

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CRIMINAL TERM - PART K-18 QUEENS COUNTY

P R E S E N T: Hon. Sheri S. Roman,
Justice

THE PEOPLE OF THE STATE OF NEW YORK:

:Ind. No.: 311/98

:

-against-

:Hearing: Second Violent Felony

: Offender Hearing on

JAMAL GREEN,

: Remittal from Appellate

: Division, Second Department

DEFENDANT

:

:Hearing Date: November 14, 2006

Joseph LoBosco, Esq.

For the Defendant

Hon. Richard A. Brown, D.A.

by: Jennifer Hagan, Esq.

Opposed

Upon the hearing held in this matter on remittal from the Appellate Division, Second Department, and in the opinion of the court herein, this court finds, pursuant to Criminal Procedure Law Section 400.15 and Penal Law Section 70.04, that defendant is a second violent felony offender. See the accompanying memorandum of this date.

Date: November 29, 2006

Gloria D'Amico

Clerk

Sheri S. Roman, J.S.C.

Appeals, "The Legislature may distinguish among the ills of society which require a criminal sanction, and prescribe, as it reasonably views them, punishments appropriate to each." People v. Broadie, 37 N.Y.2d 100, 110 (1975).

The hearing proceeded before this court on November 14, 2006. The People called one witness at the hearing, Ellen Prinz, an Associate Court Clerk, who is assigned to data entry in the Queens County Supreme Court. The People contend that defendant is a second violent felony offender based upon his previous conviction on October 18, 1989 of Criminal Possession of a Weapon in the Third Degree under subsection four, which is classified as a D Violent Felony.

The defendant called no witnesses, but introduced into evidence a Certificate of Disposition, dated June 21, 2005, which stated that the prior conviction of October 18, 1989, relied upon by the People, was in fact for Criminal Possession of a Weapon in the Third Degree under subsection one of P.L. Section 265.02, which is classified as a D non-violent felony. It was this Certificate of Disposition which led the Appellate Division to find that there was conflicting documentation regarding the defendant's prior 1989 conviction.

Based upon this certificate of conviction, defendant contends that he was previously convicted of Criminal Possession of a Weapon in the Third degree under subsection one, a D non-

violent felony, and therefore contends that he should not be sentenced as a second violent felony offender.

Briefly by way of background, on April 20, 1999, defendant was found guilty, after a jury trial before this court, of Assault in the Second Degree, a Class D Violent Felony; Burglary in the First Degree, a Class B Violent Felony; Criminal Possession of a Weapon in the Second Degree, a Class C Violent Felony; Criminal Possession of a Weapon in the Third Degree, a Class D Violent Felony; and three counts of Endangering the Welfare of a Child, which are Class A Misdemeanors.

The convictions arose out of an incident which took place on December 2, 1997, in which defendant gained entry into the complainants' apartment and robbed Luis Vasquez and Janet Sornoza of money and jewelry at gunpoint while they were in the company of their three children. During the robbery, defendant threatened to kill them and as Mr. Vasquez struggled with defendant over the gun, a shot went off injuring Mr. Vasquez. Defendant then pointed the gun at Mr. Vasquez's head and pulled the trigger, but the gun jammed. A neighbor of Mr. Vasquez entered the apartment during the incident, wrestled the gun from the defendant and held the defendant until the police arrived. The loaded gun was recovered by the police.

On May 12, 1999, prior to sentencing, defendant was adjudicated a second violent felony offender and was sentenced by this court to a definite term of imprisonment of twenty years for Burglary in the First Degree; seven years for Assault in the Second Degree; fifteen years for Criminal Possession of a Weapon in the Second Degree; five years for Criminal Possession of a Weapon in the Third Degree; and one year for each count of Endangering the Welfare of a Minor. All sentences were to be served concurrently.

Pursuant to the Appellate Division order of July 11, 2006, the defendant's conviction was affirmed, but the sentences were vacated pending the instant second violent felony offender hearing.

