

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO)	CASE NO. CR 14 580457 A
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JOURNAL ENTRY DENYING THE</u>
)	<u>DEFENDANT'S CRIMINAL RULE 29</u>
)	<u>MOTION FOR A COMPLETE</u>
MICHAEL BRELO)	<u>ACQUITTAL BUT GRANTING</u>
)	<u>HIS MOTION FOR AN ACQUITTAL</u>
Defendant.)	<u>ON THE FIREARM SPECIFICATIONS</u>

John P. O'Donnell, J.:

Defendant Michael Brelo is a Cleveland police officer on trial for two counts of voluntary manslaughter for the deaths of Timothy Russell and Malissa Williams on November 29, 2012. Each count carries a three-year firearm specification under section 2941.145 of the Ohio Revised Code. Russell led police on a car chase that lasted about 22 minutes and ended in a parking lot in East Cleveland. Williams was his passenger. Both were killed by police bullets after 13 officers fired at least 137 shots over 17.8 seconds.

A bench trial began on April 6, 2015. After 13 days, 38 witnesses and hundreds of exhibits the state concluded its presentation of evidence on April 22 and the defendant made an oral motion for acquittal under Rule 29(A) of the Ohio Rules of Criminal Procedure. The state opposed the motion orally and in writing and this entry follows.

Criminal Rule 29(A) provides as follows:

(A) Motion for judgment of acquittal. The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses.

The due process clause of the Fourteenth Amendment to the United States Constitution protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt. *State v. Bridgeman*, 55 Ohio St. 2d 261 (1978), syllabus.

Whether the evidence is legally sufficient to sustain a guilty verdict is a question of law. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997). Evidence is sufficient under Criminal Rule 29 to sustain a conviction when there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *State v. Eley*, 56 Ohio St. 2d 169 (1978), syllabus. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *State v. Watson*, 8th Dist. No. 100356, 2014-Ohio-2395, ¶13. An essential element of a voluntary manslaughter charge is that the defendant knowingly caused the death of another. R.C. § 2903.03(A).

Brelo's first argument in favor of his motion for acquittal is that the evidence is insufficient to show that he caused the deaths of Russell and Williams. Cause is an act which directly produces the death of a person and without which it would not have occurred. *State v. Powell*, 132 Ohio St. 3d 233, 261-262 (2012). Here, Brelo argues that the state has failed to

produce sufficient evidence to prove that his shots, and not those of one or more of the 12 other shooters, directly produced the deaths of Russell and Williams.

Taking the evidence in the light most favorable to the state – as I must at this stage – a rational trier of fact could find that: Brelo shot his handgun 49 times; he reloaded twice, the second time coming just before he took an elevated position, with respect to Russell’s Chevrolet Malibu, on the trunk of a Cleveland police zone car adjacent to Russell’s car; he fired up to 15 shots directly into the Malibu’s windshield while standing atop its hood; and no other shooter fired on the Malibu from as steep an angle as Brelo. Additionally, based on the paths of bullets in their bodies and a reasonable inference about how Russell and Williams were positioned in the car, a trier of fact could also conclude that fatal wounds to each of them could only have come from Brelo’s gun. Combining all of this with Brelo’s own observations that Russell and Williams were still moving as he was on the trunk of the zone car, the evidence, viewed in a light most favorable to the state, is sufficient to persuade a rational trier of fact that Brelo caused the deaths of Russell and Williams.

Brelo’s second argument in favor of his motion for acquittal is that the state has failed to demonstrate that his use of force was not legally justified.

Where a police officer has probable cause to believe that a suspect poses a threat of serious physical harm, either to the officer or others, the officer does not act unreasonably by using deadly force. *State v. White*, Slip Opinion No. 2015-Ohio-492, ¶48. Thus, if the evidence here shows that Brelo had probable cause to believe that Russell and Williams posed a threat of serious physical harm to him or others in the parking lot (all police officers) then his conduct is legally justified and he cannot be held criminally liable. But the question presented under the Criminal Rule 29 motion is whether the state must negate the existence of legal justification by

its evidence or if Brelo's claim of legal justification is an affirmative defense that he must prove. To put it another way, the issue is whether a police officer is rebuttably presumed to be justified in using deadly force or does the officer bear the burden of proving legal justification.

Neither party has pointed me to decisional authority providing a concise answer to this question nor have I been able to find a definitive answer through my own research, most likely because "excessive force" lawsuits tend to be civil, not criminal.

