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Case Number 485,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEITH M. SCHUELLER,	*	
	*	
Plaintiff-Below,	*	**Case No. 485, 2017**
Appellant,	*	
	*	
v.	*	**Court Below:**
	*	**Superior Court — New Castle County**
	*	**Case No.: N14C-10-201EMD**
BRETT CORDREY et al.,	*	
	*	
Defendants-Below,	*	
Appellees.	*	

APPELLANT'S REPLY BRIEF

Dated: March 28, 2018

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ARGUMENT

I. THE TRIAL COURT'S RULINGS WERE NOT SUPPORTED BY THE RECORD

The Defendants-Appellees ("Defendants") appear to agree with the Plaintiff-Appellant that the factual findings of the trial court must be accepted by this Court only if they are sufficiently supported by the record and are the product of a logical deductive process. *See* Appellees' Br. 10 (quoting *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)). The case law and record references cited by the Defendants, however, do not alter the conclusion that the trial court's rulings were "clearly wrong and the doing of justice requires their overturn." *Levitt*, 287 A.2d at 673.

A. Use of the Shovel

The Defendants do not appear to dispute that the eyewitness, Kelly Boyer ("Boyer"), to Corporal Cordrey's chase of Schueller did not testify to seeing Schueller use the shovel in a violent/deadly manner, instead explaining that Schueller was merely dragging the shovel behind him as he ran away from Corporal Cordrey as fast as he could. A61:13–A62:11. Nor do the Defendants appear to refute that the other officer testified that he did not see Schueller threaten Corporal Cordrey with the shovel. A319 at 94:10-14. Despite these admissions, however,

the Defendants suggest that the trial court's references to Corporal Cordrey's testimony being corroborated by the MVR and from testimony of fact witnesses, Appellee's Br. 13 (citing *Schueller v. Cordrey*, 2017 WL 3635570, at *9 (Del. Super. Ct. Aug. 23, 2017)), as evidence for the notion that the trial court's ruling is supported by the record. None of the fact witnesses supported any assertion by Corporal Cordrey about the use of the shovel, and any reference by the court to fact witnesses corroborating Corporal Cordrey cannot reasonably be viewed as support for his assertions about what was happening during the shooting.

Contrary to the Defendants' suggestion, no effort is being made to discredit Corporal Cordrey. Instead, the trial court's credibility determination is being accepted at face value. The trial court ruled that "Cpl. Cordrey does not seem to remember exactly what happened when he pulled the trigger on his firearm *or exactly what Mr. Schueller was doing at that point in time*." *Schueller*, 2017 WL 3635570, at *9 (emphasis added). If the court was not looking to Schueller's alleged actions at the time of the shooting, the only remaining "use" of the shovel was that provided by Boyer that Schueller was doing no more than dragging a shovel behind him. Such facts would not support a conclusion that the shovel was used as a dangerous instrument, as the very case law cited by the Defendants demonstrates.

In *Taylor v. State*, 679 A.2d 449 (Del. 1996), while there was no evidence at the root of his charge that the accused ever actually handled the fan, the evidence demonstrated that he "beat the victim's head against the base of the fan." *Id.* at 450. Those actions were what allowed the appellate court to reasonably conclude, as the criminal trial court had, that "a floor fan could, under the circumstances of its use in this case, constitute a deadly weapon as that term is defined in 11 *Del.C.* § 222(5) and (6)." *Id.*

In *Commonwealth v. Masten*, 2017 WL 1839239 (Pa. Super. Ct. May 5, 2017), the defendant was one of a pair of men who shouted at the victim, "[w]e're going to kill you mother****er," *id.* at *1 (censorship added), before "hit[ting] the victim's head with a foot-long military shovel," *id.* It was not merely the act of possessing a shovel but the act of striking at the victim's head that allowed both the lower court and the *Masten* court to find that there was evidence of an intent to kill sufficient to render the shovel a "deadly weapon." *Id*. at *3-4.

Similar actions, beyond the simple possession of a shovel, were taken by the defendant in *State v. Tackett*, 2001 WL 721852 (Tenn. Crim. App. June 28, 2001). In *Tackett*, the defendant conceded that the victim had been struck in the head with a shovel during a robbery. *See id.* at *3 n.2. Despite this concession, there was

additional testimony by the victim that he used a handgun to "fire[] at the defendant as the defendant charged at him with the shovel." *Id.* at *4.

Boyer, the eyewitness to the events, did not testify that Schueller took any of these types of deadly/violent actions. She merely testified that Schueller was dragging the shovel behind him as he attempted to flee. A61:13–A62:6. Even if the court had found Corporal Cordrey's testimony regarding the shooting credible, the Corporal was clear that at no time did Schueller attempt to advance on him so as to attack. A621 at 00083:01-07 (while alleging that Schueller was swinging and moving his feet around, Corporal Cordrey is clear that Schueller was not coming any closer or attempting to close the distance); *see also* A70:1-18 (Boyer testified that when Schueller stopped the first time, he did not attempt to harm Corporal Cordrey but he put down the shovel and placed his hands on his knees before picking the shovel back up and running away). Accordingly, the court was left with no factual evidence to support its conclusion.

As a final attempt to create support for the trial court's conclusion, the Defendants note that their expert, Schueller's expert, and the trial court all indicated that a shovel could be a deadly weapon. *See* Appellees' Br. 14. The mere fact that a shovel *could* be a deadly weapon, however, is not evidence that it actually *was* used as a deadly weapon. As *Taylor* demonstrates, simple common items can be

deadly weapons, but only if there is evidence that they were used as such. The mere fact that a shovel, like the fan in *Taylor*, could be a deadly weapon is simply not evidence that it was actually used as such.

B. Time Between Boyer Losing Sight and the Shooting

Despite claims to the contrary, no effort has been made to "pin down a precise number of elapsed seconds." Appellees' Br. 15. There can be no doubt that during her deposition, Boyer provided differing time frames on the day of the incident and at trial. These discrepancies, however, did not provide the trial court with a "reasonable margin of error" that doubles the amount of time between Boyer's losing sight of the chase and Corporal Cordrey's shooting of Schueller in the back. *Id.* While initially providing a guess concerning what she thought she had said regarding the timing, *see* A76:5-9, Boyer clarified at trial that she believed it was "around five seconds from what I can recall, give or take a second," A118:19-21. Moreover, she admitted that her memory was more accurate on the day of the shooting, A109:5-9, when she told investigators that only a second had elapsed, A132:6-22. This vacillating testimony certainly would not provide the trial court with a precise number of elapsed seconds. It would provide a range of time from one to five

seconds, however, not the seemingly three to ten second range, which the court used. *See Schueller*, 2017 WL 3635570, at *10 n.36.

The Defendants attempt to downplay the significance of the trial court's error by explaining that what would have taken place between Boyer losing sight and the shooting was (1) a "continued foot chase for the short distance," (2) Schueller's stopping and turning to face Corporal Cordrey; (3) Corporal Cordrey's advising Schueller to stop swinging the shovel; (4) Schueller's not responding and continuing his actions; and (5) Corporal Cordrey's "fir[ing] his service weapon." Appellees' Br. 15. Despite providing its own list of at least five actions that would need to take place, Defendants bizarrely suggest that "there is no evidence in the record to support a lengthy exchange." *Id*. at 15-16. This leap in logic, the Defendants claim, is supported by the fact that "[m]any of these brief events could occur simultaneously." *Id*. at 15. No citation is made, however, suggesting such a finding was made by the trial court. Even assuming, arguendo, that this was the trial court's rationale, such simultaneous occurrences are not supported by either the record or logic.

To begin, the first two events could not have occurred at once, since a continued foot pursuit between the parties cannot possibly occur at the same time Schueller allegedly stops running and turns to face Corporal Cordrey. Nor does the record support the notion that Corporal Cordrey could have ordered Schueller to stop

swinging while still chasing Schueller. On the contrary, Corporal Cordrey admitted that he did not even realize that Schueller possessed the shovel until he finally caught up with him. *See* A544:12-16, A618 at 00064:24–00065:03 (it "didn't register" that Schueller even had a shovel in his hand during the foot pursuit); A559:19–A560:3 (Corporal Cordrey noticed the shovel after Schueller came to a stop the second time).

The remaining events cannot occur simultaneously either unless the Defendants are suggesting that Corporal Cordrey's command to put down the shovel and surrender occurred at the exact same moment that he shot Schueller in the back. It would seem unlikely that the Defendants are making such an admission at this point, however, which means that neither the record nor logic supports any argument that the sequence of events between Boyer's losing sight of the chase and Corporal Cordrey's shooting of Schueller occurred simultaneously. Accordingly, even if the trial court were to have assumed as much in making its findings, those assumptions and findings would still be in error.

C. The Shooting

The trial court found that "the expert witnesses only helped the Court realize that *without credible facts surrounding the actual shooting*, the Court cannot actually know what happened near the shed when Cpl. Cordrey shot Mr. Schueller." *Schueller*, 2017 WL 3635570, at *8 (emphasis added). As outlined in the Opening Brief, the finding that there were no credible facts surrounding the actual shooting is simply not supported by the record. Instead, there were no credible facts supporting the conclusion that Schueller turned when he was shot by Corporal Cordrey. The Defendants do not appear to contest any of the specific facts outlined in the Opening Brief. Instead, they note only that the court did not find these specific facts helpful. In an attempt to salvage the trial court's conclusions, the Defendants also refer to testimony concerning physical and legal possibilities. *See* Appellees' Br. 17-19.

