

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	
v.)	Case No. 7:08-po-0024
)	
DAMON J. GETTIER,)	By: Hon. Michael F. Urbanski
Defendant.)	United States Magistrate Judge

MEMORANDUM OPINION

Defendant Damon J. Gettier (“Gettier”) was charged with possession of a loaded weapon in a motor vehicle on the Blue Ridge Parkway (“Parkway”) and failure to obey a traffic control device, in violation of 36 C.F.R. § 2.4(b) and 36 C.F.R. § 4.12, respectively. Section 2.4(b) provides that “[c]arrying or possessing a loaded weapon in a motor vehicle, vessel or other mode of transportation is prohibited . . .” Section 4.12 states that “[f]ailure to comply with the directions of a traffic control device is prohibited unless otherwise directed by the superintendent.”

A trial was held on February 7, 2008, at which the facts were largely undisputed. After the close of evidence, Gettier moved for a judgment of acquittal on two grounds. Gettier first argues that because the restriction on possessing a loaded weapon in a motor vehicle on the Parkway is not posted on signs at the entrance of the Parkway, he cannot be held criminally liable for violating such restriction. Second, Gettier argues that the absence at trial of the National Park Service Ranger who issued his citation prejudiced his right to a fair trial. The court took Gettier’s motion under advisement to maturely consider the issue. After studying applicable law, and for the reasons set forth in this Memorandum Opinion, the Court must reject Defendant’s arguments and enter a finding of guilt on the violation of 36 C.F.R. § 2.4(b) and 36 C.F.R. § 4.12. A sentencing hearing will be set.

I.

On January 4, 2008, Rangers Ryan Parr and Thomas Lewis of the National Park Service (“NPS”) observed a vehicle enter the Parkway near milepost 112 in the Western District of Virginia. The vehicle made a right turn onto the Parkway, but, according to the testimony of Ranger Parr, failed to signal and did not come to a complete stop at the stop sign before executing the turn. The Rangers proceeded to pull Gettier’s vehicle over on national park property. Ranger Lewis approached Gettier’s vehicle and Gettier promptly informed him that he had a loaded weapon in the vehicle and a Virginia concealed weapons permit. Ranger Lewis asked Gettier to step out of the vehicle and requested permission to search the vehicle. Gettier consented to the search of the vehicle, and Ranger Parr executed the search. Gettier told Ranger Parr that he had a Kimber .45 caliber semi-automatic pistol in the center console of the vehicle, and Ranger Parr retrieved the weapon. Gettier told the Rangers that the weapon was “cocked and locked,” meaning that the weapon was ready to fire.¹ Ranger Lewis then completed a search of the vehicle and also found a fully-loaded .38 caliber Smith and Wesson handgun in the passenger seat pocket. Gettier told the Rangers that he had forgotten that the second weapon was in the vehicle. The Rangers explained to Gettier that loaded firearms are not allowed in motor vehicles traveling on the Parkway, at which point Gettier began arguing that such a restriction conflicted with his Virginia concealed weapons permit. Gettier then demanded a court date. Accordingly, Gettier was issued a Violation Notice for both charges with a trial date of February 7, 2008.²

¹ Ranger Parr testified that the weapon was in a leather holster with the hammer back, hence being “cocked,” but that there was a strip of leather between the hammer and the firing pin which would need to be removed before the weapon would fire.

² Both Rangers Parr and Lewis signed the Statement of Probable Cause portion of the
(continued...)

At the trial in this matter, only Ranger Parr testified as to the facts of the criminal violations. Gettier argued that his right to a fair trial was prejudiced because the majority of his initial conversation occurred with Ranger Lewis, and not Ranger Parr. Further, Gettier testified that he drove the length of the Parkway in Roanoke and Bedford Counties and never once observed a sign informing the public of the prohibition against carrying or possessing a loaded firearm in a motor vehicle on the Blue Ridge Parkway. Gettier also testified that he did not know whether he came to a complete stop at the stop sign before making a right turn onto the Parkway or whether he used his turn signal before making the turn. Gettier did testify that he was aware of the prohibition against hunting in a National Park, in spite of the fact that no signs are posted alerting the public of that restriction.