But the Ohio Supreme Court's decision in *White*, supra, is useful in deciding the question. The defendant in *White* was an Ottawa Hills police officer. He pulled over a motorcyclist for suspected traffic violations. As White approached he drew his service weapon and ordered the motorcyclist to put up his hands. Instead, the biker reached toward his right side as if to get a weapon. White fired a single shot, paralyzing the motorcyclist. A grand jury charged White with a single count of felonious assault and the trial jury found him guilty of that charge and a three-year firearm specification identical to those in this case.

The trial court had instructed the jury on "justification" as an affirmative defense. On appeal, one of the issues before both the Sixth District Court of Appeals and the Ohio Supreme Court was the correctness of the substance of that jury instruction, but neither court rejected the proposition that a police officer's claim of privilege to use deadly force because the victim presented a threat of serious physical harm is an affirmative defense that the officer-defendant is required to prove. Indeed, the court of appeals, in overruling White's assignment of error that the evidence at trial was insufficient as a matter of law, said the following:

White asserts insufficiency on due process grounds, by which he means that one or more of [the] elements [of felonious assault] were not proven beyond a reasonable doubt. His specific attack is on the "knowingly" element, but he points to facts implicating defenses like "justification" and self-defense.

On four evidentiary points in the trial record there can be no dispute: (1) White was armed with his departmentally-issued pistol; (2) he intentionally shot McCloskey with it; (3) the injury resulting to McCloskey from this act was catastrophic and permanent; and (4) (to White's point) no evidence indicated that he shot McCloskey for any reason other than from an immediate fear for his safety and that of Officer Sargent.

Yet appellate review for sufficiency does not encompass the strength or merits of defenses, whether characterized as "affirmative" or not. *State v. Hancock*, 108 Ohio St.3d 57, 2006 Ohio 160, 840 N.E.2d 1032, ¶ 37. In terms of the core sufficiency of the state's case against White, without regard to his status as a peace officer, the impact of federal use-of-force law or the assertion of any defenses, the evidentiary test is simply one of adequacy. *State v. Morris*, 10th Dist. No.05AP-1139, 2009 Ohio 2396, ¶ 25 (insufficiency analysis is inapplicable to jury's rejection of self-defense claim).

Viewed in [the light most favorable to the state], and without reference to any other consideration, we find that sufficient evidence was submitted which, if believed, would prove the elements of felonious assault beyond a reasonable doubt. *State v. White*, 6th Dist. No. L-10-1194, 2013-Ohio-51, ¶¶88-92.

While the appellate court did not explicitly hold that justification is an affirmative defense, the fact that the court of appeals analyzed a claim of insufficiency of the evidence by examining only whether the state presented sufficient evidence of each element of the offense without requiring proof negating a claim of justification provides implicit support for the position that legal justification of a police officer's use of deadly force is in the nature of an affirmative defense, not a presumption.

Similarly, while the Supreme Court affirmed the appellate court's conclusion that the substance of the trial court's jury instruction on justification was incorrect, the higher court's failure to comment on whether the jury should have been instructed on justification as anything other than an affirmative defense buttresses the conclusion that it is an affirmative defense. In a portion of its opinion addressing White's claim that the trial court should have given a mistake-of-fact instruction, the Supreme Court notes that "a mistake-of-fact instruction could only relate to White's affirmative defense of justification in using deadly force." *White*, supra, ¶60. That reference, even though it was not made in the context of deciding the exact nature of a police

officer's claim of legal justification and apportioning a burden of proof accordingly, makes it clear that the Supreme Court deemed it unremarkable that the *White* trial judge instructed the jury that legal justification is an affirmative defense.

The Ohio Supreme Court has said of affirmative defenses:

[T]hey represent not a mere denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged, but, rather, they represent a substantive or independent matter which the defendant claims exempts him from liability even if it is conceded that the facts claimed by the prosecution are true. Among those defenses, in Ohio, are self-defense. . . . Affirmative defenses must be proved by a preponderance of the evidence. *State v. Poole*, 33 Ohio St. 2d 18, 19.

Brelo's claimed legal justification for his use of force – namely, that he had probable cause to believe that the Malibu's occupants posed a threat of serious physical harm to him and others – is an affirmative defense that he must prove by a preponderance of the evidence. Although the prosecution is entitled to present evidence in its case undercutting Brelo's anticipated defense, it is not required to do so.

