

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM: PART K-21

THE PEOPLE OF THE STATE OF NEW YORK : BY: DARRELL L. GAVRIN, J.S.C.
: :
: DATED: November 10, 2008
-against- :
: Ind. No. 1343/2007
JAMAL ALSTON :
: Defendant :

The defendant, Jamal Alston, was tried before a jury which returned a verdict, on September 22, 2008, finding the defendant guilty of two counts of robbery in the second degree, criminal possession of stolen property in the fifth degree and criminal possession of a weapon in the fourth degree.

Pursuant to CPL 330.30(1), the defense attorney orally moved to set aside the verdict of guilty of criminal possession of a weapon in the fourth degree. The indictment charged the defendant with this crime, pursuant to Penal Law 265.01 (2), based on the possession of a dangerous instrument, to wit: a BB-gun, with intent to use unlawfully against another. The defendant contends that the evidence at trial did not establish that the defendant possessed a loaded BB-gun and therefore, was legally insufficient to support the jury's guilty verdict on this charge.

During trial, evidence was adduced that persons, with whom the defendant was acting in concert, possessed a BB-gun which was displayed to the robbery victim. The pellet or BB-gun was recovered by the police and introduced into evidence at trial. This gun was not loaded at the time it was recovered by the police. Further, there was no testimony or evidence that it was loaded when it was displayed to the victim during the commission of the robbery.

The issue raised on this motion is whether the defendant's conviction for criminal possession of a weapon in the fourth degree, based on the possession of a dangerous instrument, must be dismissed in the absence of any evidence that the BB-

gun was loaded.

It is well settled that an unloaded gun is not a dangerous instrument. (See, Matter of Angel Q., 194 AD2d 793; People v. Seabrooks, 120 AD2d 691; People v. Stephens, 97 AD2d 523; People v. Bonfont, 84 AD2d 844; People v. Castaldo, 72 AD2d 568). Therefore, in the absence of evidence that a pellet or BB gun is loaded and operable, a conviction of criminal possession of a weapon in the fourth degree, based upon the possession of a dangerous instrument, cannot stand and will be reversed. (People v. Alston, 270 AD2d 281; also see, People v. Lauren 163 Misc. 2d 873).

The Court notes that there is an exception to the rule that an unloaded gun is not a dangerous instrument, when there is evidence from which it can be inferred that the gun was threatened to be used as a bludgeon or club. (People v. Colavito, 126 AD2d 554, affd 70 NY2d 996). However, in the instant case, the only evidence was that the BB-gun was pointed at the robbery victim. There was no evidence from which it could have been inferred that the gun was threatened to be used as a bludgeon. Therefore, the exception to the rule that an unloaded gun is not a dangerous instrument does not apply and defendant's conviction of criminal possession of a weapon in the fourth degree cannot stand. (See, People v. Seabrooks, *supra*).

Accordingly, the motion by the defendant to set aside the jury verdict of guilty on the fourth count of the indictment, criminal possession of a weapon in the fourth degree, is granted. In all other respects, the jury's verdict of guilty on the other counts submitted to them remains the same.

This memorandum shall constitute the decision and order of the court.

Order entered accordingly.

The Clerk is directed to forward copies of this Decision and Order to the attorney for the defendant and to the People.

Darrell L. Gavrin, J.S.C.

