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IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD No. 730767

FRANK D. SWART,
Plaintiff in Error,

v.

COMMONWEALTH OF VIRGINIA,
Defendant in Error.

APPENDIX

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Supreme Court of Virginia

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RECORD No. 730767

FRANK D. SWART,
Plaintiff in Error,

v.

COMMONWEALTH OF VIRGINIA
Defendant in Error.

APPENDIX

SUMMONS ISSUED TO DEFENDANT NOV. 13, 1972

Commonwealth of Va.—Game Warden's Summons to Appear in Court
Frank Daniel Swart
Date 11-13-72; Time 9:40.
White, Male; Age 51; Height 5′10″.
No. 44025
Address: P. O. Box 400
City, Fairfax; State, Va.
You are hereby notified to appear in Frederick County Court
at Winchester, Virginia
on December 19, 1972 at 2:00 o'clock, p.m.
To answer the charge of violating the Game law
Hunting Rabbit with illegal weapon
(22 pistol)
Accepted as legal supoena:
Signature, Defendant, F. D. Swart
Signature, Game Warden David Ramsey
NOV. 14, 1972
COMMONWEALTH OF VIRGINIA
STATE OF VIRGINIA SEAL
Commission of Game and Inland Fisheries

* * * * *

[Begin Transcript, page 3, line 2]

PROCEEDINGS IN TRIAL COURT FEB. 2, 1973

THE COURT: Now, as I understand it, Mr. Ambrogi, this matter apparently is mostly a question of law.

MR. AMBROGI: Yes, sir. Mostly an interpretation of a game law; of certain game statutes.

THE COURT: I will probably have to spend some time examining the particular statutes involved.

MR. SWART: I would move that the Commonwealth specify at this time which statute he is relying upon.

THE COURT: Any objection?

MR. AMBROGI: No, sir. 29-140.

THE COURT: 29-140. Maybe I better see that so I will have some familiarity as we go along.

MR. AMBROGI: If Your Honor please, it will also be 161, which is the penalty provision. That is not the offense statute but the penalty statute.

THE COURT: The parties ready?

MR. AMBROGI: Yes, sir.

WHEREUPON,

GAME WARDEN DAVID R. RAMSEY was called as a witness on behalf of the Commonwealth, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AMBRIGO: [4]

Q. Would you state your name, please?

A. David Ramsey.

Q. Your occupation?

A. Virginia State Game Warden.

Q. Were you on duty and employed in that capacity on the thirteenth of November of last year, 1972?

A. Yes. I was.

Q. Are you the officer that issued the summons to the defendant in this case on that date?

A. Yes, sir.

David Ramsey

Q. Did this occur in Frederick County?

A. Yes, sir. It was off what we call Brierly Lane between the Cedar Creek Grade and Middle Road.

Q. What time of day was this?

A. Approximately 9:40 a.m.

Q. Tell the Court the circumstances, will you please?

A. On this particular day, the thirteenth of November, the first day of small game season . . .

MR. SWART: Your Honor, the witness is reading from some notes. May I inquire as to what he is reading from, and when they were made?

THE WITNESS: The only thing I have is a copy of your summons.

MR. SWART: When were those notes made? [5]

THE WITNESS: There are no notes except on the bottom.

MR. SWART: May I see what it is?

THE WITNESS: Sure you can see.

MR. SWART: No objection.

BY MR. AMBROGI:

Q. Go ahead.

A. As I said, I was on routine patrol that day. It was the first day of the small game season in the western counties. I came through Brierly Lane through some orchards, and Mr. Swart and three other guys were down in the field. I stood in the fence row and watched them for approximately ten or fifteen minutes. They were shooting the twenty-two pistol. I was judging from the sound. I couldn't actually see the pistol. The other three men were watching Mr. Swart, so I walked on down to where they were and asked them if they had the pistol. Mr. Swart in turn took the pistol from his pocket. It was in a small holster. He gave the pistol to me. I told Mr. Swart it was illegal to hunt with a twenty-two caliber pistol in the State of Virginia. We went back up to my car, and I issued Mr. Swart a summons for hunting of rabbit with an illegal weapon, to-wit: A twenty-two pistol.

