

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**Case Nos. 12 – 6437/6438
ELECTRONICALLY FILED**

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAFARI T. MOORE,

Defendant-Appellant

**Appeal from the United States District Court
For the Eastern District of Kentucky at Lexington
Criminal Action Nos. 5:08-186, 12-89
Hon. Joseph M. Hood**

REPLY BRIEF FOR APPELLANT

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Reply Statement of Facts

The government omits from its statement of facts any mention whatsoever of the evidence presented at trial regarding the terrifying conduct of James King, who for no reason pulled a gun and pointed it at close range at appellant's Jafari Moore's head, forcing Moore to disarm him. Likewise, the government omits mention of the implausible testimony from King, his compatriot, Layland, and the strip club bouncer, Evans, that Moore ran up "out of the blue," pulled King's gun from King's waistband and began firing. (James King testimony, Tr. vol. II, RE 60, Page ID # 515-516; William Layland testimony, Page ID # 555-556; Josh Evans testimony, Page ID # 320-321). Similarly, the government omits the conflicting testimony regarding officer Terry's alleged inquiries regarding the gun after he took possession of it only a very few minutes after the terrifying incident in which Moore was forced to take it from King. These points, however, are adequately set forth in the Brief for Appellant at pages 3-14 and need not be repeated in further detail here.

Argument

Point 1

De Novo Review Applies To Whether Moore Presented a Prima Facie Case As To His Justification Defense

The issue as to Moore's request for a justification defense jury instruction is whether he presented sufficient *prima facie* evidence to support giving it. The government concedes that the standard of review applicable to this issue is *de novo*. *Brief for Appellee* at 8 n. 3. Accordingly, the parties agree that this Court should apply a *de novo* standard of review to the main question this appeal presents.

Furthermore, the government does not contest that reversible error occurs where an accurate instruction is refused, and the defendant's theory of defense is not otherwise covered in the instructions. *United States v. Riffe*, 28 F.3d 565, 569 (6th Cir. 1994). Here, there is no assertion that the justification instruction offered by Moore was inaccurate or that the defense was otherwise covered in the instructions.

Finally, the government does not contest whether Moore presented *prima facie* evidence supporting the first four elements of the justification defense. The court below focused solely on the fifth

element in denying Moore's requested jury instruction as to justification. Accordingly, the issue framed for this Court's *de novo* review regards the fifth element of the justification defense: whether Moore presented evidence that he did not maintain possession of the gun that King threatened him with and he took from King any longer than absolutely necessary.

Point 2

The Testimony At Trial Indicated that Moore's Possession of the Gun He Took From King Ended Within a Very Few Minutes

The duration of Moore's possession of the gun after King threatened him with it and he disarmed King is key. The testimony at trial indicated that it ended within a very few minutes, a short time span for which this Court's precedents support Moore's right to have the jury instructed on his justification defense.

The government recognizes the difficulties that the record presents by taking a contradictory approach. In its statement of facts, the government acknowledges that the car Moore was riding in was stopped and his possession of the gun ended "shortly" after leaving Diva's. *Brief for Appellee* at 3. However, in its argument the

government asserts that Moore “continued to possess the firearm long after the incident.” *Id.* at 12. So “shortly” becomes “long”; the record indicates that “shortly” – mere minutes at most – is correct.

The evidence shows the following regarding the duration of Moore’s possession of the gun King threatened him with and which Moore took from King:

- according to officer Terry, he stopped the car in which Moore was riding very quickly after the radio call only 1 1/2 - 2 miles from Diva's. (Tr. I, RE 59, Page ID # 368).
- Moore's companions, Freeman, Gill and Bates, all confirmed that the traffic stop occurred within a very few minutes of their leaving the Diva's parking lot. (Tr. vol. II, RE 60, Page ID # 429, 452, 456, 468-70).
- The traffic stop ended Moore's possession of the gun, as Terry recovered it from the car after Moore and the other passengers were evacuated from it.

The very short duration of Moore’s possession is critical, because this Court has acknowledged that emergency situations and a short time span in which the possession occurred do not undermine the justification defense. For instance, in *United States v. Newcomb*, 6 F.3d 1129, 1137 (6th Cir. 1993), this Court, in reversing the court below's error in denying the justification defense jury instruction, observed as follows:

... there was evidence that the emergency situation unfolded rapidly, almost spontaneously, and that Newcomb's criminal conduct lasted for mere minutes. ... it would be reasonable to conclude that there was a crisis situation that simply did not allow Newcomb the luxury of choosing from among several alternative courses of action, some of which would not have required him to perform an illegal act.

