

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

MARQUIS COX,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1574 EDA 2014

Appeal from the Judgment of Sentence of April 30, 2014
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0004158-2013

BEFORE: GANTMAN, P.J., PANELLA AND OLSON, JJ.

MEMORANDUM BY OLSON, J.:

FILED JULY 31, 2015

Appellant, Marquis Cox, appeals from the judgment of sentence entered on April 30, 2014, following his bench trial convictions for carrying a firearm without a license, carrying a firearm on public property in Philadelphia, and possession of a firearm in a court facility.¹ After careful consideration, we vacate Appellant's judgment of sentence.

The trial court set forth the facts of this case as follows:

Philadelphia Deputy Sherriff Henry McDonald testified that he was on duty at the metal detectors in the lobby of the Philadelphia Traffic Court on the afternoon of November 20, 2012. [Appellant] placed his bag on the x-ray conveyor belt, then walked through the metal detector. As [Appellant's] bag went through the x-ray, Deputy McDonald observed that there was a weapon inside. To confirm his

¹ 18 Pa.C.S.A. §§ 6106, 6108, and 913, respectively.

observation, the Deputy ran the bag through the machine a second time. The weapon proved to be an unloaded, small, black, semiautomatic gun, in a square black weapons case.

[Appellant] was alone when he placed his bag on the conveyor. His mother followed 20-30 seconds later and put her pocketbook on the conveyor.

Deputy McDonald then approached [Appellant], who was standing waiting, having already gone through the metal detector. When Deputy McDonald told [Appellant] there was a weapon in his bag, [Appellant] did not say anything but he appeared shocked. [Appellant's] mother then came through the metal detector, and both she and [Appellant] accompanied the Deputy to a room in the rear, where Deputy McDonald removed the gun. When the gun was revealed, [Appellant's] mother said that the weapon should not have been in the bag, repeating over and over: "How did that get there? It shouldn't have been there. We're moving." While in the back room with the Deputy's supervisors, [Appellant's] mother said the gun belonged to her. The Deputy requested a carry permit, but none was produced.

After about an hour, and after consulting with his supervisors, Deputy McDonald placed [Appellant] under arrest, at which point [Appellant] said to his mother: "Mom, I don't want you to get in trouble. I'll say the gun is mine."

There were stipulations that the weapon was operable and that [Appellant] did not possess a permit to carry a firearm in Philadelphia.

[At trial, Appellant's] mother testified that the bag in question was hers, as was the gun, and that [Appellant] was just helping her with her things when he placed the bag on the belt. She did not know how her gun got into the bag, but surmised it must have been put in there accidentally when someone was straightening up in the house she shared with family members.

Finally, there was a stipulation that [Appellant] enjoyed a reputation as a peaceful, law-abiding citizen.

Trial Court Opinion, 8/29/2014, at 2-3 (record citations omitted; page numbers supplied).

Procedurally, the case progressed as follows:

Following testimony by the Deputy Sherriff and [Appellant's] mother, and arguments by counsel, [the trial court] found [Appellant] guilty of the [aforementioned crimes].

On April 16, 2014, a hearing was held on [Appellant's] motion for extraordinary relief, alleging the verdict was against the weight of the evidence and a new trial was necessary in the interests of justice. After hearing argument, the motion was denied and the matter was continued for sentencing.

On April 30, 2014, [Appellant] was sentenced on the charge of carrying a firearm without a license to 11 months [and] 15 days to 23 months [of imprisonment], and a consecutive sentence of two years [of] probation on the charge of carrying [a] firearm[] in a public place in Philadelphia. No further penalty was imposed on the charge of possession of a firearm in a court facility.

A timely notice of appeal was filed on May 20, 2014.

On May 30, 2014, the [trial court] entered an order directing the filing of a statement of [errors] complained of on appeal, pursuant to Pa.R.A.P. 1925(b). [Appellant] filed a timely statement of errors complained of on appeal on June 20, 2014. Upon motion of [Appellant], the time for filing a supplemental 1925(b) statement was extended on June 24, 2014, to 21 days after the receipt of the notes of testimony. Following preparation of the notes of testimony, counsel for [Appellant] advised the [trial court] that he would not be filing a supplemental 1925(b) statement. [The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on August 29, 2014.]

Id. (parentheticals and superfluous capitalization omitted).

On appeal, Appellant presents the following issues for our review:

1. Was not the evidence insufficient to support [A]ppellant's conviction for violating Sections 6106 and 6108 of the Uniform Firearms Act, where the Commonwealth failed to establish that [A]ppellant possessed a firearm?
2. Was not the evidence insufficient to support [A]ppellant's conviction for possession of a firearm in a court facility under 18 Pa.C.S. § 913, where the Commonwealth failed to establish that [A]ppellant knowingly possessed a firearm or knowingly caused it to be present in the courthouse, and where the Commonwealth failed to present evidence establishing that notice regarding the provisions of Section 913 was posted at public entrances to the courthouse or that [A]ppellant had actual notice of these provisions?
3. Did not the trial court err in denying defense counsel's motion for extraordinary relief and for a new trial, where the verdict was against the weight of the evidence and a new trial was necessary in the interests of justice?

Appellant's Brief at 3.

In his first issue presented, Appellant claims that the Commonwealth presented insufficient evidence to support his convictions for carrying a firearm without a license and carrying a firearm on public property in Philadelphia. More specifically, Appellant argues "possession requires proof that the defendant knew that the firearm was in the bag and intended to exercise control over it." *Id.* at 15. According to Appellant, "aside from the bare fact of [his] physically handling the bag that subsequently proved to contain the gun," the evidence at trial demonstrated that "[A]ppellant did not know what was in the bag." *Id.* Appellant posits that he voluntarily placed the bag on an x-ray machine in a court building and that such action is inconsistent with the intentional concealment of a weapon. *Id.* He also

points to the courthouse deputy's testimony that Appellant was shocked and froze upon hearing about the discovery of the firearm. *Id.* at 16. Appellant also relies upon his mother's reaction and statements to the deputy wherein she "directly acknowledged ownership of the gun." *Id.* at 17. Appellant maintains that the firearm was located in a box inside the bag, which lends further support to his claim that he did not know of the presence of the weapon. *Id.* at 18. He also claims there was no evidence that the bag belonged to Appellant and his mother was able to identify the bag as hers by listing the nursing supplies contained therein. *Id.*

The standard of review for claims of insufficient evidence is well-settled:

As a general matter, our standard of review of sufficiency claims requires that we evaluate the record in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Nevertheless, the Commonwealth need not establish guilt to a mathematical certainty. Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

The Commonwealth may sustain its burden by means of wholly circumstantial evidence. Accordingly, the fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence. Significantly, we may not substitute our judgment for that of the fact finder; thus, so long as the evidence adduced,

accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant's crimes beyond a reasonable doubt, the appellant's convictions will be upheld.

Commonwealth v. Franklin, 69 A.3d 719, 722-723 (Pa. Super. 2013) (citations, quotations, brackets, and parentheticals omitted).

Carrying a firearm without a license is governed by 18 Pa.C.S.A. § 6106(a), which provides, in pertinent part:

(a) Offense defined.--

(1) [...A]ny person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.

18 Pa.C.S.A. § 6106(a)(1).

Carrying a firearm on public property in Philadelphia, pursuant to 18 Pa.C.S.A. § 6108, is mandated as follows:

No person shall carry a firearm, rifle or shotgun at any time upon the public streets or upon any public property in a city of the first class unless:

(1) such person is licensed to carry a firearm[.]

18 Pa.C.S.A. § 6108.

Both crimes require the carrying of a firearm and, therefore, are clearly possessory offenses. "To prove possession of a firearm, the Commonwealth must establish that the individual either had actual physical possession of the weapon or had the power of control over the weapon with the intention to exercise that control." ***In the Interest of R.N.***, 951 A.2d

363, 370-371 (Pa. Super. 2008). Possession of a firearm is not a strict criminal liability crime. The United States Supreme Court has noted a *mens rea* requirement is traditionally required in criminal statutes; strict liability offenses are disfavored generally and some indication of legislative intent to impose strict liability is required to dispense with *mens rea*. ***Commonwealth v. Mayfield***, 832 A.2d 418, 426 (Pa. 2003), *citing* ***Staples v. United States***, 511 U.S. 600, 605-606 (1994). “Whether a given statute is to be construed as requiring criminal intent is to be determined by the court, by considering the subject matter of the prohibition as well as the language of the statute, and thus ascertaining the intention of the legislature.” ***Mayfield***, 832 A.2d at 427 (citation omitted). Under the definition section of the Pennsylvania Crimes Code, “[generally, a] person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.” 18 Pa.C.S.A. § 301(a). Moreover, “[p]ossession is [a punishable] act, [...] if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.” 18 Pa.C.S.A. § 301(c). These definitions are applicable to the aforementioned firearm offenses. **See** 18 Pa.C.S.A. § 107(a).

This Court has looked at criminal intent, or *mens rea*, in conjunction with possession of narcotics offenses and determined:

Pennsylvania courts interpreting [35 P.S.] § 780-113(a)(30) as it applies to possession with intent to deliver a controlled substance have concluded that the Commonwealth must establish *mens rea* as to the possession element. In ***Commonwealth v. Rambo***, 412 A.2d 535, 536-537 (Pa. 1980), the defendant was the recipient of two packages from Morocco containing hashish. The defendant argued that he was not aware that the packages contained hashish, and our Supreme Court noted that “[s]uch knowledge is required by our statute and our case law in order to prove possession of a controlled substance.” ***Id.*** at [] 537. [Our] Supreme Court relied upon 18 Pa.C.S.A. § 301, which defines possession as “an act, within the meaning of this section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate the possession.” ***Id.*** (quoting 18 Pa.C.S.A. § 301(c)). In addition, the [C]ourt wrote:

For legal purposes other than criminal law—e.g., the law of finders—one may possess something without knowing of its existence, but possession in a criminal statute is usually construed to mean conscious possession. So construed, knowingly receiving an item or retention after awareness of control over it could be considered a sufficient act or omission to serve as the proper basis for a crime.

Id. at [] 537-[5]38 (quoting W. LaFave & A. Scott, Jr., Handbook on Criminal Law § 25, p. 182 (1972)). Since the record in ***Rambo*** did not reflect that the defendant knew that the packages contained hashish, the Supreme Court vacated the conviction under § 780-113(a)(30). ***Id.*** [] at 537-[5]38 (citing ***Commonwealth v. Sterling***, 361 A.2d 799 ([Pa. Super.] 1976)).

Commonwealth v. Mohamud, 15 A.3d 80, 90 (Pa. Super. 2010).

In evaluating whether a person has knowledge of contraband in the context of possession, an *en banc* panel of our Court provided the following guidance:

[...A]n awareness of the presence of the items which [a defendant] was accused of having [i]s an essential element of his supposed intent to control. But this knowledge need not be proven by his admission of such knowledge, or by testimony of his associates that he saw these articles. The defendant's knowledge of the presence of these articles may be inferred from all the surrounding circumstances.

Inference is a process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted.

Commonwealth v. Gladden, 311 A.2d 711, 712 (Pa. Super. 1973) (*en banc*) (citations, quotations, ellipsis, and footnotes omitted).

Here, Appellant concedes that he was in actual possession of the firearm, but argues that the Commonwealth failed to prove he had knowledge of it. Appellant's Brief at 15. Upon review, the trial court considered only whether Appellant possessed a concealed weapon on his person, but did not consider whether Appellant knew he possessed it. The Commonwealth contends that the trial court made credibility determinations in its favor and Appellant's arguments disregard the standard of review for sufficiency of the evidence claims. Commonwealth's Brief at 9.

Again, "we evaluate the record in the light most favorable to the verdict winner, giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." ***Franklin***, 69 A.3d at 722. