

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL ACTION
	:	NO. 04-61
TROY BROADUS	:	

MEMORANDUM OPINION AND ORDER

RUFE, J.

November 2, 2004

On July 29, 2004, a jury convicted Defendant Troy Broadus of one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). Defendant has filed a motion asking this Court to grant a new trial pursuant to Federal Rule of Criminal Procedure 33¹ on two grounds: 1) the Court's failure to instruct the jury on an innocent possession or justification defense; and 2) ineffective assistance of counsel based on trial counsel's failure to more strenuously pursue an innocent possession or justification defense. As the interest of justice does not require a new trial, Defendant's Motion is denied.

I. FACTUAL BACKGROUND

On December 1, 2003 at approximately 9:18 p.m., Philadelphia Police Officers Jacob Williams and Curtis Younger were on routine patrol when they pulled over a 2001 Chevrolet Tahoe sport-utility vehicle without registration tags traveling westbound on the 100 block of East Allegheny Avenue in Philadelphia, Pennsylvania. After the Tahoe stopped, Officer Williams approached the driver's side of the vehicle, and Officer Younger approached the passenger's side. When Officer Younger opened the front passenger door, he found Defendant sitting in the front passenger seat with

¹ In his initial filing with respect to this motion [Doc. #44], Defendant moved for judgment of acquittal under Federal Rule of Criminal Procedure 29(c) in addition to a new trial under Rule 33. However, in his supplemental memorandum [Doc. #51], Defendant withdrew his request for relief under Rule 29(c). Accordingly, the Court addresses only Defendant's request for a new trial under Rule 33.

a container of Chinese food in his hand. Fearing that Defendant could throw the food at his face, Officer Younger asked Defendant to put the food down, and Defendant complied. Then, because Defendant was agitated and continually reached toward his waistband with his left hand, Officer Younger conducted a “safety frisk” of Defendant while Defendant remained in his seat and found a handgun in a holster tucked into Defendant’s waistband.² Officer Younger then placed Defendant in handcuffs and removed the handgun from his waistband, at which time Defendant told Officer Younger that “it was his cousin’s gun and he was taking it to the bar.”³

At trial, Defendant attempted to prove that the handgun was not in Defendant’s waistband but was tucked between the center console and the passenger seat of the vehicle. To this end, Fred Broadus, Defendant’s cousin, testified that he had been sitting in the front passenger seat of the Tahoe earlier in the evening on December 1, 2003, while Herschel Davis drove and Defendant and another man named Antwan sat in the back seat. Mr. Davis dropped Fred Broadus off at the bar he owned, where he unloaded some boxes from the back of the vehicle. Most importantly, Fred Broadus testified that prior to exiting the vehicle, he tucked his handgun between the center console and the passenger seat because he “was uncomfortable lifting the boxes and things out – out of the car.”⁴ Mr. Davis’ trial testimony corroborated that of Fred Broadus with one significant exception: Mr. Davis was unaware that Fred Broadus left his gun in the Tahoe.⁵ After they dropped Fred

² Prior to the trial, Defendant filed a Motion to Suppress the handgun as the fruit of an unlawful search. The Court denied the Motion, finding that “Officer Younger had a reasonable, articulable suspicion that criminal activity was afoot and therefore was reasonably warranted in conducting the pat-down for weapons.” Findings of Fact, Conclusions of Law and Order Regarding Defendant’s Motion to Suppress Evidence [Doc. #28] at 5 (internal quotations and citation omitted). Defendant does not contest this ruling here.

³ 7/28/04 N.T. at 49.

⁴ Id. at 185.

⁵ Id. at 200-01, 209.

Broadus off at the bar, Defendant moved into the front passenger seat of the Tahoe. Mr. Davis then drove the Tahoe to another location where they dropped Antwan off, leaving only himself and Defendant in the Tahoe.⁶ Mr. Davis testified that the aforementioned police stop occurred as they were on their way back to the bar after dropping off Antwan.

Officer Younger initially arrested Defendant for failing to have a permit for the handgun. It was later discovered that Defendant had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, and a grand jury returned an indictment against Defendant for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).⁷ A jury then convicted Defendant on this charge on July 29, 2004.

II. STANDARD OF REVIEW

“Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.”⁸ “The decision whether to grant a motion for a new trial under Rule 33 is committed to the sound discretion of the trial court, which may set aside the verdict and order a new trial if it ascertains that the verdict constitutes a miscarriage of justice.”⁹ More specifically, “[a]ny error of sufficient magnitude to require reversal on appeal is an adequate ground for granting a new trial.”¹⁰ With respect to jury instructions, “[t]he district court has wide discretion

⁶ Mr. Davis testified that they stopped for the Chinese food at some point during the night, but he could not remember whether it was before or after they dropped Fred Broadus off at the bar. Id. at 201.

