DISTRICT OF COLUMBIA COURT OF APPEALS

Draft copy

No. 18-CF-1242
DAVID SUTTON
Appellant

CF3-14299-16

v.

UNITED STATES
Appellee

PETITION FOR REHEARING OR REHEARING *EN BANC*

This *Petition* represents a question of exceptional importance, that is, at what point does an aggravated assault occur for purposes of the government proving beyond a reasonable doubt that appellant was armed with or had readily available a firearm, where no firearm was used in effectuating the assault.

Additionally, *en banc* consideration is necessary to maintain uniformity of this Court's decisions. Appellant Sutton contends that the Panel misapprehended a critical point of law when it concluded that "it is enough that the evidence supported an inference that the gun was readily available to Mr. Sutton as he set in motion the collision that led to [the complainant's] injuries" (Memorandum Opinion and Judgment, 18-CF-1242, p.7). Such finding by the Panel conflicts with this Court's ruling in *Frye v. United States*, 926 A2d 1085, 1096 (DC 2005), as will be examined below.

A. Background

The government put on evidence that appellants participated together in a series of offenses over the course of about an hour and a half – beginning in DC with the theft of an automobile belonging to Silverio Casas and culminating with wrecking that same vehicle in an accident in DC that left Ms. Leidy Navarro seriously injured. The government put on evidence that appellants committed three armed robberies in Washington, DC, and a fourth robbery in Mt. Rainier, MD (which was introduced as other crimes evidence going to identity). Appellants were charged as co-conspirators in the series of robberies based on, among other things, testimony regarding the timing of the offenses and location of Sutton and Gregory's cellphones and calls between them. The government put on expert testimony as to Ms. Navarro's injuries and medical treatment.

B. Argument

The government presented insufficient evidence at trial for the jury to find Appellant Sutton guilty beyond a reasonable doubt of aggravated assault against the complainant, Ms. Navarro "while armed with or having readily available a pistol or other firearm or imitation thereof," and the possession of a firearm during a crime of violence count connected to that charge.

1. The Offense of Aggravated Assault While Armed Does Not Occur Until the Collision in this Case Which Resulted in Significant Bodily Injury.

Contrary to what the government argued in its brief – and contrary to what the Panel appeared to find, there is no offense of aggravated assault *before* an injury actually occurs. The government argued in its brief that "the aggravated assault occurred not after the crash, but just before it, when Sutton recklessly drove at a high rate of speed through multiple red lights and stop signs and then collided with Navarro's car" (Brief for Appellee p. 45-46). At oral argument Judge Deahl posited a hypothetical:

> Let's say I've got a spear, like a javelin, and I see somebody 30 feet away from me and I chuck it at them and strike them, have I committed an aggravated assault while armed despite the fact that by the time it connects, I'm no longer in possession of that spear?

(Oral Argument Video, February 16, 2021 at 1:10:35)

When below signed counsel submitted that, yes, if the victim suffered a serious bodily injury as a result of being struck by the javelin, the assailant may have committed an aggravated assault while armed, J. Deahl followed up with the question: "Even though I'm not armed at the time it connects?" (*Id* at 1:11:08).

On the one hand, the Panel's hypothetical seems to suggest that the offense of aggravated assault can occur before actual physical contact and injury, but while such contact appears inevitable. Alternatively, the Panel appears to suggest that, while the firearm in the vehicle may not have been in Appellant Sutton's possession at the time of the collision/injury, he could still be considered to be "armed" with that weapon. The logical misstep here is that – while a javelin

launched from an assailant's hand or a bullet spiraling from a gun is no longer in the possession of the assailant – the javelin and the bullet are nonetheless both the source of the complainant's injury. In the instant case, the *automobile* was the source of Ms. Navarro's injury and thus, the hypothetical does not accurately mirror the facts of the instant offense by suggesting that a weapon – whether or not in the possession of an assailant - could still cause injury.