Gettier also testified about a stop that occurred two days later for failing to stop at the very same stop sign. Because this stop occurred after the offense in question, the court finds such evidence to bear no relevance on the matter at hand. Additionally, Gettier argues that the Ranger Lewis illegally searched his person without consent. Gettier admits that he consented to the search of the vehicle, but not to a search of his person. Because the search of Gettier's person revealed no evidence used at this trial, the court also finds this testimony to be irrelevant.

II.

Gettier argues that both charges against him should be dismissed because his Sixth Amendment right to a fair trial was prejudiced by the absence of Ranger Lewis.³ At multiple junctures during the trial, Gettier argued that he could not effectively present his defense to the charges without the presence of Ranger Lewis. Gettier never made any argument as to why

²(...continued)
Violation Notices.

³ Ranger Parr testified that Ranger Lewis had been transferred to Missouri.

Ranger Lewis' presence was of such import, beyond that Ranger Lewis approached the vehicle, initiated the conversation with Gettier, searched his person, and issued him the citation.

The Sixth Amendment to the Constitution provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The presence of Ranger Lewis at trial goes to Gettier's rights "to be confronted with the witness against him" and "to have compulsory process for obtaining witnesses in his favor." Gettier's argument under the Confrontation Clause is fundamentally flawed as Ranger Lewis was neither a witness, nor did he testify against Gettier. No out of court statements or declarations made by Ranger Lewis were used against Gettier at trial. Accordingly, Ranger Lewis cannot be considered a "witness against him" under the plain language of the Sixth Amendment. In California v. Green, 399 U.S. 149, the Court made clear that it is the "literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause." Id. at 157. Gettier's argument that he was deprived of his right to confront Ranger Lewis is without merit, because Ranger Lewis was in no way a witness against him.

At trial, the only witness against Gettier was Ranger Parr. Ranger Parr testified that he witnessed Gettier fail to stop before entering the Parkway and that he retrieved the "cocked and locked" .45 caliber semi-automatic pistol from the center console of the vehicle. As such, the evidence produced at trial is sufficient to find Gettier guilty of both violations. Gettier also admitted possession of a loaded firearm in his motor vehicle on the Parkway. Further, Gettier

testified that he did not know if he stopped at the stop sign or if he activated his turn signal before turning onto the Parkway. As such, there was sufficient evidence presented at trial, including his own admissions as to the weapons, to convict Gettier of both violations.

Gettier's argument that the government was required to produce Ranger Lewis to testify at trial also is without merit. "[T]he Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him 'compulsory process for obtaining witnesses in his favor.'" United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982) (quoting the U.S. CONST., amend. VI). To be sure, Gettier could have subpoenaed Ranger Lewis to appear at his trial, but did not avail himself of the compulsory process made available to all defendants by the court. Gettier made no argument to excuse his failure to request Ranger Lewis' appearance at trial, nor did he seek a continuance to try to subpoena Ranger Lewis.

To establish a violation of the Sixth Amendment right to compulsory process "more than the mere absence of testimony is necessary." Id. (citing Washington v. Texas, 388 U.S. 14 (1967)). The Court in Washington found a violation of the compulsory process clause when the defendant "was arbitrarily deprived of 'testimony [that] would have been *relevant* and *material*, and . . . *vital* to the defense.'" Valenzuela-Bernal, 458 U.S. at 867 (quoting Washington, 388 U.S. at 16). Here, Gettier fails to argue that Ranger Lewis was in any respect vital to his defense. Both Rangers Lewis and Parr executed the Statement of Probable Cause on the back of the Violation Notices in this case, and those statements assert simply that Gettier failed to stop at a stop sign and had two loaded weapons in his motor vehicle. Because Gettier has failed to make any showing that Ranger Lewis' testimony would be favorable to his defense, much less vital,

the court cannot find that Gettier's right to compulsory process, as guaranteed by the Sixth Amendment, has been violated. Washington, 388 U.S. at 16. Further, Gettier's failure to avail himself of the process established by the court to compel the attendance of any witnesses he chooses to subpoena or to request a continuance to do so also renders his argument meritless.

III.

