

**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.)	
)	
MICHAEL BRELO)	<u>JOURNAL ENTRY DENYING THE</u>
)	<u>DEFENDANT'S MOTION TO DISMISS</u>
Defendant.)	<u>THE FIREARM SPECIFICATIONS</u>

John P. O'Donnell, J.:

Defendant Michael Brelo is a Cleveland police officer accused of the on-duty voluntary manslaughter of Timothy Russell and Malissa Williams on November 29, 2012. Russell and Williams were the driver and passenger, respectively, of a car that was pursued by Cleveland police for about 22 minutes to a parking lot in East Cleveland. They were killed there by police bullets after 13 officers fired a total of 137 shots over 17.8 seconds.¹

Of those 137 shots, according to the state, the only ones that give rise to criminal liability are “the last shots fired by”² Brelo. The state’s expert believes that Brelo shot 49 rounds and that the first 34 were legally justified but the last 15 were not.

¹ This cursory summary of the allegations is taken from the discovery filed of record in this case, namely the 67-page report of Philip Bogdanoff, the state’s proposed expert in the police use of force. His report was part of discovery produced on June 26, 2014. My description of the evidence in this journal entry is only made for the purposes of the motion under consideration. I am aware that the evidence admitted at trial may reveal a different version of events.

² Bogdanoff report, page 67.

Each count of the indictment includes a firearm specification under Ohio Revised Code section 2941.145(A). Brelo may be found guilty of a specification on a given count only if the jury finds him guilty of the underlying voluntary manslaughter charge and then finds, beyond a reasonable doubt, that he used a firearm to facilitate the offense. In the event of a guilty finding on the specification, the effect of the specification is to enhance Brelo's punishment by requiring a three-year prison term, to be served consecutively to any prison sentence imposed on the underlying crime.

On July 14, 2014, the defendant filed a motion to dismiss the firearm specification on the grounds that it is unconstitutional when applied to a peace officer who is required by the terms of his employment to carry a gun. The motion was supplemented on September 12. A ruling on the motion and its supplement was deferred by an entry dated September 28, primarily to await the outcome of a pending case before the Ohio Supreme Court where an argument similar to Brelo's was under consideration.

That case has now been decided as *The State of Ohio v. Thomas Caine White*, Slip Opinion No. 2015-Ohio-492. The Supreme Court's opinion was published on February 18, 2015, and on February 23 the defendant filed a supplement to his original motion citing to the decision in *State v. White* and asking for a ruling on the motion to dismiss. The state opposed the motion to dismiss on March 11 and this entry follows.

In Brelo's post-*White* supplement he argues that the "firearm specification is . . . improper" because the only questions of fact in this case are whether Brelo acted in the scope of his employment and whether he used reasonable force under the circumstances. In essence, Brelo has filed a motion for summary judgment on the firearm specifications. The state opposes

the motion on the basis that a ruling is premature until after the state has presented its evidence at trial.

The defendant in *White* was an Ottawa Hills police officer. He pulled over a motorcyclist for suspected traffic violations. As he 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 the one in this case. Ultimately, the Ohio Supreme Court did not address the constitutionality of the specification as applied to a police officer who has to carry a gun as part of his job duties. Instead, the court decided the case on the “narrower grounds of statutory interpretation,” *Id.*, ¶28, and said the following:

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” 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. A concurring opinion by the chief justice made it clear that a “mistake in judgment regarding the need to use the firearm”³ is not enough to justify a charge under R.C. 2941.145(A).

Here, the evidence is expected to show that Brelo fired 49 shots and that at least 34 of those were reasonable to deal with a perceived threat. If the jury finds Brelo guilty it means not only that the jury found all of the elements of voluntary manslaughter beyond a reasonable doubt but also that he was not justified in taking one or more of those last 15 shots to confront the perceived threat. To put it another way, the jury will have concluded that Brelo made a “mistake in judgment regarding the need to use [a] firearm.”⁴ At that point his position will be exactly analogous to White’s, and the concurring opinion is explicit that “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.”⁵ If White did not abandon his employment and depart from the course and scope of his law enforcement duties by shooting a traffic law violator in the back it is unlikely that the evidence at trial here will support a finding that Brelo abandoned his employment to the point that a three-year firearm specification may be applied to him.

³ *White*, supra, ¶72.

⁴ *Id.*

⁵ *Id.*, ¶74.

Nevertheless, whether he did is a question of fact that cannot be decided until trial evidence has been admitted⁶ and the motion to dismiss is denied as premature but the defendant retains the right to make an equivalent motion after the presentation of the state's case in chief.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date

⁶ See, e.g., *State v. Lawson*, 7th Dist. No. 12 MA 194, 2014-Ohio-879, ¶26: In criminal matters, a motion to dismiss can only raise matters that are "capable of determination without a trial of the general issue." Crim.R. 12(B); *State v. O'Neal*, 114 Ohio App.3d 335, 336 (1996). Thus, in the criminal context, a motion to dismiss "tests the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced by either the state or the defendant." *State v. Patterson*, 63 Ohio App.3d 91, 95 (1989). If the allegations contained in the indictment constitute offenses under Ohio criminal law, it is premature to determine, in advance of trial, whether the state could satisfy its burden of proof with respect to those charges, and thus, a motion to dismiss must be denied. Consequently, a pretrial motion, such as a motion to dismiss, must not entail a determination of the sufficiency of the evidence to support the indictment because such a determination cannot properly be made until, at the earliest, the conclusion of the state's case in chief and pursuant to a Crim.R. 29(A) motion.

SERVICE

A copy of this journal entry was sent by email on March 19, 2015, to the following:

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