Q. Did you examine the pistol?

A. Yes, I did.

Q. Was it in fact a twenty-two pistol? [6]

A. It was a twenty-two caliber pistol, and I took the pistol from Mr. Swart down in the field and carried it back to the car. It was an Irosco, I believe is the way it is spelled, Arms Company, twenty-two caliber

pistol; no serial number or anything on this pistol. I wrote this receipt and had Mr. Swart to sign that. He did receive his pistol back from me on that day, and I put the time at ten a.m. that I gave the pistol back to him. He signed the receipt and I marked my own on the bottom of it.

MR. SWART: You going to offer that in evidence?
MR. AMBROGI: Yes.
MR. SWART: I would like to question the witness about the circumstances surrounding the giving of it.

BY MR. AMBROGI:
Q. You say you had examined the pistol and returned it to him?
A. Yes. I did.
Q. Did he shoot any game with the pistol?
A. He was shooting at game, at a rabbit. Whether he actually hit it with it, I couldn't say.
Q. But, you did see him shoot at the rabbit?
A. Yes.

MR. AMBROGI: I believe that is all.
MR. SWART: You going to offer this? [7]
MR. AMBROGI: Right.

CROSS EXAMINATION

BY MR. SWART:
Q. Mr. Ramsey, on this particular day, you were in uniform were'nt you?
A. Yes, sir.
Q. There was no question but what you were a law enforcement officer?
A. No question with me.
Q. That was obvious to all four of the persons there, was it not?
A. Yes.
Q. Did the defendant question the need for writing a receipt for his own pistol?
A. No, sir. The receipt was given for the fact the pistol could have been held for evidence. I wrote the receipt to return the pistol to you to have the receipt for evidence.
Q. Were you not asked why it was necessary to write a receipt for the pistol?
A. Yes. And, I explained it to you at that time.
Q. Did you not say the defendant had to sign the receipt?

A. No, sir. I told you at that time I could hold the pistol for evidence, and that was all that was necessary. If you wanted the pistol back [8] at that time, you had to sign the receipt.

Q. You stated that at that time?

A. Yes, sir. If you wanted it back at that time.

Q. Mr. Ramsey, you are a law enforcement officer, and you know you are supposed to tell the exact truth without coloring it up.

A. That is the exact truth, sir.

MR. AMBROGI: Your Honor, I object. He is arguing with the witness. The witness has testified to exactly what he did, and he is attempting to get him to change his testimony.

MR. SWART: I think I am entitled to cross examine.

THE COURT: Objection overruled.

BY MR. SWART:

Q. Do you recall the words being spoken that you just testified to?

A. The exact words? I can't tell you the exact words I said on the thirteenth of November. No, sir.

Q. Are you absolutely positive in your own mind that you said you wanted this for evidence?

A. I am absolutely sure I told you that the receipt is given to you so that you could have the gun back rather than hold the gun for evidence, and I would have the receipt. Now, whether I said the receipt was for evidence or not, I don't know. I said I wanted the receipt.

Q. Is the only reason you wanted the receipt for evidence? [9]

A. Yes, sir.

Q. It wasn't intended to be a receipt for my gun then?

A. It was intended so you could return home with your gun.

Q. But, the reason you wanted the receipt . . .

MR. AMBROGI: I would object again. He is arguing with the witness.

THE COURT: That is argumentative. You can ask him why.

MR. SWART: I think I am entitled to lead him on cross examination.

BY MR. SWART:

Q. I think you said it, but since there was an objection, I want to make sure again. Is not the only reason you asked for this receipt to be signed was because you wanted it for evidence?

A. No, sir. The receipt was for evidence and for returning your gun to you.

Q. Getting back to the time you said you saw the gun shot. How far away were you?

A. Approximately one hundred (100) or one hundred fifty (150) yards in the fence row above you.

Q. Didn't you testify in the County Court you were two [10] hundred (200) yards?

A. Approximately; maybe; I don't know the exact distance. I was guessing the distance then like now.

Q. Would two hundred (200) yards be a fair estimate?

A. I would say from one hundred (100) to two hundred (200) maybe.

Q. That is a big variance. Do you recall testifying in the county court it was two hundred (200) yards?

A. No, sir. Not to the fact that it was exactly two hundred (200) yards. No, sir.

Q. Do you remember what you did say?

A. I said approximately, maybe two hundred (200).

Q. Your memory on that is not as good as on the receipt business then?

A. I don't recall exactly what I said on that. I said . . . the receipt is not from memory. The receipt is the standard way of giving your gun back to you. There is no memory to it.