Gettier next argues that he cannot be convicted of carrying or possessing a loaded weapon in a motor vehicle in a national park because he did not have adequate notice that such activity was in violation of federal law. This argument also lacks merit.

In United States v. Lofton, 233 F.3d 313, (4th Cir. 2000), the Fourth Circuit decided a case very similar to the one at bar. In Lofton, the defendant was charged with violating another provision of section 2.4 of the Code of Federal Regulations, 36 C.F.R. § 2.4 (a)(1), prohibiting "possessing, carrying, or using a weapon, trap or net within lands owned or administered by the National Park Service." 233 F.3d at 315. This charge arose when law enforcement officers heard shots being fired and saw Lofton carrying a shotgun in Oxen Cave Park, a park located in Maryland and administered by the National Park Service. The defendant in Lofton argued, as Gettier does here, that the park was required to give notice of the prohibition against carrying weapons therein. Id. at 316. The Fourth Circuit rejected Lofton's argument, holding as follows:

[S]ince regulation 2.4 does not require that parks give notice of the weapons prohibition, nor does it make carrying weapons illegal only in parks where such notice is given, the absence of any such notice is irrelevant. The publication in the Code of Federal Regulations of the general ban against the carrying of weapons in national parks provided sufficient notice to [the defendant] of the criminality of his conduct.

Id. As Lofton is controlling precedent in this jurisdiction, Gettier's notice argument fails pursuant to the ruling in that case.

At the center of this case is Gettier's concern that he is a law abiding citizen who owns firearms and is allowed to carry them in his car on the highways of Virginia pursuant to the Second Amendment and a concealed weapons permit issued under Virginia state law. Gettier contends that he should have the same right to possess loaded guns in his car when driving on the Blue Ridge Parkway. Defendant argues that the Blue Ridge Parkway is, in one respect, a road much like other roads in Virginia, bearing traffic which many travelers use as a highway between, for example, United States routes 460 and 220 in the Roanoke area. But the Blue Ridge Parkway is not just a highway. While the Blue Ridge Parkway is in one sense a road, it is also a national park dotted with hiking trails, scenic overlooks, campgrounds and other attractions used by countless visitors. As such, the Parkway is subject to federal law and regulation just as any other national park. To protect the safety of persons visiting our national parks, the Department of the Interior has issued regulations concerning weapons, traps and nets in national parks. As the Fourth Circuit said in Lofton of the identical concern raised here, "[w]hile carrying a shotgun might under proper circumstances be perfectly legal according to Maryland law, it is not allowed in national parks, except under certain limited conditions not present in this case." 233 F.3d at 317. As regards Gettier's notice argument, Lofton controls this case and compels denial of the motion for judgment of acquittal.

It is worth noting that the regulation of weapons in national parks set forth in the Code of Federal Regulations is not an absolute ban on possession of a weapon in such a park. Under 36 C.F.R. 2.4(a)(3), "[t]raps, nets and unloaded weapons may be possessed within a temporary

lodging or mechanical mode of conveyance when such implements are rendered temporarily inoperable or are packed, cased or stored in a manner that will prevent their ready use.” Further, persons may obtain permits under 36 C.F.R. § 2.4(d) to carry or possess firearms in a national park such as the Parkway “[t]o provide access to otherwise inaccessible lands or waters contiguous to a park area when other means of access are otherwise impracticable or impossible” and for other purposes specified in the regulations. As such, the regulatory scheme balances the interests of public safety of visitors to national parks with a person’s ability to possess a weapon therein. Obviously, this case does not involve a permitted use under the regulations, and it is plain that having a loaded “cocked and locked” semi-automatic pistol in the center console of a motor vehicle on the Parkway violates 36 C.F.R. § 2.4(b).

For the aforementioned reasons, Gettier’s motion for a judgment of acquittal is denied. The United States has proven that Gettier violated 36 C.F.R. § 2.4(b) and 36 C.F.R. § 4.12 beyond a reasonable doubt, and the Court finds Gettier **GUILTY** of the offenses as charged. The Clerk is hereby directed to set this case down for sentencing and to send a copy of this Memorandum Opinion to defendant and counsel of record for the United States.

ENTER: This 25th day of March, 2008.

/s/ Michael F. Urbanski
United States Magistrate Judge