The government argues that Moore's situation was different than Newcomb's, a point on which it is partially correct but the difference favors Moore's position: Moore, unlike Newcomb, had his own life threatened and obtained possession of the gun by disarming his assailant. Newcomb, on the other hand, did not have his own life threatened and gained possession of the weapon following discussion with its possessor in which the possessor's mother was also present. Newcomb involved a crisis, emergency situation to be sure; but it did not present the type of immediate, terrifying threat to his own life that Moore faced.

Newcomb also presents a dissonance between the defense and police testimony therein, one that undercuts the rationale of the court below and that advocated by the government. The police witness testified in *Newcomb* that he followed the defendant down an alleyway and saw him stick the firearm in question under or in an abandoned

couch, an action reasonably viewed as one intended to evade or deny possession of the gun. Quite on the other hand, the defendant in *Newcomb* and other defense witnesses testified at trial that another person placed the gun in the couch and did so quite some time before the police arrived. The Court noted the difference in the testimony of the police and defense witnesses. 6 F.3d at 1130-31.

The rationale applied by the court below here is at odds with the reasoning and holding in *Newcomb*. Under the rationale of the court below the defendant in *Newcomb* would not be entitled to the justification defense jury instruction because he did not admit to sticking the gun in the couch in the alleyway as the police officer followed him down it and insisted upon offering contrary defense testimony at trial. This rationale disregards a criminal defendant's right to "a meaningful opportunity to present a complete defense" and to have the jury instructed on the defense theory of the case.

California v. Trombetta, 467 U.S. 479, 485 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Taylor v. Withrow*, 288 F.3d 846, 851-52 (6th Cir. 2002), *cert. denied*, 537 U.S. 1007 (2002).

To affirm Moore's conviction this court is going to be required to craft a rule as follows: no matter what is happening that proceeded a felon coming in the possession of a firearm, no matter that his own life has been terrifyingly put in jeopardy through no action of his own, no matter that a very short period of time has passed between his taking possession of the gun and intersection with police, he must immediately whether asked about it or not confess completely and fully the circumstances by which you came into possession of the weapon. This is the rule applied by the court below and urged by the government. It finds no support whatsoever in the jurisprudence of this court or that of any other, since the government does not cite to any case or other authority whatsoever offering support for its position. Furthermore, there is no dispute that Moore's possession of the gun he took from King ended when the car was stopped.

Moore presented a *prima facie* case supporting his justification defense. The court below committed reversible error in refusing to give Moore's requested jury instruction. Accordingly, the judgment in Case No. 12-89 should be reversed and the case remanded for a new trial.

Point 3

Evidence Regarding King's Assault Charge Was Admissible to Show King's Intent and Absence of Mistake In Pulling the Gun on Moore

Two sharply contrasting versions of events in the Diva's parking lot were presented by the witnesses. Neither the government nor the court below disputed that the defense testimony established a prima facie case as to the justification defense. But relevant both to what happened and the reasonableness of Moore's actions is King's intent – did he intend to threaten and terrify Moore putting him in fear for his life – and/or did he simply mistake or misinterpret Moore's intentions in trying to help start the vehicle. Evidence of the pending assault charge against King was properly admissible for the jury to consider what happened in the Diva's parking lot: did King pull the gun on Moore or did Moore run up “out of the blue” and grab it from him? Did King intend to put Moore in fear? Did King, a white man in a strip club parking lot after 3 a.m. in the morning, mistake as a threat the helpful actions of an African-American man and pull a gun on Moore?

The court below's explanation that Moore did not know of King's pending assault charge misses the point that a jury should have more

information regarding King in order for it to find and conclude what did happen in that parking lot. Furthermore, if the jury were to conclude that King intended to provoke fear by Moore for his life, it would certainly support the jury's findings regarding at least the first two of the justification defense elements.¹

The government does not address that evidence concerning King's violent assault charge in Florida was properly admissible to show the absence of any mistake by King regarding Moore's intentions, when Moore attempted to aid with starting King's vehicle. The court below similarly failed to consider or address this point. Similarly, the government does not address why the evidence regarding King's pending assault charge could not properly be considered by the jury in its necessary finding of what were King's actions, an issue necessary for it to resolve.

