

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Michael Todd Kelly, | : | |
| | : | |
| Petitioner | : | |
| | : | |
| v. | : | No. 600 C.D. 2012 |
| | : | SUBMITTED: November 2, 2012 |
| Pennsylvania Game Commission, | : | |
| | : | |
| Respondent | : | |

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE LEADBETTER**

FILED: January 30, 2013

Petitioner, Michael Todd Kelly, proceeding *pro se*, appeals from the order of the Pennsylvania Game Commission (Commission), which revoked his hunting privileges for a period of twenty (20) years. We affirm.

On May 31, 2010, Petitioner was hunting wild turkey with a Mossberg 12 gauge pump shotgun in a wooded area off of Woodhill Road, Mahoning Township, Montour County, Pennsylvania. Jeffrey Blue was also hunting wild turkey in the same area. Around 10:40 a.m., Mr. Blue was actively calling turkey when Petitioner saw movement in the woods. Mistakenly believing it was caused by a turkey, Petitioner shot Mr. Blue in the head and chest and found Mr. Blue lying on the ground bleeding. Mr. Blue gave Petitioner his phone and

asked him to call for help. Petitioner handed the phone back to Mr. Blue saying that he was unfamiliar with cell phones and did not know how to make a call. Petitioner's uncle then arrived on the scene. Petitioner and his uncle left the scene after Petitioner expressed fear about going back to jail for getting caught with a gun. Petitioner told Mr. Blue that he was going to get help. After leaving the scene, Petitioner went to his uncle's house, removed his hunting clothing and hid the shotgun. Petitioner and his uncle then returned to the scene, but Mr. Blue had already been transported. After Petitioner left, Mr. Blue called his girlfriend who called 911. Mr. Blue was taken to Geisinger Medical Center in serious condition and spent three days in the special care unit. Mr. Blue sustained multiple injuries in the head, neck, right shoulder, right ribs, and right arm from 28 shotgun pellets. Mr. Blue identified Petitioner to the authorities.

On November 30, 2010, Petitioner plead guilty to aggravated assault, Section 2702 of the Crimes Code, *as amended*, 18 Pa. C.S. § 2702, and illegal possession of a firearm, Section 6105 the Pennsylvania Uniform Firearms Act, *as amended*, 18 Pa. C.S. § 6105, pursuant to a plea agreement with the Commonwealth. Petitioner was sentenced to two concurrent terms of forty-eight (48) to ninety-six (96) months imprisonment in a state correctional institution, with credit for 221 days of time served.

Previously in 1992, Petitioner was convicted of intent to deliver a controlled substance, a felony offense under Section 113(a)(30) of The Controlled Substance, Drug, Device and Cosmetic Act.¹ As a convicted felon, Petitioner is prohibited from possessing, using, or controlling a firearm under Section 6105(c)(2) of the Pennsylvania Uniform Firearms Act, 18 Pa. C.S. § 6105(c)(2).

¹ Act of April 14, 1972, P.L. 233, *as amended*, 35 P.S. § 780-113(a)(30).

On August 30, 2011, Wildlife Conservation Officer Rick Deitrich filed a petition seeking revocation of Petitioner's hunting license. The Commission issued an order to show cause why Petitioner's hunting privileges should not be revoked for a period of 20 years pursuant to Section 2741(b)(2) of the Game and Wildlife Code, 34 Pa. C.S. § 2741(b)(2).

At a hearing presided over by a hearing officer, Mr. Blue, Officer Deitrich, and Petitioner testified. Mr. Blue testified regarding his own actions before the shooting. He further testified that Petitioner did not provide any assistance to him. Officer Deitrich testified about his investigation of the shooting. Officer Deitrich testified that he interviewed Petitioner's uncle who stated that Petitioner had told him they needed to leave the scene because he did not want to go back to jail and that he could not be caught with a gun. Officer Deitrich stated that the local police conducted a manhunt for Petitioner and that he questioned Petitioner after he was apprehended several hours after the shooting. Officer Deitrich testified that Petitioner confirmed that he told his uncle that they needed to leave the scene because he did not want to go back to jail. Petitioner apologized to Mr. Blue and stated that the shooting wasn't intentional, but rather that his actions were reckless. He testified that he was unfamiliar with cell phones and was so traumatized by the shooting that he was unable to think straight. He also testified that he intended to assist Mr. Blue and he eventually returned to the scene.

The hearing officer concluded that the Commission was authorized to revoke Petitioner's license because he had been accused of shooting at or causing injury to a human being and failing to render assistance in violation of Sections 2522 and 2523 of the Wildlife Code, *as amended*, 34 Pa. C.S. §§ 2522 and 2523. The hearing officer acknowledged that Petitioner's actions were not intentional,

but reasoned that the accidental nature of the shooting did not negate the fact that he caused serious bodily injury to Mr. Blue and failed to render immediate and full assistance. The hearing officer also noted that Petitioner completely ignored the law which prohibited him as convicted felon from possessing a firearm. The hearing officer determined that due to the magnitude and severity of Petitioner's actions a twenty year suspension was the appropriate penalty. The Commission concurred with the hearing officer's recommendation and adopted the recommendation to revoke Petitioner's hunting privileges for twenty years. This appeal followed.