⁷ Defendant was also initially charged with a violation of 18 U.S.C. § 924(g), but this provision was removed in a later superseding indictment.

⁸ Fed. R. Crim. P. 33(a).

⁹ United States v. Guadalupe, No. Crim.A.01-429-01, 2003 WL 22016882, at *1 (E.D. Pa. June 18, 2003) (quoting United States v. Daniels, No. Crim.A.95-369, 1996 WL 311444, at *4 (E.D. Pa. June 6, 1996)).

¹⁰ 3 Charles Alan Wright at al., Federal Practice and Procedure § 556 (3d ed. 2004).

. . . . [T]he court erred in refusing to give an instruction only if the instruction was correct, not substantially covered by other instructions, and was so important that the omission of the instruction prejudiced the defendant.”¹¹ Further, “a trial court need not instruct the jury on any principle that does not have a factual basis in the evidence.”¹²

III. DISCUSSION

The jury convicted Defendant on one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1), the elements of which are: “(1) that [Defendant] had previously been convicted of a crime punishable by imprisonment for a term exceeding one year; (2) that [Defendant] knowingly possessed a firearm; and (3) that the firearm had passed in interstate commerce.”¹³ Defendant now contends that a new trial is warranted because the Court did not instruct the jury on a “justification/innocent possession” defense.

Defendant incorrectly lumps the justification and innocent possession defenses together when in fact they constitute separate and distinct affirmative defenses to 18 U.S.C. § 922(g)(1). In his brief, Defendant cites only to one case in which the Third Circuit discusses the applicability of the justification defense¹⁴ and no cases discussing the innocent possession defense. Nevertheless, the Court addresses herein whether it should have instructed the jury on either defense.

¹¹ United States v. Smith, 789 F.2d 196, 204 (3d Cir. 1986); see also United States v. Rorke, No. Crim.A.90-485, 1991 WL 165275, at *11 (E.D. Pa. Aug. 22, 1991), aff’d, 972 F.2d 1334 (3d Cir. 1992) (Table) (“When a court examines the jury charge to determine whether it was proper, it should view the instructions as a whole, and a new trial should be ordered only if the trial court abused its discretion in giving the instructions.”).

¹² Gov’t of the Virgin Islands v. Fonseca, 274 F.3d 760, 767 (3d Cir. 2001) (citing Bird v. United States, 187 U.S. 118, 132-33 (1902)).

¹³ United States v. Dodd, 225 F.3d 340, 344 (3d Cir. 2000).

¹⁴ Defendant also mistakenly lists the elements of a justification defense as the elements of an innocent possession defense.

A. Justification

The Third Circuit has recognized the affirmative defense of justification to a felon in possession of a firearm offense. A defendant has the burden to prove by a preponderance of the evidence the following four elements to successfully assert this defense:

(1) that the defendant or someone else was under unlawful and present threat of death or serious bodily injury; (2) that the defendant did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative that would avoid both the criminal conduct and the threatened death or injury; and (4) that there was a direct causal relationship between the criminal act and the avoidance of the threatened harm.¹⁵

Defendant presented no evidence to support any of these elements at trial because Defendant's position was that he never possessed the handgun, not that he had no reasonable alternative but to possess the gun. In particular, there was no evidence presented that Defendant or anyone else was under any threat of death or serious bodily injury. Accordingly, there was no factual basis in the evidence for this defense, and Defendant was not entitled to a justification instruction.¹⁶

B. Innocent Possession

To successfully assert an innocent possession affirmative defense, the record must reveal that:

(1) the firearm was attained innocently and held with no illicit purpose and (2) possession of the firearm was transitory--i.e., in light of the circumstances presented, there is a good basis to find that the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible. In particular, "a defendant's actions must demonstrate

¹⁵ Dodd, 225 F.3d at 342.

¹⁶ The Government correctly notes that Defendant never requested an instruction on this defense. Therefore, the Court's failure to give this instruction is reviewable only for plain error. Fed. R. Crim. P. 30(d), 52(b). Nevertheless, because this defense did not have a factual basis in the evidence, the absence of a justification instruction was proper under any standard of review.

both that he had the intent to turn the weapon over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct.” When these requirements are met, possession is “excused and justified as stemming from an affirmative effort to aid and enhance social policy underlying law enforcement.”¹⁷

Although the innocent possession defense has yet to be recognized or even addressed by the Third Circuit,¹⁸ the Court need not today decide that issue as the defense clearly has no factual basis in the evidence presented at trial.

Defendant’s entire defense in this case was that the handgun was tucked between the passenger seat and the center console of the Tahoe without Defendant’s knowledge. In fact, on the second day of trial defense counsel even admitted on the record that he was not planning on requesting an innocent possession instruction because “[i]t would be inconsistent with our whole - - defense.”¹⁹ Not until after the Government made its closing rebuttal argument did defense counsel request an innocent possession charge.²⁰ Nevertheless, the fact remained that the evidence in the record could not support such a charge.