Q. Then, you are relying upon your normal procedure then, not your memory?

A. I said I gave the gun back to you and took a receipt to return the gun to you and have the receipt for evidence.

Q. Getting back to the time the gun was fired, how many times did you observe someone shoot it?

A. See the gun shot? I couldn't see the gun at all.

Q. So, you never did see the gun? [11]

A. Not until you gave it to me.

Q. How many times did you hear it shot?

A. Approximately four times.

Q. Did you see a target?

A. I saw the rabbits you were hunting and the ones that you had in your bag. I didn't exactly examine them to see if they were hit with the twenty-two or not.

Q. Did the group have other rabbits?

A. You had rabbits; some of you did.

Q. Did I have the gun in my hand?

A. You had a twelve-gauge shotgun, and I think maybe I have the type; Winchester, I think. No, I don't see it on here.

Q. I ask you again. Did you see the target the gun was fired at?

A. No. I didn't see the rabbit you said you were shooting at.

David Ramsey

Q. Did you examine any of the rabbits in the possession of anyone at that place?

A. Not for shooting. No.

Q. Then, you don't know whether or not they had been shot with a shotgun or a pistol?

A. No.

Q. You said the shot, you heard it four times?

A. I said approximately, I didn't exactly stand and count [12] them as they were being shot.

Q. Do you know whether or not it was four times?

A. I wouldn't say definitely four, but I think it was four.

Q. Would you say from three to five then?

A. From three to five. Yes.

Q. You didn't see anyone when the gun was shot?

A. I saw all four of you when the gun was shot.

Q. But, you couldn't tell who was shooting it?

A. No. I couldn't tell who was shooting it, and all I can say is that the other three men were standing and looking at you, and they were more or less facing me and you had your back to me, and that is the reason I said you had the gun when I came down to you.

Q. As I understand it, you didn't see the target?

A. No. I didn't see the rabbit.

Q. Could you tell in what direction the gun was pointed?

A. No. Not exactly.

Q. Could you tell whether it was pointed toward the sky or the left or at the ground?

A. I could tell you didn't have it pointed up in the air. Yes, sir. You didn't have your arm sticking up in the air. You had it pointed towards the ground.

Q. It was pointed at the ground? [13]

A. I don't know how your arm was pointing, but your arm was down.

Q. There were no dogs chasing a rabbit at that point, were there?

A. No, sir. Not that exact vicinity. There were dogs running around in the area, but not where you were.

Q. Not where we were. It was the opening day of hunting season, and there were a lot of hunters in the area, were there not?

A. A good many. Yes.

MR. SWART: I think that is all.

REDIRECT EXAMINATION

BY MR. AMBROGI:

Q. Did Mr. Swart make any statements to you?

A. He told me at the time when we went back to the car and I wrote

him the summons . . . I explained to him that in Frederick County if he wanted to take care of it ahead of time, the County Court did recognize if he came in County Court. He told me at that time that he didn't intend to take care of it until he made a study of the law to see whether I knew what I was doing or not.

Q. Did he tell you whether or not he was hunting rabbits?

A. He said they were hunting rabbits, and he didn't know a twenty-two pistol was illegal to hunt with.

Q. Was the gun loaded or empty when you saw it? [14]

A The gun had either three or four, I wouldn't say exactly, either three or four empty shells and one loaded that I took out when we got back to the car.

Q. Were these twenty-two caliber cartridges?

A. Twenty-two caliber cartridges.

Q. Was there just one pistol in the group to your knowledge?

A. To my knowledge, that is all that was there. I asked for the pistol. and he gave me this one.

MR. AMBROGI: I believe that is all, except I move this be introduced into evidence, Your Honor, the receipt for the firearm Mr. Ramsey didn't confiscate.

THE COURT: Any objection?

MR. SWART: I have no valid objection, Your Honor.

THE COURT: Introduced them as Commonwealth's Exhibit Number One.

RECROSS EXAMINATION

BY MR. SWART:

Q. Now, Mr. Ramsey, you said you took a bullet out of the gun?

A. I took the bullets out on the floor board of the car, the empties and the full one.

Q. Did you put them back in the gun?

A. I don't recall. I think I just handed them to you. [15]

Q. Mr. Ramsey, think again. Do you recall unloading that gun?

A. Yes, sir.

Q. How do you open it?

A. I asked you how to open it. I don't recall how to open it?

Q. Didn't I empty it and put the bullets in my pocket?

A. The bullets were put on the floor board of the car and were picked up and handed back to you.

Q. Do you have any of them?

A. Any of the bullets? No, sir.

David Ramsey

Q. Do you know who manufactured them?
A. No, sir. I didn't look to see who was the manufacturer.
Q. Did you measure them with any calibre or measuring device?
A. No.
MR. SWART: That is all.

