No. 19-7183

IN THE

SUPREME COURT OF THE UNITED STATES

Third Circuit

Malcolm Williams — PETITIONER
(Your Name)

vs.

Commonwealth of Pa. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Supreme Court of Pa. (Eastern District)
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Malcolm Williams #MY7043
(Your Name)

1111 Altamont Blvd.
(Address)

Frackville Pa, 17931
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether Appellant should be awarded an arrest of judgement on the charge of Murder in the Third Degree, as there is insufficient evidence to sustain the verdict, The Commonwealth did not prove that the Appellant brought the gun to the fight or caused it to fire during the fight.

Moreover, the Commonwealth did not prove, by sufficient evidence that the Appellant acted with malice and, hence, the Commonwealth has failed to prove the elements of the crime. An arrest of judgement must be rewarded.

(suggested answer: yes)

2. In the alternative, whether Appellant be awarded a new trial as the greater weight of the evidence does not support the verdict. The greater weight did not support any proposition finding the Appellant guilty as the principal, and the greater weight of the evidence did not support any findings of malice, and, hence, a new trial is required. The verdict was based on speculation, conjecture and surmise

(suggested answer: yes)

3. Did the Court err when it denied the Appellant's Motion in Limine to exclude the introduction into evidence a statement by the deceased that the Appellant had a gun as it was hearsay and violated Appellant's Sixth Amendmant right to confrontation.

(suggested answer: yes)

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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CASES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Superior Court of Pa. court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was 5/9/19. A copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on the following date: 10/29/2019, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

The jury had lingering doubt about how the death of Seth Fassett occured. We know this because the jury acquitted the Appellant of the chrges of First Degree Murder and Carrying a Concealed Firearm. In other words, the jury had doubt as to how the death occured and who brought the gun to the fight.

The Appellant testified that he was assualted by Seth and Hans Fassett because the Appellant disrespected their employee and wasted their time having them inspect a car and not pay for services. On December 30,2015, at approximately 10:00 in the morning, Carlton Keys, who worked at the garage immediately next to the Appellant's home, walked over to look at the Appellant's van. Mr. Keys told the Appellant that he needed new belts, and with labor everything would cost $180.N.T. 11/30/16 at 59. The Appellant told Mr. Keys that he had to go to work and that they could do the work another time.

That same day around 1:30, Mr. Hans Fassett walked over to look at the van without Mr. Keyswhile the Appellant was preparing for work. He brought a tool to plug into the van's computer, The Appellant remarked about Mr. Hans Fassett bringing the wrong tool, and then accused Mr. Keys of trying to "get him" or charge too much money. Id. at 62. The Appellant and Mr. Hans Fassett continued to exchange e escalating, heated words. The victim, Mr. Seth Fassett, heard the argument and ran over

Trial defense counsel filed a written motion in limine on May 5,2016, to preclude witness Hans Fassett from testifying to a hearsay staement made by the victim, Seth Fassett. This hearsay statement by Seth Fassett was, "[G]un, he has a gun" referring to Appellant as having a gun. N.T. 11/29/16pg. 87. In his written motion, trial defense counsel argued that the statement was hearsay and in violation of Appellant's right to confrontation. The Trial Court conducted a hearing on October 11,2016. The trial Court denied the motion in limine

Both Hans Fassett and the Victim were standing on either side of the Appellant arguing with him. The Appellant turned to close the hood of his van when he was punched in the back of the head. Id. at 65. A full blown fist fight ensured between Hans and Seth Fassett. The victim drew a firearm.A stuggle ensured and durin that struggle over the firearm. The gun discharged into the hand and then into the victims chest. Hans testified that at the time of the shot he was standing next to his brother and the Appellant was standing in front of them. Id. at 125-26.

There was a witness who desribed the incident differently. Nicholas Milton was standing lest than fifteen feet away from the fight at the time the victim died. Mr. Milton is a friend of the victim for over twenty years and was sitting with the victim inside the garage just a few minutes before his death.

He testified on cross-examination :

Q. What hand was the gun in?

A. The right.

Q. And what position was it pointed when he shot him?

A. Down towards his stomach.

Q. And so the defendant was on top of the victim, is that what your saying/

A. What do you mean?

Q. Well, what was the position of the victim and the defendant?

A. He was up talking to Seth because Seth was falling back. N.T. 11/29/16pg.261

The Medical Examiner's Report strongly corroborates that the victim was holding the gun during the struggle and rules out the Appellant as the shooter. Mr. Hans Fassett testified that the Appellant was holding the gun in his right hand a second after the shot went off. N.T. 11/29/16 at 112. However, Dr. Chu of the Medical Examiner's Office testified that the gunshot entratrance wound was on the victim's right chest area:

"He had a gunshot wound that entered on the right side of his chest. This bullet went through his aorta which is the largest artery in the body, as well as his left lung, and the bullet was recovered on the left side of his back.

