Cite as People v. Evergood, 74 N.Y.S.Supp. 12 (Mag. Ct. 1947)

PEOPLE on Complaint of ALTOMARI, v. EVERGOOD.

City Magistrates' Court of City of New York, Felony Court, Borough of Manhattan.

Sept. 5, 1947.

Proceeding by the People, on the complaint of Joseph Altomari, against Philip Evergood for violation of the statute prohibiting possession of a pistol or other firearm, which may be concealed on the person, without a written license. On defendant's motion to dismiss the complaint.

Defendant paroled for trial in the Court of Special Sessions.

Paul Reilly, Asst. Dist. Atty., of New York City, for the People.

Murray I. Gurfein, of New York City (Morris A. Wirth, of New York City, of counsel), for defendant.

MORRIS PLOSCOWE, City Magistrate.

I have written a short opinion in this case in view of the unusual circumstances of this particular complaint and in view of the public interest and the professional reputation of the defendant.

Philip Evergood, the defendant in this case, is a distinguished American artist. Some two years ago he received a shotgun and a World War I Navy Very pistol in exchange for two paintings. He bought shells for the shotgun which he placed in a locked cabinet. He hung the Very pistol, which was designed to fire warning flares, on the wall of his living room along with other curios and objects d'art. While on vacation, a burglar forced his way into his apartment and studio. He broke into the file containing the shotgun shells. He discovered that the shells would fit the Very pistol. He made use of this discovery to kill a police officer who attempted to apprehend him. Evergood had no knowledge that shotgun shells could be fired from the Very pistol. For him the pistol was nothing more than a curio. He had no license from the Police Department for the possession of this pistol. He is accordingly charged with violation of Section 1897, subdivision 4, of the Penal Law which prohibits any person having in his possession "any pistol, revolver or other firearm of a size which may be concealed upon the person, without a written license therefor."

Counsel moves to dismiss the complaint on three grounds:

1. The Very pistol was not a "firearm" within the meaning of Section 1897, subd. 4, of the Penal Law;

2. Assuming that the Very pistol is a firearm, the possession of the defendant was not the kind which was prohibited by the statute;

3. Assuming it is a "firearm" it is, at the most, a "sawed-off shotgun." To make the possession of a sawed-off shotgun a misdemeanor, there must be an intent to use by the defendant (Sec. 1897, subd. 1, Penal Law), which was manifestly absent in this case.

It is our opinion that the Very pistol is a "firearm" within the meaning of Section 1897, subdivision 4. A firearm has been defined as any weapon from which a shot is discharged by the force

of an explosive (68 Corp.Jur., p. 4), or as a "weapon which acts by the force of gunpowder." People v. Schmidt, 1927, 221 App.Div. 77, 222 N.Y.S. 647, 649.

There is no question that the Very pistol discharges a missile by means of gunpowder. The only question is whether it is a "weapon." It was not originally designed as a weapon but as a signalling device. However, it is capable of being used as a weapon and was so used by the burglar in this case. Counsel for the defendant argues that the normally foreseeable use of this pistol is decisive of the issue as to whether it is a "weapon" and hence a firearm within the meaning of the statute. However, People v. Anderson, 1932, 236 App.Div. 586, would seem to require a contrary interpretation. There a contraption shaped like an ordinary fountain pen used primarily for the ejection of tear gas was held to be a "firearm" within the meaning of the statute, because it was capable of firing 30 and 38 calibre bullets. In that case, as here, counsel contended that the real test was whether the contraption was designed for the purpose of firing bullets. The Appellate Division, however, took the view that it was not the original purpose for which the device was made but its adaptability to firing bullets which made it a firearm prohibited by Section 1897 of the Penal Law. For a similar holding see Village of Barboursville ex rel. Bates v. Taylor, 1934, W.Va., 174 S.E. 485, 92 A.L.R. 1093.

Counsel bases his argument that the defendant's possession was not the kind prohibited by statute primarily on People v. Persce, 1912, 203 N.Y. 397, in which the Court said, in interpreting the word "possesses": (It) "clearly should not be construed to mean a possession * * * such as could theoretically and technically follow from the legal ownership of a weapon in a collection of curios and interesting objects." It may be noted first that this statement is pure dicta which was completely unnecessary to the decision of the case. The defendant in People v. Persce was being prosecuted for the possession of a slingshot which was actually found in his pocket. Secondly, the statute construed by People v. Persce was different from the statute in the instant case. Third, at least since People ex rel. Darling v. Warden of City Prison, 1913, 154 App.Div. 413, actual physical possession of a weapon is not necessary for a violation of Section 1897, subdivision 4, and constructive possession is sufficient. The mere fact that the defendant knowingly had in his apartment a "firearm" is sufficient prima facie to indicate a violation of Section 1897 of the Penal Law. As the Court said in the Darling case, "the Legislature intended exactly what it said, to prohibit a person at any time and in any place * * * to have * * * a pistol in his possession without the permit required."

Finally, it is argued that if a Very pistol may fire shotgun shells it becomes a "sawed-off shotgun." Section 1897, subdivision 1, of the Penal Law provides that a person who attempts to use against another a sawed-off shotgun is guilty of a misdemeanor. There is no question that Evergood had no intent to use the Very pistol against anybody. For him it was merely a harmless, interesting object. If counsel's contention on this point is correct that only Section 1897, subdivision 1, is applicable, then this prosecution must be dismissed. Counsel, however, overlooks the fact that subdivisions 1 and 4 of Section 1897 must be read together. There is no question that a sawed-off shotgun is a "firearm." If it is of a size that may be concealed upon the person, then subdivision 4 of Section 1897 is applicable. The Very pistol in this case is of such a size. Thus, even if it were a "sawed-off shotgun" its possession would still violate subdivision 4.

Two further facts would also seem to require me to hold the defendant for the Court of Special Sessions:

1. The Court of Special Sessions has convicted defendants, who possessed flare pistols without a permit, of a violation of Section 1897 of the Penal Law. See People v. Edwin Cheseborough, Docket No. 686 of 1946, Bronx County, [footnote 1] and People v. Reyno James, Docket No. 356 of 1947, Bronx County. [footnote 1] In the latter case the defendant was convicted for possession of a flare pistol after trial by Justices Cooper, Paige and Oliver.

2. I am orally advised by the Legal Bureau of the Police Department that permits have been issued to aviation companies and ship owners that use flare guns as signalling devices. This is at least a tacit recognition by the persons who applied for these permits, and by the Police Department, that flare pistols fall within the terms of Section 1897 of the Penal Law.

Since my task as a Committing Magistrate is to determine only prima facie whether Section 1897 of the Penal Law has been violated by the defendant Evergood, I am required, in view of all of the above circumstances, to hold him for trial in the Court of Special Sessions. Defendant will be paroled for trial in the Court of Special Sessions.

FOOTNOTES

1. No opinion for publication.