The predicate conviction relied upon by the People was based upon Indictment No. 3632/89. In that case, on October 18, 1989, defendant pleaded guilty to Criminal Possession of a Weapon in the Third Degree. The indictment and the court papers do not reference the subsection under which defendant was convicted. On December 14, 1989 defendant was sentenced to five years probation.

The issue as to the proper subsection of defendant's prior felony conviction arises in this case because a conviction for Criminal Possession of a Weapon in the Third Degree under subsection one of Penal Law Section 265.02 is classified as a D,

non-violent Felony, whereas a conviction under subsection four of Penal Law 265.02 is classified as a D Violent Felony and results in harsher sentencing parameters.

Specifically, under subdivision one of Penal Law Section 265.02,

"A person is guilty of criminal possession of a weapon in the third degree when: (1) He commits the crime of criminal possession of a weapon in the fourth degree as defined in subdivision one, two, three or five of section 265.01, and has been previously convicted of any crime."

Thus, for a defendant to be convicted under subsection one, the defendant must have possessed a firearm and been previously convicted of any crime, whereas for a defendant to be convicted under subsection four he must have been found guilty of possessing a loaded firearm not in his home or place of business.

Since a subsection was not indicated on the court file it was necessary for this court to review the language of the indictment, the court file, and the plea minutes in order to ascertain the applicable subsection. This court has reviewed the court file of Indictment 3632/89 as well as the minutes of the defendant's plea taken before Justice Seymour Rotker and finds that it is clear that defendant pled guilty to Criminal Possession of a Weapon in the Third Degree under subsection four of Penal Law 265.02 which constitutes a D Violent Felony.

A review of the Criminal Court complaint dated July 15, 1989, states that defendant was stopped while driving his

automobile and that a 25 caliber Raven semi automatic handgun loaded with 7 rounds was recovered from the floor of the vehicle.

The Police Officer who verified the Criminal Court complaint charged the defendant with the commission of the offense of Criminal Possession of a Weapon in the Third degree and he specified that defendant violated subsection four of Penal Law Section 265.02 alleging that defendant possessed a loaded firearm, and that such possession was not in the defendant's home or place of business.

As a result of the Criminal Court complaint, an indictment was filed on August 2, 1989. Defendant was indicted for Criminal Possession of a Weapon in the Third Degree and Criminal Possession of a Weapon in the Second Degree. The indictment, however, does not specify the subsection, although the language tracks Penal Law Section 265.02(4).

Count one of Indictment No.3632/89 states as follows:

"The Grand Jury of the County of Queens by this indictment, accuse the defendant of the crime of Criminal Possession of a Weapon in the Third Degree committed as follows: The defendant on or about July 14, 1989, in the County of Queens, knowingly and unlawfully possessed a loaded firearm, to wit: 25 caliber Raven semi-automatic Serial #1555331, such possession not being in the defendant's home or place of business. The subject matter of this count being an armed felony as that term is defined in Section 1.20 of the Criminal Procedure Law."

Despite the fact that this indictment does not specify the subsection for P.L. 265.02, the language of the count clearly shows that defendant was charged with a violation of subsection four of Penal Law Section 265.02 as the language of Count one is

identical to the language of Penal Law Section 265.02(4) which states,

" A person is guilty of criminal possession of a weapon in the third degree when:(4) He possesses any loaded firearm. Such possession shall not except as provided in subdivision one, constitute a violation of this section if such possession takes place in such persons home or place of business."

Additionally, this court has reviewed the minutes of October 18, 1989 the date on which defendant pled guilty to Criminal Possession of a Weapon in the Third Degree before Justice Rotker. The minutes indicate that it was made clear to defendant that he was pleading guilty to Criminal Possession of a Weapon in the Third Degree, a Class D Felony. Defendant admitted that on July 4, 1989 at 3115 Farrington Street, (which was a different address than he gave as his home address) or in the vicinity, he knowingly and unlawfully possessed a 25 caliber loaded automatic or semi automatic pistol with seven rounds.