Then he had a gunshot wound of his right hand where the bullet actually entered, near the tip of the right middle finger and then crossed at the right index finger and almost at the base of the thumb, and there was no bullet recovered from that." Id. at 65.

The victim's injury is completely inconsistent with a right handed shooter firing a shot while standing face-to-face with the victim. Futhermore, the path of the bullett is from right to left, again ruling out a right handed shooter standing in front of the victim. Id. at 69. In fact, in the scenario painted by the prosecution, you would expect to see an entrance wound on the left side of the victim's body with the bullet lodging into the right side of the victim's body.

REASONS FOR GRANTING THE PETITION

Pursuant to Rule 1114 of the Appellate Rules of Criminal Procedure, the Defedant respectfully request that this Honorable Court grant this Petition for Writ of Certiorari in that the Superior Court has not decided this case in accordance with stare decisis or has so far deviated from the case law as to render its decision incorrect as a matter of law.

POINT ONE

Appellant must be awarded an arrest of judgement on the charge of murder in the thied degree as there is insufficent evidence to sustain the verdict

The Superior Court incorrectly placed emphasis on the use of a deadly weapon on a vital part of the victim's body. In many cases this would be correct. The Court relied primiarily on Kennerly and Mercado. Commonwealth v. Kennerly 410 A.2d 319, 321 (Pa. Super. 1979), Commonwealth v. Mercado 649 A.2d 946,957 (Pa. Super. 1994). Appellant's case, however, is distinguishable because the victim, the brother Hans Fassett, and the Appellant were locked together in a wrestling match when the gun was discharged. The fact that the victim was struck in the vital part of the body was the result of a random discharge and not a malicious act.

The Commonwealth simply did not prove that this was a case of Yhird Degree Murder. This was not a situation where the shooter went looking for his victim; rather, the victim intervened into a fist fight between two men.

The victim victim jumped into the fight, causing all the participants to fall to the ground and become disoriented. This raised the question of who brought the gun to the fightand how did it go off. The fact that the Appellant left the scene is consistent with a person trying to get away from a violent situation or another another person who had a gun, The present case was a scuffle between three men when a shot went off.

Nothing about the substance of the argument or the manner in which the Appellant and the Fassett brothers would have foretold that a shooting was about to happen. Ther was no evidence at trial for the jury to infer a wanton and willful disregard of an unjustified and extremely high risk that death or serious bodily injury to another would result. None of the three witnesses actually saw the moment that the gun was fired. They heard the shot, and then saw the victim falling back. There was np legally sufficient evidence at trial to show the Appellant actually pulled the trigger or intended to pull the trigger.

As has been repeatly stated, Malice is the absolutely essential ingrdient of murder. See, Commonwealth v. Reilly, 549 A.2d 503 (Pa. 1988). That Court said;

Malice express or implied is the criterion and absolutely essential ingredient of murder. Malice in its legal sense exists not only where ther is a particular ill will, but also whenever there is a wickedness of disposition , hardness of heart, wanton conduct, cruelty, recklessness of consequence and mind regardless of social duty.

When ruling on sufficiency argument, all of the evidence must be read in the light most favorable to the Commonwealth and the Commonwealth is entitled to all reasonable inferences arising there from. Commonwealth v. Boyle, 368 A.2d 661 (Pa. 1977). If, under the standard, the evidence is not sufficient to sustain the charge, the Court is required to dismiss the case and discharge the Appellant. Commonwealth v. Poindextor, 375 A.2d 384, aff'd 399(Pa.1979) Most abviously, the due process clause protects the accused againsst conviction except upon proof beyand a reasonable doubt of every fact necesaary to constitute the crime with which he is chrged. See,In Re: Winship, 397 U.S. 358 (1979).

Moreover, it certainly cannot be overlooked that the Commonwealth must prove that the Appellant is the slayer. In the instant matter, the Commonwealth did not prove that the Appellant was the person who took the life of the victim. Moreover, the Appellant was not charged as a conspirator nor did the Commonwealth present ant evidence of accomplice liability. Thus, if yhe evidence is sufficient to make out the slaying by the Appelant, The Commonwealth's case must fall.

