

SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DE 19801-3733
TELEPHONE (302) 255-0670

August 22, 2013

Matthew B. Frawley, Esquire
Department of Justice
820 N. French Street, 7th Floor
Wilmington, DE 19801

Eugene J. Maurer, Jr., Esquire
Eugene J. Maurer, Jr., P.A.
1201-A King Street
Wilmington, DE 19801

RE: State of Delaware v. Kevin J. Ramos
ID No. 1208009169

Submitted: June 19, 2013

Decided: August 22, 2013

Dear Counsel,

The defendant was indicted by the Grand Jury on charges of Carrying a Concealed Deadly Weapon, Possession of Ammunition by a Person Prohibited and Possession of a Firearm by a Person Prohibited on January 22, 2013. The case was scheduled for a jury trial on May 23, 2013 but just prior to the selection of the jury, the parties agreed to a bench trial. Evidence was presented on May 23rd and 24th including testimony from the defendant. At the conclusion of the evidence, the Court agreed to allow the submission of letter memorandum regarding the justification defense of “choice of evils” that had been asserted by the defendant during the trial. This is the Court’s ruling after considering the parties’ submissions.

There is no dispute that the State presented sufficient evidence to support

the charges. Officers were called to the area of Pleasant and Van Buren Streets in the city of Wilmington based upon receiving a complaint about an individual with a firearm. A description of the individual was provided, and upon arriving at the location, the officers observed an individual matching that description. As they exited their vehicle, the defendant began to run, and during the chase removed a silver handgun from his waist area, subsequently throwing the gun over a garage. The gun was recovered by the police, and the defendant was taken into custody.

While the defendant acknowledges that because of a prior felony conviction he illegally possessed a loaded gun, at trial he relied on the defense of justification or what is better known as the “choice of evils” defense. In support of this defense, the defendant testified that approximately three weeks before the arrest an incident occurred between friends of his, who were at his house for a party, and a female who was walking by and lives around the corner from his home. Soon after this incident occurred, the female’s uncle confronted the defendant and an argument ensued over what had occurred. A couple days later, while the defendant was walking home, he was struck in the head by the uncle, causing an injury to the defendant’s head area. The defendant subsequently learned that the uncle was a fugitive from Puerto Rico on what he believed to be outstanding murder charges.

The defendant did not feel he could call the police since he believed it would only make matters worse in the neighborhood where he lived. In addition to the uncle, the defendant also had a conflict with another individual in the neighborhood who believed the defendant was snitching on him, for his drug and robbery-related activity. This led to several confrontations with that individual as well. Several days prior to the defendant being arrested, the uncle, as well as the other individual, both approached the defendant brandishing a knife, but the defendant was able to escape the confrontation.

The defendant testified that he was terrified as a result of these events and believed his family was in danger. The defendant and his girlfriend even discussed leaving the neighborhood. The day before the defendant was arrested, the uncle reappeared at the defendant’s home and based upon his conduct, the defendant believed he was armed, although he never actually saw a firearm. Fearing for his life and that of his family, the defendant at that point decided to obtain a handgun.

The “choice of evils” justification defense is set forth in 11 *Del. C.* § 463. The statute states as follows:

Unless inconsistent with the ensuing sections of this Criminal Code defining justifiable use of physical force, or with some other provisions of law, conduct which would otherwise constitute an offense is justifiable when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the defendant and which is of morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder.¹

As a result, under the statute, in order for the defendant to prevail he must establish the following:

- (1) His illegal conduct was necessary as an emergency measure;
- (2) It occurred in order to avoid an imminent public or private injury which is about to occur;
- (3) The situation that led to the illegal conduct was not occasioned by or developed through any fault of the defendant; and
- (4) The situation is of such gravity that according to the ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweighs the desirability of avoiding the illegal conduct.

¹ 11 *Del. C.* § 463.

For the reasons set forth below, the Court finds the defendant has failed to set forth sufficient facts to establish at least three of the four elements and, therefore, will find the defendant guilty of all counts.

The applicability of the “choice of evils” defense to justify the arming of oneself for protection has not been specifically addressed previously in this jurisdiction. The two factually closest cases, *Holmes v. State*² and *Mills v. State*,³ both involved whether the jury should be instructed on a “choice of evils” defense and ruled the facts did not support such a request. However, similar defenses have been raised in Maryland, California, Maine, and New Hampshire and those cases are helpful in analyzing this issue. In the Maryland case of *State v. Crawford*,⁴ the defendant was charged with illegally carrying a handgun. Based on Crawford’s testimony, which was contradicted by the police, he believed an intruder had entered his apartment and was shooting at him.⁵ During a subsequent struggle he was thrown through a window, but as luck would have it, a handgun dropped beside him and he subsequently used it to protect himself.⁶ In deciding the case, the Maryland Court of Appeals ruled:

As we see it, the 1972 handgun control legislation does not address the unexpected and sudden circumstance when an individual is threatened with present, impending danger to his life or limb and as a consequence has no time to seek other protection. Furthermore, we cannot accept the contention that, in such circumstances, the General Assembly intended that the individual should succumb to his attacker and possibly forfeit his life rather than take possession of a handgun and act in self-defense. We find it entirely reasonable and consistent with § 36B’s legislative purpose to conclude that when an individual finds himself in sudden, imminent danger of loss of life or serious bodily harm, or reasonably believes himself or others to be in such danger, and without preconceived design on his part a handgun comes into his possession, he may temporarily possess the weapon for a period no longer than the necessity or apparent necessity requires him to use it in self-defense. We therefore hold that necessity may be a defense to the charge of unlawful possession of a handgun.⁷

After articulating the requirements for the “choice of evils” defense, the court

² 2010 WL 5043910 (Del. Dec. 9, 2010).

