

ORIGINAL

IN THE  
SUPREME COURT OF OHIO

IN RE: J.T. : NO. 2014-0449  
Defendant-Appellant : On Appeal from the Hamilton County  
Court of Appeals, First Appellate  
District  
Court of Appeals  
Case Number C-130434

MEMORANDUM IN RESPONSE

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

Although J.T. claims that this case has far-reaching implications, the First District's decision is only a judgment entry. Moreover, it was correctly decided on the facts of the case.

**STATEMENT OF THE CASE AND FACTS**

Cincinnati Police Officer Boggio filed a complaint against J.T. for being a delinquent child because he was carrying a concealed weapon. (T.d. 1). J.T. had a loaded Hi-Point 9mm handgun in his waistband. (T.d. 1). The charge was amended to a misdemeanor before trial because the gun was inoperable. (April 8, 2013 T.p. 4; T.d. 12). After trial, the magistrate adjudicated J.T. delinquent. (T.d. 12).

J.T. filed an objection to the magistrate's decision. (T.d. 13). On May 30, 2013, after hearing, the judge denied J.T.'s objection to the magistrate's decision. (T.d. 24).

J.T. filed an untimely appeal, raising one assignment of error: that the gun is not a deadly weapon, and therefore his adjudication was made in error.

On March 17, 2013, Officer Frank Boggio was working in Cincinnati Police District Five. (April 8, 2013 T.p. 7).<sup>1</sup> He responded to an incident where a male juvenile in a dark blue, hooded sweatshirt stood with a group of about ten juveniles, and was showing them a handgun. (T.p. 8).

Boggio and his partner approached the group, and stopped two juveniles in dark, hooded sweatshirts. (T.p. 8). J.T. would not turn around toward Boggio, but instead kept his back to the officer. (T.p. 8). He looked over his shoulder at Boggio to speak to him. (T.p. 8).

After several commands, J.T. turned toward Boggio. He had his arms up inside his sweatshirt. (T.p. 8). Boggio told J.T. to pull his arms out, and as he did, Boggio could see "a

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<sup>1</sup> All references to the transcript of proceedings are from the trial on April 8, 2013, unless otherwise noted.

rather large bulge right around the waistband.” (T.p. 9). Boggio patted J.T. down and felt a gun. He called “Gun” to his partner, and asked J.T., “Is this a gun?” J.T. said, “Yes.” (T.p. 9). Boggio retrieved the gun from J.T.’s waistband. (T.p. 9). It was a Hi-Point caliber nine millimeter model C-9 type, semiautomatic handgun. (T.p. 10).

Boggio testified that the gun could cause harm even though it is inoperable. (T.p. 12). He explained that it could be used as a bludgeon. He said “it’s a rather heavy handgun, could easily be used as a heavy blunt object.” (T.p. 12). Boggio further testified that he had heard of cases where a gun has been used as a bludgeon. (T.p. 13).

J.T.’s counsel elicited testimony from Boggio that the gun was in J.T.’s waistband. (T.p. 14). When the State admitted the gun into evidence, it also admitted the gun’s magazine and bullets that were recovered in the gun. (T.p. 15).

#### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. 1: An inoperable pistol, which is not used or displayed in any way, is not, per se, a “deadly weapon” within the meaning of the carrying concealed weapon statute, pursuant to R.C. 2923.11(A).**

In order to prove that J.T. was carrying concealed weapons, the State had to prove that he knowingly carried or had, concealed on his person or concealed read at hand, a deadly weapon. R.C. 2923.12. A deadly weapon is any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon. R.C. 2923.11(A).

In this case, J.T. carried an inoperable firearm in his waistband. The State presented no testimony that it could readily be rendered operable, and therefore, it is not a firearm under the statute. R.C. 2923.11(B)(1) and (C). But, the State argued at trial, during objections, and now argues on appeal, that an inoperable firearm is still a deadly weapon.

This Court should be guided by the decisions of the Eighth District in deciding whether an inoperable firearm is a deadly weapon. In *State v. Crosby*, the Eighth District said ‘to be a deadly weapon, a handgun must: (1) be “capable of inflicting death,” and (2) be “designed or specially adapted for use as a weapon or possessed, carried, or used as a weapon.”’ *State v. Crosby*, 8<sup>th</sup> Dist. No. 40724 (April 3, 1980); see also *State v. Henry*, 8<sup>th</sup> Dist. No. 46286 (August 25, 1983); *State v. Brooks*, 8<sup>th</sup> Dist. No. 44362 (October 7, 1982). The *Crosby* Court went on to note that “[i]n resolving the issue of whether a gun is a dangerous weapon within the meaning of R.C. 2923.11(A), operability has been held to be an irrelevant factor.” *Id.* That Court concluded that “whether unloaded or inoperable, a handgun is a deadly weapon because it is certainly capable of inflicting death and it is designed for use as a weapon.” *Id.*

J.T.’s counsel’s reliance on *State v. Macias*, *State v. Brown* and *State v. Luckey* is misplaced. *State v. Macias*, 2<sup>nd</sup> Dist. No. 1562, 2003-Ohio-1565; *State v. Brown*, 101 Ohio App.3d 784, 656 N.E.2d 741 (1995); *State v. Luckey*, 322 N.E.2d 354, 81 A.L.R.3d 995 (1974). Fake guns, BB guns, and starting pistols are not designed for use as deadly weapons. Therefore, they must be possessed, carried, or used as weapons. *Macias*, *Brown*, and *Luckey* simply highlight this portion of the definition of deadly weapon. R.C. 2923.11(A). Actually, *Luckey* implies that an inoperable firearm, because it “is designed to inflict serious bodily injury such as a pistol, rifle or shot-gun, such weapon is dangerous per se.” *Luckey* at 358.

As the trial court understood, an inoperable firearm is a deadly weapon. ‘A gun designed for use as a weapon may be considered a “deadly weapon.”’ *State v. Hazley*, 2<sup>nd</sup> Dist. No. 10496 (Sept. 15, 1988). The gun J.T. had concealed in his waistband was identified by Officer Boggio as a Hi-Point “caliber nine millimeter model C-9 type, semiautomatic” handgun. (April 8, 2013 T.p. 10-11). J.T. told Boggio that it was a gun. (April 8, 2013 T.p. 14). J.T. himself appeared to

consider the gun to be a deadly weapon – it was recovered with a magazine and bullets. (T.d. 1; April 8, 2013 T.p. 15). Inoperable firearms, because they are designed for use as a weapon, are per se deadly weapons.

Additionally, J.T.'s inoperable Hi-Point was possessed and carried as a weapon. The handgun was concealed in J.T.'s waistband has no purpose other than its function as a weapon. *Compare In re: Hamlin*, 4<sup>th</sup> Dist. No. 1438 (June 28, 1988), p.5. The trial court clearly understood this during argument on J.T.'s objections, when it asked counsel, "Is there sort of res ipsa loquitur or, I mean, what else could it be used for?" (May 22, 2013 T.p. 9). The court again asked counsel, "And what else could it be used for, you know?" (May 22, 2013 T.p. 10). J.T.'s counsel misinformed the trial court when it said "courts have found again these inoperable guns are not, per se, deadly weapons." (May 22, 2013 T.p. 20).

Other courts have found that inoperable firearms are deadly weapons. In *State v. Marshall*, the Tenth District said that "[t]he test of a deadly weapon is whether it is capable of inflicting death. The actual use of the weapon doesn't require the same means for which it was designed." *State v. Marshall*, 61 Ohio App.2d 84, 86, 399 N.E.2d 112 (1978). The *Marshall* Court went on to say that "a gun may inflict death in two ways: (1) in the manner for which it was designed by firing a bullet, or (2) by being used as a bludgeon." *Id.* That Court decided that "an inspection of the gun in this case shows that it was capable of inflicting death if used as a bludgeon." *Id.*

Here, the inoperable firearm possessed by J.T. was still capable of inflicting death because it could have been used as a bludgeon. Boggio testified that the gun could cause harm, even though it was inoperable. (April 8, 2013 T.p. 12). He explained that "[i]t's a rather heavy handgun, could easily be used as a heavy blunt object." (April 8, 2013 T.p. 12). Boggio added

that he knew of cases where a gun had been used as a bludgeon. (April 8, 2013 T.p. 13). As such, the gun recovered from J.T.'s waistband was capable of inflicting death, and it was designed for use as a weapon. The State presented sufficient evidence to prove that J.T.'s Hi-Point was a deadly weapon. *See State v. Dye*, 14 Ohio App.2d 7, 8, 235 N.E.2d 250 (1968).

### CONCLUSION

Based on the facts of this case, the trial court and appellate court properly found that J.T.'s inoperable semiautomatic firearm was a deadly weapon.

Respectfully,

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### PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Gordon C. Magella, Office of the Hamilton County Public Defender, 230 E. Ninth Street, Third Floor, Cincinnati, Ohio 45202, counsel of record, this 22<sup>nd</sup> day of April, 2014.



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