THE COURT: Just a moment. Now, you stated the accused told you on the way to the car he didn't know what he was going to do at the time until he investigated what the law was; then just after that you stated the accused said he was hunting rabbit and he didn't know that it might be illegal with a twenty-two, but you didn't say when that might have been said to you. Was that said at the same time, on the way to [16] the car, or when you first walked up to where the group was, or when?

THE WITNESS: When we were standing and talking about the gun, he said he didn't know it was illegal to hunt with a twenty-two. That was before we went to the car.

THE COURT: Where was it said?

THE WITNESS: Where was it said? Down in the field where all four of the men were. Only Mr. Swart and I went to the car which was approximately two (200) or three hundred (300) yards . . . I would say fifty (50 to one hundred (100) yards from where I was standing observing the men. The other three men stayed there in the field hunting. The statement about what he was going to do was made at the car.

THE COURT: I know that. I just wanted to find out where the other statement was made. Any further questions?

Mr. AMBROGI: No, sir, Your Honor. No further questions. No further evidence.

CLOSING ARGUMENTS

MR. SWART: Your Honor, I would move to dismiss this case on two grounds. First, the statute does not charge a criminal offense, even if the condition for the use of a pistol were not met. Secondly, because the game warden has acknowledged he didn't measure the bullets and didn't know the manufacturer, and he can't testify that they didn't meet the requirements of the statute. And, thirdly, because of the fact [17] there is no evidence that I was hunting with the pistol.

[End Transcript, page 17, line 2]

* * * * *

[Begin Transcript, page 23, line 24]

THE COURT: Well, maybe some other statute in this [24] chapter has some effect on it.

David Ramsey

MR. SWART: I don't think there is anything that explains it, Your Honor, but that is one of the reasons I asked the Commonwealth to specify the statute involved, so we would know what we were faced with this morning.

MR. AMBROGI: I don't think there is, Your Honor. I think the only statutes are the ones 29-140 and 29-161.

[End Transcript, page 24, line 7]

* * * * *

OPINION OF COURT

May 16, 1973
(Dictated May 3, 1973)

Mr. Frank D. Swart
P. O. Box 400
Fairfax, Virginia 22030

Lawrence R. Ambrogi, Esquire
Commonwealth Attorney
Frederick County Court House
Winchester, Virginia 22601

Re: *Commonwealth* v. *Swart*—Circuit Court of Frederick County, Criminal Docket No. 2546

Gentlemen:

This is my opinion in the matter taken under advisement at the conclusion of trial proceedings in open court.

The accused was charged by summons with violation of the game law, to wit: "Hunting rabbit with illegal weapon (22 pistol)," was convicted in the County Court and appealed to this court. Jury trial having been waived, the case was tried by the court alone.

At the conclusion of the evidence the accused moved to strike on various grounds. The court overruled the motion in all respects as it related to sufficiencey of evidence, but deferred ruling on the portion of the motion to the effect that the violation charge did not constitute a criminal offense.

The principal burden of the accused's argument is that nowhere does the law make it a crime to hunt rabbits with a .22 caliber pistol, that such a conclusion can only be reached by implication rather than from specific provisions of the law and that acts otherwise not illegal or forbidden cannot be made criminal by implication only.

I find that it is not necessary to resort to implication to see that the act with which the accused is charged is a criminal violation. The only

resort necessary is to ordinary statutory construction of related sections of Title 29, which contains the game, inland fish and dog laws. CODE § 29-1.

§ 29-143 of the CODE is crucial to the decision of this case. By Subsection (k) it is expressly made unlawful to hunt any wild animal "except as specifically permitted by law and only by the manner or means . . . stated." Thus there is an express prohibition against all such hunting unless the law specifies that it may be done and unless it is done in a way the law sets out. If such hunting is not permitted or is permitted but is done other than "by the manner or means" specified it become unlawful and hence an offense.

"Game" is defined to include wild animals "that are commonly hunted for sport or food; and rabbit is included in "game animals." § 29-2.1(g) and (k). Subsection (n) of that section defines hunting and contains the following express proviso: "that whenever hunting . . . is permitted reference is made to doing so by *lawful means and in a lawful manner.*" (Emphasis added).