³ 732 A.2d 844 (Del. 1999).

⁴ 521 A.2d 1193 (Md. 1987).

⁵ *Id.* at 1194-96.

⁶ *Id.* at 1195.

⁷ *Id.* at 1199.

found that the jury should have been instructed on the “choice of evils” defense stating:

Based on Crawford’s testimony, he satisfies each element of the test. First, after being attacked and shot, Crawford wrestled the gun away from one of his assailants, and in so doing fell out of his second story apartment window. Crawford landed next to the gun. He heard footsteps coming from around the corner and picked up the gun to defend himself if the person or persons who had assaulted him in his apartment were pursuing him. Thus, Crawford had a reasonable belief that imminent peril was at hand. Second, Crawford did not intentionally or recklessly place himself in the predicament; he was attacked in his own apartment. Third, Crawford was wounded and dazed. Crawford had no opportunity to contact the police to seek protection, and neither retreating nor trying to talk to his assailants was a reasonable, legal alternative. Fourth, Crawford’s possession of the handgun was merely fortuitous. The handgun was originally possessed by Crawford’s assailant and only became available to him after he disarmed the assailant. Thus, Crawford had no preconceived design to gain possession of the handgun before being attacked. Fifth, after grabbing the handgun, Crawford crawled and staggered away from his apartment in an effort to reach safety, but his assailants continued to follow and shoot him. He surrendered the handgun when a police officer stood beside him so that he could see the officer’s pants leg and thus be sure he was out of danger. Thus, if the jury believed Crawford’s testimony on each of these points, a defense of necessity would have barred conviction.⁸

Unfortunately for the defendant here, the factual situation is significantly different. While the Court will not minimize the fear the defendant may have felt, there was no immediate impending peril of death or serious bodily injury. Ramos also had an alternative to arming himself, which was to contact the police, which

⁸ *Id.* at 1201 (footnotes omitted).

he had time to do. In addition, he purchased the gun the day before reflecting a preconceived design to use the weapon if subsequently confronted again. As such, *Crawford* does not support the defendant's position in the present case.

The Supreme Court of California created a test similar to Maryland's that required the defendant to establish

(1) [he] is in imminent peril of great bodily harm or reasonably believes himself or others to be in such danger, (2) without preconceived design on his part a firearm is made available to him, (3) his temporary possession only persists until the necessity or apparent necessity dissipates, and (4) no other alternative means of avoiding the danger are available.⁹

Using this standard, Mr. Ramos's conduct, again, would not support a claim of self-defense. His situation was not imminent, neither he nor others were in peril of any great bodily harm at the time the event occurred, his conduct was preconceived, and he had alternatives available to avoid the danger.¹⁰

Maine and New Hampshire have "competing harms statutes" that are more liberal in allowing consideration of the defendant's objective belief that his conduct was necessary.¹¹ However, they too require that the threat of physical harm is one that is imminent or that the conduct was urgently necessary and that there is no reasonable legal alternative available to avoid the conduct.¹² Again, those elements are not found in Mr. Ramos's case.

While the Court can sympathize with the situation confronting the defendant, it cannot condone Mr. Ramos, in essence, taking the law into his own hands and arming himself. The "choice of evils" defense is only available in this jurisdiction to a defendant when the evidence supports a finding that the defendant's conduct was in response to an emergency situation to avoid imminent physical injury, caused by no fault of the defendant. The Court correlates "emergency measure" to a situation that exists without conceived design or plan

⁹ *Crawford*, 521 A.2d at 698 (quoting *People v. King*, 582 P.2d 1000, 1007 (Cal. 1978)) (internal quotation marks omitted).

¹⁰ See also *United States v. Gant*, 691 F.2d 1159 (5th Cir. 1982).

¹¹ Me. Rev. Stat. tit. 17-A, § 103; N.H. Rev. Stat. Ann. § 627:3.

¹² *Id.*

by the defendant. The Court finds that “imminent” requires an event that is occurring in at least close proximity to the time of the defendant’s possession of the weapon. Arming oneself in anticipation that a confrontation may occur in the future is simply not available as a defense in this jurisdiction. While perhaps appropriate in Cheyenne, Wyoming in the late 1800s, it is not acceptable by any reasonable standard more than a century later in a modern city.

The Court finds Mr. Ramos’s conduct was preconceived and not in response to an emergency situation. His situation did not reflect a threat of imminent physical harm and he had the time and ability to contact the police if he desired to do so, something that societal standards of intelligence and morality would expect. As a result, the Court finds the defendant guilty of all charges, a presentence investigation will be ordered, and sentencing will occur on November 1, 2013, at 9:30 a.m.

Sincerely yours,

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.

WCCjr:twp

cc: Prothonotary
Investigative Services