Petitioner asserts that the Commission's decision was not supported by substantial evidence because it relied upon false testimony and mischaracterized a hunting accident as a criminal act. Petitioner also argues that the Commission improperly commingled prosecutorial and adjudicative functions.²

Section 2741(b)(2) of the Wildlife Code, *as amended*, 34 Pa. C.S. § 2741(b)(2), authorizes the Commission to deny a hunting license to any person who:

(2) Has been accused of having violated any of the following provisions even though such person has not been convicted of a violation of these sections:

Section 2501 (relating to hunting or furtaking prohibited while under influence of alcohol or controlled substance).

Section 2505 (relating to safety zones).

Section 2509 (relating to damage to property).

² The Commission argues that Petitioner's appeal should be quashed for failure to comply with the Pennsylvania Rules of Appellate Procedure. While the Commission is correct that Petitioner's brief does not comply with the appellate rules, we decline to quash the brief and dismiss his appeal because we are able to discern the legal issues raised. *Smithley v. Unemployment Comp. Bd. of Review*, 8 A.3d 1027, 1029 (Pa. Cmwlth. 2010).

Section 2522 (relating to shooting at or causing injury to human beings).

Section 2523 (relating to rendering assistance after incidents).

Petitioner was charged with violations of Sections 2522 and 2523. Section 2522 prohibits any person, while hunting, from carelessly or negligently shooting at, injuring or killing any human being through use of a firearm. To shoot at and cause serious bodily injury to a human being is a misdemeanor of the second degree and the Commission may deny the perpetrator a license to hunt for a period of no less than five years and no more than ten years. 34 Pa. C.S. § 2522(b)(2) and (c)(2). Section 2523 requires a person who has inflicted injury to a human being with a firearm while hunting to render immediate and full assistance to the injured and prohibits the perpetrator from fleeing. A violation of Section 2523 is a misdemeanor of the second degree and the perpetrator forfeits the privilege to hunt for a period of ten years. 34 Pa. C.S. § 2522(b)(2). As part of his plea agreement, the charges under Sections 2522 and 2523 were among the seven charges *nolle prossed* in return for Petitioner's guilty plea to aggravated assault and illegal possession of a firearm.

Petitioner argues that the Commission's decision is not supported by substantial evidence because Officer Deitrich was untruthful. Officer Deitrich described the shooting scene as being clear with woods on both sides and Mr. Blue described the area as having a lot of foliage. Petitioner also disputes Officer Deitrich's testimony that it took 12 to 13 hours to apprehend and investigate Petitioner. Petitioner was accused of violating Sections 2522 and 2523 of the Wildlife Code. Petitioner's violation of Section 2522 is supported by the testimony of Mr. Blue who identified Petitioner as the person who shot him.

Petitioner's violation of Section 2523 is also supported by Mr. Blue's uncontradicted testimony that Petitioner failed to provide any aid to him. Petitioner's arguments are nothing more than challenges to the Commission's credibility determinations and the weight to be accorded the evidence offered at the hearing. It is well settled that all determinations of witness credibility and evidentiary weight are solely within the province of the Commission. *See Buoncuore v. Pa. Game Comm'n*, 777 A.2d 1222, 1224 (Pa. Cmwlth. 2001).

Petitioner's argument that the revocation of his license is not supported by substantial evidence because the shooting was accidental is without merit. Although the shooting was accidental, this does not relieve Petitioner of responsibility. Section 2522 prohibits a hunter from carelessly or negligently shooting at a human being. The hearing officer found Petitioner's actions to be careless and reckless because he shot at movement in the undergrowth without first determining if the movement was actually caused by a turkey.³ We conclude that the revocation of Petitioner's license is supported by substantial evidence.

Petitioner asserts that the Commission improperly commingled prosecutorial and adjudicative duties in violation of his right to due process. The Pennsylvania Supreme Court has held that "hunting is not a property or liberty interest to which the full panoply of due process protections attach." *Pa. Game Comm'n v. Marich*, 542 Pa. 226, 232-33, 666 A.2d 253, 257 (1995). The revocation of a hunting license is subject to the procedural and judicial safeguards provided for by the Administrative Agency Law, 2 Pa. C.S. §§ 101. *Id.* The Commission appointed a hearing officer to hold a hearing on the revocation of

³ The Court notes that Petitioner has completely failed to acknowledge that he was prohibited from possessing or using a firearm because of his status as a convicted felon.

Petitioner's license. 58 Pa. Code § 145.6. The hearing officer provided opportunities for both the Commission and Petitioner to present testimony. The hearing officer issued a well-reasoned opinion containing findings of fact, conclusions of law and a recommendation to revoke Petitioner's license for a period of twenty years based upon the findings of fact and conclusions of law. The Executive Director of the Commission reviewed the hearing officer's decision and concurred with the recommendation. The record fails to support Petitioner's argument that the Commission commingled prosecutorial and adjudicative functions in violation of his due process rights.

For all of the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
Judge

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ORDER

AND NOW, this 30th day of January, 2013, the order of the Pennsylvania Game Commission is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
Judge