The testimony offered by the Commonwealth witnesses who were present only established that the Appellant was holing a gun a second or so after a shot was fired.

There was no evidence establishing that the Appellant pulled the trigger as opposed to an accidential discharge or self-inflicted wound. Gussing is not good enough. Probability is not good enough. Onlty proof beyond a reasonable doubt carries the day.

While circumstantial evidence can be enough to make out a crime, it must be of sufficient quantity and quality to establish guilt of a crime beyond a resaonable doubt. See, Commonwealth v. Wentzel, 61 A.2d 309 (Pa.1948); See, also, Commonwealth v. Cimaszewski, 288 A.2d 805(Pa.1972). In Commonwealth v. Quartapella, 539 A.2d 855 (Pa. Super. 1988), the Court held:

When circumstantial evidence is used to establish an essential element of the crime, that element must flow beyond a reasonable doubt from the proven circumstances.... This court must fix 'a line of demarcation between the requisite degree of persuasion ("beyond a reasonable doubt") and impermissible speculation. The former is required while the later is not tolerated as a basis for conviction.

Thus andfor all the forgoing reasons, the Commonwealth did not prove that the Appellant was the slayer nor did it prove that the Appellant acted with malice. An arrest of judgement on the charge of Murder in the Third Degree must be granted.

POINT TWO

The Appellant must be awarded a new trial as the trial court err when it denied the appellant's motion in limine to exclude the introduction into evidence a statement by the deceased that the appellant had a gun as it was hearsay and violated appellant's sixth amendment right to confrotation.

The Superior Court erred when it determined that Appelllant's right to confrotation was not violated. The trial court allowed Hans Fassett, the victim's brother to testify that the victim, Seth Fassett, said "Gun, He's got a gun." (referring to Apellant). The Superior Court did not analyze the primary purpose of this statement under Crawford. The statement was testimonial,as its purpose was not to report an ongoing emergency but to name the shooter to initate investigation and procsecution.

Under the Sixth Amendment to the United States Constitution and Article 1, Section 9 of the Pennsylvania Constition., a defendant has a right to confront witnesses presenting evidence against him. Crawford v. Washington, 541 U.S. 36 (2004); Commonwealth v. Allshouse, 36 A3d 163 (Pa.2012). Crawford "limited the Confrotation Clause,s reach to testimonial staements, "i.e. those "establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpertrator." Michigan v. Bryant, 131 S. Ct. 1143, 1153 (2011) (quoting DAvis v. Washington, 547 U.S. 813, 826 (2006)). BY contrast, a staement is non-testimonial, and its admission does not violate the Confrotation Clause, where its primary purpose is non-testimonial, for example, to enable the police to respond to an "ongoing emergency." Bryant at 1154

To evaluate a staement's primary purpose, the court should examine objective factors such as where the speakers are located, whether the statement occurs during an emergancy or afterwards, and what reasonable purpose can be ascertained from the statements. Id., 1156, 1160-61.

The Court should not give "controlliang weight to the intentions of police [because] the declarant's statements, not the interrogator's questions, will be introduced {at trial] to prove the truth of the matter asserted. "Id., 1162. In Bryant, the Court considered the statement of a victim who had been shot and told police information about the incident and the perpertratot while bleeding on the ground at the scence of the crime, concluding that the staement was non-testimonial because of the following factors :

1. The victim told the police that the assailant fled and was an ongoing threat;

2. The victim was shot, and the emergency may not be over even thoughthe shooter fled:

3. The victim repeatedly asked when emergency medical services would arrive suggested that his primary purpose was to obtain medical assistance;

4. The police interrogation was informal and the victim was not told police were seeking information for a prosecution. Id, 1163-66.

This court should not automatically conclude that Seth Fassettt perceived an ongoing emergancy or responding to it was his primary purpose. Case-specifc factors suggest that his purpose was testimonial. First, unlike in Bryant, Hans Fassett testified at trial to a statement told to him by Seth Fassett. Hans Fassett was interviewed by police, and only upon questioning at the police district did he tell the police about Seth Fassett's statement. The staement that, "Gun, he has a gun," is the definition of evidence establishing the facts of a past crime in order to identify the perpertrator.

The trial court's opinion did not consider the above factors but, rather, focused on the facts establishing whether or not the staemnet qualified as hearsay exception. There was no discussion about whether or not this was a teatimonial statement.