Appellant Sutton contends that fleeing from the police (even if that did amount to setting in motion events that ultimately led to a collision) is not sufficient evidence to sustain a conviction for aggravated assault – as the offense of aggravated assault did not occur *until* Ms. Navarro sustained the requisite injuries. As the *Frye* Court explained:

> To prove AAWA, the government must prove beyond a reasonable doubt that the accused, while armed (D.C. Code § 22-3202 (2002)): "(1) by any means . . . knowingly or purposely caused serious bodily injury to another person; or (2) "under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engaged in conduct which created a grave risk of serious bodily injury to another person, and thereby caused serious bodily injury." Riddick v. United States, 806 A.2d 631 at 639 (citing D.C. Code § 22-404.01 (2001)). To prove an attempt to commit the offense of AAWA, the government must prove that the accused: (1) intended to commit that particular crime; (2) did some act towards its commission; and (3) and failed to consummate its commission.

Frye at 1095 (citations omitted).

Appellant's argument is that the aggravated assault occurred at the time of the vehicle collision, and not prior to that collision – no matter how reckless

Appellant Sutton's behavior in trying to evade the police. Indeed, the government cites *Frye v. United States*, 926 A2d 1085, 1096 (DC 2005) where this Court held that the defendant was guilty only of *attempted* aggravated assault while armed where he drove his vehicle at the victim – a former girlfriend – and would have been guilty of the completed offense of aggravated assault while armed only had he succeeded in hitting the victim's car with his own and causing injuries.

The government's argument that "had the gun been placed anywhere in Sutton's reach *until* the car crashed, it would have been "readily available" to him" (Govt. Brief at 46)(emphasis added) is erroneous, as there is no *aggravated* assault until there is actual contact with the victim and the requisite serious injuries required by that offense. As *Frye* makes clear, until there is an injury, the crime is only an attempt crime; there is no aggravated assault. Thus, while Appellant Sutton is driving recklessly, but has not yet collided with Ms. Navarro, there is no aggravated assault, and whether or not a gun was within his reach prior to the offense, it does not follow that he possessed it actually or constructively at the time of the offense. Appellant Sutton submits that the Panel is incorrect in finding that "it is enough that the evidence supported an inference that the gun was readily available to Mr. Sutton as he set in motion the collision that led to Ms. Navarro's injuries" (MOJ at 7). The relationship of Mr. Sutton to

the firearm before the crash is not the only relevant inquiry, as the offense of AAWA does not happen until the collision and, at the time of the collision, there exists an entirely different set of spatial circumstances than existed prior to the crash. This Court has found that previous possession of contraband as part of a "concert of illegal action" is a factor the jury may consider in determining whether an appellant exercised constructive possession over that contraband. *Wheeler v. United States*, 494 A2d 170, 173 (DC 1985). However, in addition to evidence of prior use of the weapon during the robberies, the government in this case was obligated to show that, at the time of the offense, appellant had "some appreciable ability to guide [the contraband's] destiny." *Wheeler* at 172 (citations omitted). That is the crux of Appellant Sutton's argument.

2. The Government's Evidence was Insufficient to Prove Beyond A Reasonable Doubt that Appellant Sutton was Armed With Or Had Readily Available a Firearm at the Time of the Collision.

The offense of aggravated assault did not occur until the collision. Even given that the gun was jointly possessed during the course of earlier robberies, it does not follow that Appellant Sutton either possessed or had access to the gun at the moment of the car crash and, most significantly, the government did not prove that he did beyond a reasonable doubt. Possession requires more than knowledge of the gun's presence; it requires proximity and ease of access at the time of the offense.

The government's evidence in the instant case was that Appellant Gregory, immediately after the crash, was found crawling out of the woods with a gun in his pants. There was no evidence that the weapon was on Appellant Sutton's person or readily available to him at the time of the car crash. Evidence at trial suggested that the gun actually belonged to Appellant Gregory, as a search warrant of his home turned up a magazine compatible with the gun recovered by police and used in the offenses.

Testimony and photos of the wreck admitted into evidence dictate that any loose item in a vehicle crashing with the force and speed described at trial would go flying, and that such a loose item, for example a gun, would be neither in close proximity to nor easily accessible to Sutton at the time of the crash. Indeed, the evidence showed that Appellant Sutton was injured at the time of the crash when his head slammed into the windshield – even more reason to doubt that he had easy access to a weapon.