Finally, in the event his motion for a complete acquittal is denied, Brelo has moved under Criminal Rule 29 in the alternative for an acquittal on the firearm specifications.

The Ohio Supreme Court's decision in *White* addressed the circumstances under which a police officer convicted of a crime could also be convicted of a firearm specification.

The Supreme Court agreed to review the *White* case to decide, among other things, whether it was constitutional to apply a firearm specification to a police officer who has no choice but to carry a gun on the job. In the end the court avoided the constitutional issue by deciding the case on the "narrower grounds of statutory interpretation." *White*, supra ¶28. After examining the purpose behind the penalty enhancement provided by the firearm specification statute – to deter criminals from using guns – the court said:

We therefore conclude that the General Assembly did not intend the firearm specification to apply to a police officer who fired a gun issued to him to protect himself, fellow officers, and the public from a person he thought was about to brandish a weapon. In those circumstances, it cannot be said that the officer used the firearm in an attempt to “facilitate” an offense. Rather, the statute requires that a distinction be drawn between a police officer who acts in accord with the duty to uphold the law and one who abandons that duty by committing a criminal offense.

The firearm specification may apply if the facts of a given case demonstrate that the actions of the officer display criminal misconduct constituting a departure from the course and scope of official duties, as police officers have no license to commit crimes under color of office. *Id.*, ¶¶34-35.

The court went on to distinguish what White did – misperceive a threat of harm – from the voluntary criminal conduct of a police officer who has completely abandoned his law enforcement duties – by, for example, robbing a drug dealer – and held that a police officer who does not “abandon employment or act outside the course and scope of official duties,” *id.*, ¶37, cannot be subject to a firearm specification. Applying that test, the court found that White had not abandoned his employment or acted outside the course and scope of his official duties and thus could not be charged with the firearm specification.

The Supreme Court held that White could not be subject to a firearm specification even though a jury had found beyond a reasonable doubt that the state proved all of the elements of felonious assault by White. It is thus plain that the court means that a police officer who is acting in the course and scope of his duties in one moment and committing a crime in the next will not be subject to a firearm specification despite the fact that no crime perpetrated by a police officer can ever be said to be within the course and scope of the officer’s law enforcement duties. Instead, the state must demonstrate that the officer carried his gun with the intent to use it criminally.

As the chief justice explained in her concurring opinion:

Here, White is subject to criminal liability based on an allegation of unreasonable force arising from a mistaken decision while engaging in his law enforcement duties. There is no allegation that White abandoned his employment and intentionally engaged in criminal conduct. Thus, the crux of the issue is whether White's mistake of judgment in carrying out his official duties was reasonable, not whether White intentionally engaged in criminal conduct. And as part of his employment, White, like other similarly situated police officers, was required to carry and use a firearm if necessary. He did not carry or use his firearm to facilitate a criminal offense. Instead, he used it in an attempt to do his job. *Id.*, ¶73.

Brelo and White's positions are nearly identical, and the Supreme Court said "even if the jury finds on remand that White's use of his firearm was a mistake for which criminal liability must attach, the firearm specification does not apply to White under these facts." *Id.*, ¶74.

Taking the evidence in a light most favorable to the state, at least 34 of Brelo's 49 shots were reasonable to deal with a perceived threat. If he is eventually found guilty of voluntary manslaughter beyond a reasonable doubt in the face of his affirmative defense that all of his shots were legally justified it will mean only that he was not justified in taking one or more of those last 15 shots to confront the perceived threat. In other words, he will have made "an unreasonable or unjustified mistake of fact or judgment regarding a perceived threat while carrying out his official duties," *id.*, and the firearm specifications cannot be applied to him.

Based upon the evidence and the law, the defendant's Criminal Rule 29 motion for a complete acquittal on all charges is denied but his alternative motion for an acquittal on the firearm specifications is granted.

IT IS SO ORDERED:



Judge John P. O'Donnell

April 26, 2015
Date

SERVICE

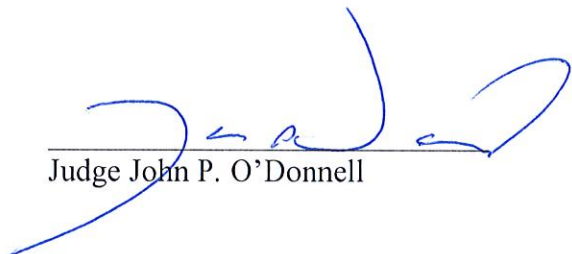
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Judge John P. O'Donnell