute.

Applying the foregoing to the instant case, in contrast to using a firearm to commit a felony—of which Trace was acquitted by a jury—Trace's possession conviction was based on the fact that the Court found sufficient evidence that he possessed a firearm at the time of an alleged crime, as opposed to him using that firearm to commit the crime. The fact that similar evidence was used to prove the two crimes is not unique to these charges and, as such, the fact that evidence for both charges consisted of witness testimony does not invoke Double Jeopardy Clause concerns.

Trace's conviction for possessing a firearm as a convicted felon therefore does not invoke double jeopardy.

C. *The Commonwealth Was Not Collaterally Estopped from Pursuing a Conviction for Possession of a Weapon by a Convicted Felon.*

“[I]n a subsequent prosecution for an offense arising out of the same transaction, collateral estoppel bars a state's relitigation of facts that have been decided in the defendant's favor in the prior trial even though the second prosecution is not barred.” *Simon v. Commonwealth*, 220 Va. 412, 416, 258 S.E.2d 567, 570 (1979). The burden is on the defendant to prove that the verdict in the prior litigation was based on the same issue as the current litigation. *United States v. Tramunti*, 500 F.2d 1334, 1346 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974).

The Commonwealth relies on *Currier v. Commonwealth*, in which the Virginia Court of Appeals addressed the issue of collateral estoppel in a case where a charge of a felon in possession of a firearm had been severed from other charges. 65 Va. App. 605, 779 S.E.2d 834 (2015), *aff'd*, 798 S.E.2d 164 (Va. 2016). In that case, the court held that the Double Jeopardy Clause, including its collateral estoppel component, is intended to prevent “the practice of ‘unfair and abusive reprosecutions.’” *Id.* at 613, 779 S.E.2d at 837 (quoting *Ashe v. Swenson*, 397 U.S. 436, 446 n.10 (1970)). “That concern is not present when a trial proceeds on a charge that was severed from a combined original group of charges and the charge was severed with the defendant's consent and for his benefit.” *Id.* The Supreme Court of Virginia affirmed this holding for the reasons stated by the Court of Appeals. *Currier v. Commonwealth*, 798 S.E.2d 164 (Va. 2016). The defendant appealed, and the United States Supreme Court subsequently granted certiorari and heard oral arguments on February 20, 2018, although it had not published

its decision at the time of this ruling. *Currier v. Virginia*, No. 16-1348, 2017 U.S. LEXIS 6315 (Oct. 16, 2017).²

Despite the procedural posture of *Currier*, this Court is bound to follow the precedent established by the Virginia Supreme Court. Further, regardless of the United States Supreme Court's ultimate decision, the outcome of the case at bar would be unaffected.

Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, [the realism and rationality] approach requires a court to “examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude *whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.*”

Ashe, 397 U.S. at 444 (emphasis added). As Virginia appellate courts have noted, “[t]he doctrine of collateral estoppel is not often available to an accused, because it is ‘usually impossible to determine with any precision upon what basis the [fact finder] reached a verdict in a criminal case,’ leaving the defense of collateral estoppel available to an accused only in ‘a rare situation.’” *Rice v. Commonwealth*, 57 Va. App. 437, 443–44, 703 S.E.2d 254, 258 (2011) (quoting *Jones v. Commonwealth*, 217 Va. 231, 233, 228 S.E.2d 127, 128–29 (1976)).

Ashe v. Swenson was one of “the rare case[s] where it was possible to determine with certainty what the jury in the earlier prosecution had decided.” *Id.* at 443, 703 S.E.2d at 258 (quoting *Jones*, 217 Va. at 233, 228 S.E.2d at 128). In *Ashe*, several masked individuals robbed six men who were playing poker in the basement of a house. *Ashe*, 397 U.S. at 437. One of the defendants, who had been acquitted by a jury of robbing one of the poker players, was subsequently brought to trial for robbing a different poker player. *Id.* at 439. The defendant moved to dismiss the charge based on his prior acquittal, the motion was denied, and he was ultimately convicted of the second robbery. *Id.* at 439–40. Although the Supreme Court of Missouri affirmed the conviction, the Supreme Court of the United States reversed, holding as follows:

[T]he record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that [the alleged victim] had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not.

² The Court of Appeals noted that “[c]ourts are divided with regard to whether collateral estoppel can bar a retrial when the defendant has obtained severance of the charges against him and the first trial results in an acquittal.” *Currier v. Commonwealth*, 65 Va. App. 605, 613 n.2, 779 S.E.2d 834, 838 n.2 (2015) (citing cases), *aff’d*, 798 S.E.2d 164 (Va. 2016).

Id. at 440, 445. The Court essentially held that once the jury acquitted the defendant—finding at least reasonable doubt that he was one of the robbers—the prosecution could not then try him again on the same evidence and hope for a different outcome from a different jury. *Id.* at 446.

The instant case is easily distinguishable from *Ashe*. Trace alleges that the *only* basis on which the jury could have acquitted him was its conclusion that he was not the person who committed the robbery. Although the jury might have relied on identity—or lack thereof—to acquit him, Trace has failed to satisfy his burden of proving there were no other issues on which a rational jury could have grounded its verdict. The jury could have found, *inter alia*, that although Trace was present during the encounter and possessed a firearm, the Commonwealth failed to prove beyond a reasonable doubt one or more of the elements of robbery.

Trace alleges that because his co-defendant was convicted of the robbery in which Trace is alleged to have been involved, the jury in Trace's case could not have based its acquittal on a finding that a robbery had not occurred. However, the jury in Trace's case was presented no information regarding the co-defendant's trial. Furthermore, the jury in Trace's trial was randomly selected and had nothing to do with the co-defendant's bench trial. As such, the jury was entitled to make its own independent determination based on the evidence presented.

Accordingly, the Commonwealth was not collaterally estopped from pursuing a conviction against Trace for possession of a weapon as a convicted felon.

Conclusion

Based on the foregoing, the Court DENIES Trace's motion to set aside the Court's finding that Trace possessed a firearm as a convicted felon. The Clerk's Office is directed to prepare an order consistent with this ruling and forward it to counsel of record. Any objections shall be filed with the Court within fourteen days.

Sincerely,



David W. Lannetti
Circuit Court Judge