The sole piece of evidence Defendant claims warrants an innocent possession instruction is his statement to Officer Younger that “it was his cousin’s gun and he was taking it to

¹⁷ United States v. Mason, 233 F.3d 619, 624 (D.C. Cir. 2001) (internal citations omitted).

¹⁸ The defense has received a mixed reception in other courts. One court has specifically declined to recognize the existence of the defense, United States v. Gregg, No. 01 CR. 501, 2002 WL 1808235, at *6 (S.D.N.Y. Aug. 6, 2002) (“While Congress clearly has decided to create certain exemptions, it notably has not created one for felons who possess a gun innocently, and therefore, I may not recognize one here.”), while another has limited its applicability to situations in which the elements of justification are also present, United States v. Hendricks, 319 F.3d 993, 1007 (7th Cir. 2003) (“[w]e previously have limited an ‘innocent possession’ defense to a § 922(g)(1) charge to situations in which the elements of a justification defense (i.e., necessity, duress or self-defense) are present.”). See also United States v. DeJohn, 368 F.3d 533, 546 (6th Cir. 2004) (including the elements of justification defense when describing innocent possession defense).

¹⁹ 7/29/04 N.T. at 15-16.

²⁰ 7/29/04 N.T. at 80.

the bar.”²¹ This statement alone does not entitle Defendant to the instruction. Even taking this statement in the light most favorable to *Defendant* (which is not the standard here²²), thereby presuming that Defendant had just found the gun and was headed directly to the bar to return it to his cousin, Defendant still would not be entitled to an innocent possession instruction. First of all, Defendant had no reason or justification for taking possession of the handgun in the first place; the handgun could have remained between the passenger seat and the center console. As quoted above, an innocent possession affirmative defense requires proof that a defendant “took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible.”²³ Here, Defendant could have rid himself of possession of the handgun by handing it to Officer Younger or informing Officer Younger of its location. Defendant did neither, waiting until Officer Younger discovered the gun via the security frisk before telling him that he planned to return the gun to his cousin.

In addition, it is clear from the case law that the innocent possession defense does not apply to a defendant who intends to return the firearm to a citizen as opposed to the police.²⁴ Thus, innocent possession does not apply to the case at hand because Defendant intended to deliver the handgun to his cousin, and did not turn the handgun over to Officer Younger when he had the opportunity. Accordingly, the Court properly refused Defendant’s request to give an innocent

²¹ 7/28/04 N.T. at 49.

²² Although the Court does not view the evidence in favor of the Government either, the Court is required to exercise “its own judgment in assessing the Government’s case.” United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002).

²³ Mason, 233 F.3d at 624.

²⁴ See Hendricks, 319 F.3d at 1007-08 (innocent possession instruction not warranted when the evidence showed that the defendant “had ample opportunity to turn the weapon over to the police but that he failed to do so.”); Gregg, 2002 WL 1808235, at *6 (innocent possession charge not available when the defendant did not relinquish gun when police first approached him despite the defendant’s testimony that he was on his way to the police station at the time to turn over the gun in exchange for a reward).

possession instruction.

C. Ineffective Assistance of Counsel

In his brief on behalf of Defendant, defense counsel informs the Court that Defendant believes his counsel was ineffective for failing to more aggressively promote a justification defense. Counsel properly asserts that he cannot argue his own ineffectiveness and suggests that the Court may wish to consider appointing new counsel for Defendant before addressing this issue. Although the Court agrees that in some instances it is appropriate to appoint new counsel, at this juncture doing so is unnecessary as Defendant's ineffectiveness claim on this ground is entirely without merit.

To successfully assert an ineffective assistance of counsel claim, a defendant must satisfy the well-known requirements of Strickland v. Washington, 466 U.S. 668, 687 (1984):

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

As discussed in detail above, the evidence did not support either an innocent possession or justification defense. Therefore, defense counsel's failure to "more aggressively pursue" these inapplicable defenses did not constitute deficient performance. Moreover, any alleged deficient performance clearly could not prejudice Defendant because, based on the evidence adduced at trial, had defense counsel more aggressively pursued these defenses, the Court would have refused to instruct the jury accordingly. Therefore, the Court finds it unnecessary to appoint new counsel to address this issue and finds Defendant's Motion for a New Trial on this ground to be without merit.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for a New Trial is denied. An appropriate Order follows.

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ORDER

AND NOW, this 2nd day of November, 2004, upon consideration of Defendant Troy Broadus' Post-Verdict Motion and Leave to Supplement [Doc. #44], Defendant's Supplemental Memorandum to Post-Verdict Motions [Doc. #51], and the Government's Response thereto [Doc. #54], it is hereby **ORDERED** that Defendant's Motion is **DENIED**.

It is so **ORDERED**.

BY THE COURT:

CYNTHIA M. RUFÉ, J.