¹ The first two elements of the justification defense are as follows: (1) the defendant reasonably believed there was an unlawful and present, imminent, and impending threat of death or serious bodily injury to himself or to another; (2) the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct. Sixth Circuit Criminal Pattern Jury Instruction 6.07.

As the government notes, an abuse of discretion with regard to an evidentiary ruling occurs where the court below applies the incorrect legal standard or misapplies the correct legal standard. *Brief for Appellee* at 16 citing *Schenck v. City of Hudson*, 114 F.3d 590, 593 (6th Cir. 1997). This occurred here where the court below focused on whether or not Moore was aware of King's pending charge, not the reasons offered by Moore as to why it was properly admissible and considered by the jury. Whether this is deemed an application of an incorrect legal standard or a misapplication of a correct legal standard, it is error and an abuse of discretion. The remand of this case should direct that this evidence be admitted on retrial.

Since the government offers no dispute or rebuttal to the point that King, a white man, unlawfully possessed the gun that he threatened Moore's life with and would himself be subject to prosecution as a felon in possession, its elevation of King to the status of victim is most troubling, especially since the government chose not to call King as a witness. Only a one-sided view of the case would support such an assertion and that is the problem: a criminal defendant has a constitutional right to present his side of the case and

to have the jury consider his theory of the case and any defense he may be able to offer.

This is a case where the jury should have been allowed to learn of King's pending assault charge, to decide what occurred in the Diva's parking lot and ultimately to decide whether Moore's actions were justified and reasonable. The court below abused its discretion in excluding the evidence regarding King's pending assault charge.

Point 4

Revocation of Moore's Supervised Release Would Be Contrary To The Findings Necessary For A Jury To Accept His Justification Defense and To Acquit Him

The government erroneously argues that the court below could have properly revoked more supervised release "even if the jury had acquitted him." *Brief for Appellee* at 21. The government's rationale is that the court below could have relied on Moore's underlying violent conduct – commission of an assault and wanton endangerment under Kentucky law. This is incorrect.

Acquittal by a jury and its acceptance of Moore's justification defense would necessarily include subsidiary findings of fact that Moore did not engage in any acts of assault or wanton endangerment.

First, to acquit Moore a jury must find that he proved justification by preponderance of evidence.² Second, for a jury to find that Moore was justified in taking possession of King's gun and to acquit him of the charge of felon in possession, it would have to accept the testimony as to the events in the Diva's parking lot offered by Moore and Ricky Strode. A jury simply could not find that Moore was under an unlawful and present, imminent and pending threat of such a nature to produce a well-grounded apprehension of death or serious bodily injury, the first element of the justification defense, while it also being possible that he was committing either an assault or engaging in wanton endangerment.

The case cited by the government, *United States v. Vaughn*, 428 F.Appx. 582 (6th Cir. 2011), is distinguishable from this situation. Unlike in *Vaughn* a jury's acquittal of Moore would not simply be a finding that the government had not proved the charge to a reasonable doubt. It would also be a finding to a preponderance of evidence regarding Moore's conduct that would preclude a contrary finding to a preponderance of evidence that Moore engaged in conduct constituting

² Moore acknowledged this burden of proof in the proposed instructions he filed with the court below. (RE 31, Page ID # 118).

an assault and/or wanton endangerment. Accordingly, because this Court should reverse the judgment in Case No. 12-89 and remand it for a new trial, it should vacate the revocation of Moore's supervised release in Case No. 08-186 and remand it for further proceedings.

Conclusion

For the foregoing reasons and for those set forth in the *Brief for Appellant*, the Court should reverse the judgment in Case No. 12-89 and remand for a new trial with directions that evidence regarding King's assault charge be admitted on retrial. The Court should also vacate the supervised release revocation judgment in Case No. 08-186.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Sixth Circuit's electronic filing system this 1st day of June 2013, that notice will be sent electronically by that system to All Counsel of Record.

/s/ Robert L. Abell
COUNSEL FOR APPELLANT

**CERTIFICATION OF COMPLIANCE
PURSUANT TO FRAP 32(a)(7)(B)**

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 2,515 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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