Article 2 of Title 29 deals with the subject of hunting and trapping. There hunting and trapping are again defined with reference to wild animals, in § 29-131; and rabbit is again included among game animals; § 29-132(c).

§ 29-140 permits the hunting of game animals in counties west of the Blue Ridge Mountains with pistols, but contains the express proviso against the use of bullets less than .23 caliber.

The court has found that in contemplation of the statutes the accused was hunting, he was hunting a game animal, to wit, rabbit; his hunting rabbit was west of the Blue Ridge where such may be done with a pistol; but he was doing so with a bullet of less than .23 caliber.

As this particular act of hunting is not "specifically permitted by law" and since it was not "by the manner or means" provided, it was unlawful. § 29-143(k). It is not argued by the accused that the Commonwealth cannot constitutionally proscribe criminally all hunting within her borders except that which the Commonwealth specifically permits by means expressly allowed.

If it is urged that there is no criminal offense because no criminal penalties are provided, § 29-161 providing for general penalty for violating any provision of the hunting laws should be sufficient answer.

I now find that the act with which the accused is charged does constitute a criminal offense, and hence overrule the last remaining point of the accused's motion to strike the evidence of the Commonwealth. I will announce my decision and proceed to judgment and sentence on the opening day of the May term, May 21, 1973.

Yours very truly,
/S/ ROBERT K. WOLTZ, Judge

PROCEEDINGS IN TRIAL COURT MAY 21, 1973 [2]

THE COURT: Docket 2546, Commonwealth against Swart. In the case of Commonwealth against Swart. Docket number 2546, let the record show that the accused appeared per se and that this matter comes on for the purpose of passage of judgment and sentence, it having been pending heretofore for determination of a point of law asserted by the accused. And, that the Court has since determined that point of law against the accused, which decision is contained in writing, letter of opinion filed in the case and copy of which was sent to the accused and the Commonwealth's Attorney heretofore.

Is there anything further in the case at this time, gentlemen?

MR. SWART: Your Honor, I made motion to dismiss, or some such motion, on two grounds of which you over ruled. I would like to make sure they are clear in the record.

THE COURT: Very well, sir.

MR. SWART: One was the summons issued did not charge a crime and Your Honor over ruled that.

The second was, that the evidence was insufficient to convict and Your Honor over ruled that.

Now, I would like to add a third one on the ground that Your Honor has indicated in your opinion, letter of May 16th, that you are convicting me under a statute different from that for which I was tried.

FINAL ORDER (OF CONVICTION) JUNE 18, 1973

On the 21st day of May, 1973 came the Defendant, pro se, and came the Commonwealth by her Atttorney, pursuant to a previous order of this Court continuing this case until Monday, May 21, 1973 at 9:30 a.m., for receiving the Court's ruling on the Defendant's previous motion to strike the Commonwealth's evidence.

WHEREUPON, the Defendant again moved the Court to strike the Commonwealth's evidence on grounds not yet heretofore stated. After argument by the Defendant and the Attorney for the Commonwealth, the Court overruled the Defendant's motion and the Defendant noted an exception to the Court's ruling.

WHEREUPON, nothing further remaining to be done, the Court found the Defendant guilty of hunting with an illegal weapon on November 13, 1972, as charged in the summons, imposed a fine upon him of Twenty-Five Dollars ($25.00) and ordered him to pay the costs of this prosecution. The Defendant then noted an exception to the Court's

ruling and the Court ordered this case filed among the Criminal Cases Ended.

ENTERED this 18th day of June, 1973.

ROBERT K. WOLTZ, Judge.

ASSIGNMENT OF ERROR FILED JULY 6, 1973

The Defendant hereby assigns the following errors to the rulings of the Court:

1. The summons upon which Defendant was tried does not charge a crime under the statutes of Virginia.
2. The Court convicted Defendant of violating a different statute from the one for which he was tried.
3. The evidence was insufficient to convict Defendant.

/s/ FRANK D. SWART
P. O. Box 400
Fairfax, Virginia, 22030

CERTIFICATE OF SERVICE

I hereby certify that this 5th day of July, 1973, I mailed a copy of the foregoing Assignments of Error to Mr. Lawrence R. Ambrogi, Commonwealth's Attorney for Frederick County, Frederick County Court House, Winchester, Virginia, 22601.

/s/ FRANK D. SWART