The Court's reasoning would improperly enable any witness to testify to any statement made by any person as long as a crime occured within a short period of time from the statement. This allows witnesses to set uo an innocent person pr speculate on the shooter's identity. As long as they do so in the heat of the moment and within a certain period of time after the shooting, thier statements are not subject to Confrotation Clause challenges.

Futhermore, admitting Seth Fasset's Statement Was Not Harmless Error . There is a reasonable probability of a different outcome had Seth Fassett's statement been excluded because (1) the other evidence of Appellant's guilt was weak, and (2) the statments played a large role in the trial. The trial evidence was relatively weak in that it relied primiraly on eyewitness identifacation from sources whichwere inconsistent internally and with each other.

Inconsistant statements are obvious . Hans Fassett testified that he saw the Appellant holding a large, black semi automatic hand gun, Carlton Keys testified that he saw the handle of a nickel-plated semi-automatic handgun protruding fromthe Appellant's side. Nicholas Milton testified that he saw Appellant pull a nickel plated or aluminum gun from his side. In other words, ther was no agreement as to the type of gun.

Hans Fassett was not able to testify as to who broght the gun to the fight, And he could not tell where the gun was hidden proor th the shot being fired. In fact, Hans Fassett was unable to testify with any clarity because he and his brother were working together to fight a single person, The Appellant. Hans Fassett was in a fight; at various times he was standing , knocked down, grappling,rolling around and then getting back up. Hans Fassett was swinging and hitting while getting hit. He was in no position to accurately descrobe how the shooting occured.

If all of the witnesses are to be believed, somehow Carlton Keys was able to see a gun that neither Seth nor Hans Fassett were able to see from a much closer position. Carlton Keys testified that he walked on Girard Avenue from the intersection of Redfield to the intersection of 59th Street before he heard the gunshot. This would have taken at least a minute or two to walk that distance. In the time that elasped while Carlton Keys walked away, Hans and Seth Fassett did not see a gun.

Oddly enough, Nicholas Milton provided a version of the shooting diffrent from anyone else. Nicholas Milton did not observe a life and death struggle like the one desribed by Hans Fassett, and he saw Carlton Keys standing just a few feet from the victim at the time of the shooting. Nicholas Milton was inside the garage with the victim just before the shooting. He saw the victim go outside, but he couldn't see what was happening from his position. He only stood up and went to the door to see what was happening after he heard Seth Fassett say he has a gun. Nicholas Milton testified that Carlton Keys was on the pavement standing6 or 7 feet away from wher Seth Fassett was shot. Id. at 267.

Firthermore, no eyewitness reliably saw the Appellant shoot the victim. Hans Fassett could not see who was holding the gun when it went was fired. Carlton Keys did not see who fired the lethal shot because he walked down the block.

Nicholas Milton testified that he saw the Appellant standing up-right facing Seth Fassett with the gun pointed at Seth Fassett's stomach and Seth Fassett falling back.

The evidentiary deficiencies go further. There was no physical or forensic evidence of the shooter's identity. The firearm was not recovered and there was no ballistics evidence linking the firearm to the Appellant. The police did not find any evidence such as ammunition, a holster, cleaning kit or storage box to infer the Appellant owned, possessed or had access to a firearm.

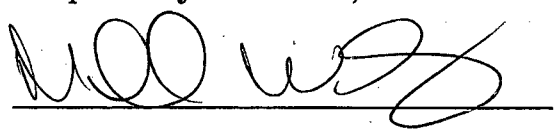
Appellant was prejudiced because he was not able to confront his accuser. First, the staement in short and potentially misleading and likely to confuse the jury. There was clearly more happening just before the shooting and there was very likely more said. Seth Fassett exclaiming "he has a gun" could have meant " he has the gun that he just took from me when I pulled it out on him." The jury was not given any context to the statement and Appellant was deprived of the opportunity to explor the statement through cross-examination. There is a discrepacy as to who fired the gun, who brought the gun, what color was the gun used, where the Appellant was standing relative to Hans and Seth Fassett and what caused the gun to fire. The problems with Hans and Fassett, Carlton Keys and Nicholas Milton identification are noted above. Seth Fassett's staement was a major piece of evidence at trial, and, were it believed, Appellant was the person who brought the gun to the fight.

However, unlike with Hans Fassett,Carlton Keys and Nicholas Milton, Appellant did not have the opportunity to confront Seth Fassett or cross-exam him about the accuracy of his staement and the context in which it was made.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 12-16-19