The Defendants, for example, argue that the Plaintiff's own expert, Dr. Bauer, "agreed that Plaintiff could have been facing Cpl. Cordrey at the time of the gunshot and then turned 180 degrees or made a powerhouse swing such that Plaintiff would end up with a bullet wound in his back." *Id.* at 17-18. The testimony cited in support of this position does not evince a belief on the part of Dr. Bauer that there was any evidence to support this conclusion but, rather, only a physical possibility.

See, e.g., A308 at 53:8-12 ("Q: He cannot turn 180 degrees under any circumstances? A: Didn't say that. I'm just trying to get a clarification if you said he's facing Trooper Cordrey."). Recognizing that an action is physically possible, however, does not create any evidence that the action actually took place. Nor does it alter Dr. Bauer's prior testimony that the type of swing theorized is actually refuted by the physical evidence. *See* A302 at 26:12–27:1 (if Schueller was in the middle of a big swing, the bullet entry should have been farther away from the center of Schueller's back).

The Defendants also note that one of their witnesses ("Kapelsohn") offered testimony concerning how Schueller could have been shot in the back and that the "the Court [found] the testimony of Mr. Kapelsohn to be more helpful." Appellees' Br. 18 (alteration in original) (quoting *Schueller*, 2017 WL 3635570, at *8). The trial court's opinion, when read in context, outlines the futility of attempting to tie Kapelsohn's theory with the court's finding. In the sentences proceeding the statement concerning the helpfulness of Kapelsohn's testimony, the court is contrasting the testimony concerning the use of force by Corporal Cordrey. *See Schueller*, 2017 WL 3635570, at *8 (footnotes omitted) ("Dr. McCauley also testified that Mr. Schueller was not a danger to the public as he was evading arrest and not trying to harm others. Not surprisingly, Mr. Kapelsohn testified that, upon

his review of the facts and with his assumptions, Cpl. Cordrey was justified in the use of deadly force."). Moreover, the sentences following the court's finding reinforce the conclusion that the mere use-of-force testimony is what the court found agreeable, not a random hypothetical unsupported by the physical evidence. *See id.* (the trial court explained that it agrees that "a shovel can be a dangerous weapon and that a person actively resisting arrest while carrying that shovel poses a threat to officer and public safety" and that "the Court does not find it credible that a Delaware State Trooper should just follow a shovel toting person who is resisting arrest while that person goes about populated areas").

Even if the trial court's decision were not so clear, it had previously ruled that Kapelsohn was not qualified as a "force science analyst." AR5, ¶ 9. Accordingly, the trial court excluded sections of Kapelsohn's report which dealt with issues such as Kapelsohn's conclusion that "Schuller Could Have Struck Tfc Cordrey With the Shovel in A Second or Less." AR5, ¶ 10. In light of these rulings, any attempt by the Defendants to tie the trial court's finding to hypotheticals that flies in the face of the physical evidence and opinions upon which the trial court already expressed doubts is futile at best and misleading at worst.

In a final attempt to salvage the trial court's conclusions regarding the shooting, the Defendants note that "the trial court found that Plaintiff **was** waving

the shovel around prior to the shooting." Appellees' Br. 19 (bold in original) (citing *Schueller*, 2017 WL 3635570, at *10). It defies logic, and legal authority, to suggest that the evidence supporting a court's conclusion is the mere fact that the court reached that very conclusion. Unsurprisingly, the Defendants cite to no case law in support of this unique theory. Instead, as previously noted, the *Levitt* court made it abundantly clear that factual findings must be "sufficiently supported by the record." 287 A.2d at 673. The trial court's factual finding cannot be supported by the record, as the Defendants concede, because the "Plaintiff correctly notes that there is no factual witness to explain that such a swing or turn took place." Appellees' Br. 19. In the absence of any factual witness or evidence on the record from which to conclude that such a swing or turn took place, the trial court's findings that such a swing did take place cannot possibly be viewed as "sufficiently supported by the record." *Levitt*, 287 A.2d at 673.

CONCLUSION

For the foregoing reasons and those contained in his Opening Brief, the Plaintiff-Appellant, Keith M. Schueller, respectfully requests that this Court reverse the trial court's August 23, 2017 decision and remand the case for the consideration of damages.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the typeface requirement of Sup. Ct. R. 13(a)(i) and the type-volume limitations of Sup. Ct. R. 14(d)(i). It was prepared in Times New Roman 14-point typeface and contains 2,514 words, which were counted by Microsoft Word 2013, the word processing program used to prepare this document.

Date: March 28, 2018

/s/ *Stephen P. Norman*
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