

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN RE: JOHN MAUPIN.

APPEAL NO. C-980094
TRIAL NO. 97-13458

DECISION.

Criminal Appeal From: Hamilton County Juvenile Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: December 11, 1998

PRESENTED TO THE CLERK
OF COURTS FOR FILING

DEC 11 1998

COURT OF APPEALS

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*,
Assistant Prosecuting Attorney, for Appellee,

Kenneth L. Lawson, for Appellant John Maupin.

Per Curiam.

John Maupin appeals from his adjudication as a delinquent in the Hamilton County Juvenile Court for the felonious assault of Kevin Mecum. As the trial court erred by employing the wrong standard of proof for Maupin's self-defense argument and by basing its decision on a mistaken belief that Maupin had a duty to retreat from his driveway, the adjudication is reversed and the cause is remanded.

Maupin's adjudication arises from an altercation between Maupin, who was seventeen years of age at the time of the offense, and Mecum and David Friedman, both then eighteen years of age. These students and former students of Moeller High School and Sycamore High School had had previous run-ins and disputes. On the evening of July 4, 1997, Maupin, accompanied in his car by three girls, exchanged angry words with the occupants of three cars of teenagers. Mecum and Friedman were in the lead car. Maupin sped away. Mecum, Friedman, and their friends turned their cars around and pursued Maupin to his home.

Maupin pulled into his driveway, and exited from his car. Mecum, Friedman and the others left their cars and advanced toward Maupin. Maupin warned them not to come onto the property. Mecum and Friedman withdrew to the street, according to some witnesses, or to the edge of the driveway, according to others. It is undisputed that Maupin, standing in his driveway, threw one punch striking Mecum in the face. Mecum dropped to the ground unconscious. His head hit the pavement. Mecum's allies then assaulted Maupin and vandalized the Maupin residence. Police and emergency medical personnel arrived. Mecum had sustained serious skull and brain injuries. He was transported to a hospital where he stayed for over ten days.

OHIO FIRST DISTRICT COURT OF APPEALS

Following their investigation, police authorities did not charge Maupin. They did, however, initiate complaints against Mecum and Friedman.¹ Ten days later, Mecum's father, Robert C. Mecum, filed a complaint against Maupin for felonious assault. Because he is the director of an organization which provides services to Hamilton County and was personally known by the then-sitting judges of the juvenile court, both judges recused themselves. A judge of the general division of the court of common pleas was assigned to sit as a judge of the juvenile court for the adjudication.

Following a lengthy hearing, the trial court heard closing argument from counsel and then ruled from the bench that the state had carried its burden of demonstrating beyond a reasonable doubt that Maupin had knowingly caused serious physical harm to Mecum. The court next evaluated Maupin's affirmative defense of self-defense, stating that Maupin had not demonstrated by a preponderance of the evidence that he was not at fault in creating the fray, "that he had a bona fide belief that he was in imminent danger of death or great bodily harm, and that his only means of escape from such danger was in the use of deadly force," and that he did not violate any duty to retreat. T.p. 278.

The trial court explained its decision by stating that "[Maupin] got out of his car and he didn't go in the house. [He,] whether its two feet or more, walked toward Mr. Friedman and walked toward Mr. Mecum. * * * [He] did not leave the scene. [He] did not run. [He] did not ask for help from the police or anything of that nature." T.p. 278-279. The court sentenced Maupin as appears of record and this appeal ensued.

¹ The evidence of the charges against and convictions of Friedman and Mecum for aggravated menacing and trespass attached to Maupin's appellate brief cannot be considered by this court, as they had not been filed in the trial court before it reached its decision and cannot be considered here for the first time. *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500, paragraph one of the syllabus.

In his first and second assignments of error, Maupin contends that the trial court erred as a matter of law in employing a deadly-force standard of self-defense rather than the non-deadly-force standard, and erred in concluding that Maupin had a duty to retreat from his driveway. We agree.

Contrary to what the trial court held, to prevail on a non-deadly-force affirmative defense, one must show by a preponderance of the evidence that (1) he was not at fault in creating the situation; (2) he reasonably believed that some force was necessary to defend himself against the imminent use of unlawful force, and (3) the force used was not likely to cause death or great bodily harm. *Columbus v. Dawson* (1986), 33 Ohio App.3d 141, 142, 514 N.E.2d 908, 910; R.C. 2901.05(A).

Under Ohio law, there is no duty to retreat, even if it is possible to do so, before using "non-deadly" force in self-defense. *Columbus v. Dawson*. Moreover, when one is in his home, one may use all reasonable force, including deadly force, to defend himself without retreating. *State v. Napier* (1995), 105 Ohio App.3d 713, 722, 664 N.E.2d 1330, 1336; see, also, *State v. Thomas* (1997), 77 Ohio St.3d 323, 673 N.E.2d 1339, syllabus.

The state urges this court to consider Maupin's argument under a plain-error standard, as he "failed to object to the self-defense standard articulated by the trial court." Appellee's Brief at 4. This contention is disingenuous at best. First, the trial court adopted the erroneous standard at the urging of the assistant prosecuting attorney. T.p. 270-271. Second, the trial court identified its use of the erroneous standard only as it explained the decision it had *already made* to adjudicate Maupin delinquent.

The standard of proof of self-defense employed by the trial court, in which Maupin was required to show that his only means of escape was to use deadly force and

OHIO FIRST DISTRICT COURT OF APPEALS

that he did not violate any duty to retreat, was erroneous. Moreover, the court's findings that Maupin failed to retreat when he had a duty to do so was the basis for the trial court's ruling that Maupin was at fault and used excessive force.

Because of the conflicting testimony, these errors were not harmless and the evidence must be weighed under the appropriate standard to determine if Maupin proved his affirmative defense by a preponderance of the evidence. The first and second assignments of error are sustained.

Maupin's fifth assignment of error is overruled, as there has been no showing that the judge sitting by assignment knew of Robert C. Mecum, or that Maupin was prejudiced in any way.

Maupin's third and fourth assignments of error are rendered moot by our resolution of the first and second assignments of error. App.R. 12(A)(1)(c).

Therefore, the judgment of the trial court is reversed and the cause is remanded for further proceedings.

Judgment reversed and cause remanded.

SUNDERMANN, P.J., DOAN and GORMAN, JJ.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Decision.