Such conclusion is supported by testimony at trial that Gregory was the second individual to flee the car and that he left the car sometime after Sutton (about 30 seconds on the video of the crash and subsequent events) – time during which he was certainly retrieving his gun from the car. Indeed, the jury already heard from Mr. Rivas that Gregory returned with Sutton to retrieve his weapon once it was wrested away during a robbery attempt. The gun was important

enough to Gregory to risk an encounter with the complainant in Maryland and thus risk being identified.

Finally, Appellant Sutton was not charged with, nor was the jury instructed on, aiding and abetting or conspiracy in regards to the aggravated assault count.

The jury in the instant case was asked to make the illogical leap that Sutton was armed with a weapon during the car crash – despite the violence of the crash, despite the fact that the weapon was recovered from co-defendant Gregory immediately after the crash, and despite there being no evidence that the weapon was on Sutton's person or accessible to him at the time of the aggravated assault against Ms. Navarro (i.e. at the time of the crash).

Given the lack of evidence from which a jury could find beyond a reasonable doubt that Appellant Sutton was armed with or had readily available a firearm at the time of the assault against Ms. Navarro appellant submits that this Court should apply the rule of lenity and vacate his conviction for aggravated assault while armed and the corresponding PFCV count.[1]

[1] Although Mr. Sutton did not object to the wording of the indictment pre-trial and it was not an issue at trial, below signed counsel urges this Court not to condone the "while armed" indictment in this case, where the weapon used in the assault, the weapon that caused Ms. Navarro's injuries, was not a firearm but an automobile. Counsel submits that it is patently unfair to expose Mr. Sutton to the greatly increased sentences that 22 DC Code Sections 4502 and 4504(b) authorize when a firearm was not even a factor in the assault, and a precedent that this Court should not set.

Only if one assumes that the crime occurs before the crash is the location of the gun irrelevant at the time of the crash. The location of a firearm during a "while armed" offense is in fact the relevant fact and one that the government failed in this case to prove beyond a reasonable doubt.

CONCLUSION

Petitioner submits that this Court should rehear his case and reverse the Panel's decision issued March 3, 2021, as it pertains to the while armed component of AAWA and corresponding PFCV count.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of _____ 2020, a copy of the foregoing En Banc Petition was served on the Court and delivered to the Office of the U.S. Attorney for the District of Columbia, Appellate Division, 555 4th St, NW, Washington, D.C. 20530 via the DCCA E-File System.

/s/

Nancy E. Allen

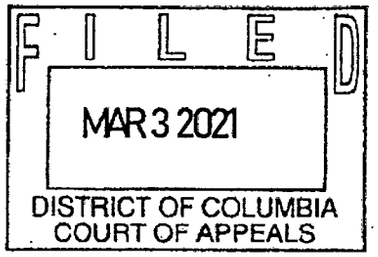
DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 18-CF-1242 & 18-CF-1268

DAVID SUTTON & DACQUAN GREGORY, APPELLANTS,

v.

UNITED STATES, APPELLEE.



Appeals from the Superior Court
of the District of Columbia
(CF3-14299-16 & CF2-14063-16)

(Hon. Ronna Lee Beck, Trial Judge)

(Argued February 16, 2021 Decided March 3, 2021)

Before THOMPSON and DEAHL, *Associate Judges*, and GREENE, *Senior Judge District of Columbia Superior Court.*[*]

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Following a jury trial, appellants David Sutton and Dacquan Gregory were convicted of conspiracy to commit robbery, car theft, unauthorized use of a vehicle during a crime of violence (UUV-CV), two counts of robbery while armed, two counts of assault with a dangerous weapon (ADW), and four counts of possession of a firearm during a crime of violence (PFCV). In addition, Mr. Gregory was separately convicted of one count each of carrying a pistol without a license (outside home or place of business), possession of an unregistered firearm, and unlawful possession of ammunition. Mr. Sutton was separately convicted of one count of unlawful possession of a firearm by a convicted felon, one count of aggravated assault while armed ("AAWA") (against Leidy Navarro), and a corresponding count of PFCV. The offenses were all in connection with incidents that occurred within less than two hours of each other on the afternoon of August 30, 2016. In these consolidated appeals, Mr. Gregory

[*] Sitting by designation pursuant to D.C. Code § 11-707(a) (2012 Repl.).