This court finds that the language of the defendant's admission also tracks the language of Penal Law Section 265.02 subdivision four. As stated in the plea minutes:

"THE COURT: Did you on July 4, 1989 at 2:30 in the afternoon, a 3115 Farrington Street, New York, or in the vicinity, knowingly and unlawfully possess a 25 caliber loaded automatic or semi automatic pistol with 7 rounds?

THE DEFENDANT: Yes.

THE COURT: Did you have a license for that gun?

THE DEFENDANT: No.

THE COURT: The Court accepts the defendant's offer of a plea of guilty to the charges."

Moreover, Court Clerk Prinz offered an explanation as to the reason why defendant obtained a Certificate of Disposition specifying subsection one. Ms. Prinz testified that prior to the 1990's, voted indictments such as the one in this case, did not, as a rule, provide a subsection. Therefore, when indictments were filed, data entry clerks were unable to enter subsections into computer files. If a defendant pled guilty or was convicted by a jury, the subsection was not entered in the computer records and as a result subsections were not indicated in a defendant's NYSID records. Ms. Prinz also testified that certificates of convictions are presently computer generated. As the current law requires that a subsection be assigned in the records of pertinent crimes, the computers have been programmed to indicate subsection one or "01" as the default subsection without regard to what the proper subsection should be.

Thus, in this case, the witness testified that no subsection was ever entered into the computer at the time defendant pled guilty to Criminal Possession of a Weapon in the Third Degree on October 18, 1989. When defendant requested a certificate of disposition in June, 2005, the certificate of disposition automatically assigned subsection one, by default, without any person ever checking to determine if this was the correct subsection.

Further, a handwritten certificate of disposition was contained in the court file and dated April 22, 1999, which was before the new rules were promulgated. This certificate merely states that defendant was convicted of Criminal Possession of a Weapon in the Third Degree, without assigning any subdivision, as no subsection was entered into the records at the time of the plea.

As stated above, the defendant relies upon a computer generated certified copy of his conviction which states that on October 18, 1989 defendant was convicted of Criminal Possession of a Weapon in the Third Degree under subsection one. This court finds based upon the credible testimony of Court Clerk Prinz that the Certificate of Disposition obtained by defendant in April 2005, was automatically assigned subsection one by the computer as the default subsection because a subsection was never specified on the original indictment or in the computer files.

It must be noted at this juncture that the present system in which computers are programmed to assign "subsection one" as a default subsection in situations where no subsection is specified on the indictment, should be modified to eliminate the input of misinformation, which in this case has resulted in unnecessary litigation. Confusion arises when the computer assigns as a default setting a subsection which is identical to an actual subsection contained in the Penal Law. This can be easily avoided by simply having the computers assign a designation such

as "00" or "99" or even "no subsection" to indicate an non-designated subsection. The use of such designations would eliminate conflicting documentation and prevent unnecessary court proceedings.

Furthermore, this court finds that defendant's contention that he was convicted under subsection one to be without merit because a charge of Criminal Possession of a Weapon in the Third Degree under subsection one includes, as one of its elements, that a defendant has been previously convicted of a crime. In this case, however, the parties stipulated that the 1989 conviction in question was defendant's first arrest and therefore subdivision one could not have legally applied to this defendant.

Therefore, as this court finds that the People have proven beyond a reasonable doubt that the defendant was indicted for a violation of Penal Law Section 265.02 subdivision four, Criminal Possession of a Weapon in the Third Degree, and that he pled guilty on October 18, 1989 to facts which constitute a violation of said section, a Class D Violent Felony, this court finds pursuant to Penal Law Section 70.04 and Criminal Procedure Law Section 400.15 that defendant previously was convicted of a Class D Violent Felony and is therefore adjudicated a second violent felony offender.

Order entered accordingly.

Sheri S. Roman, J.S.C.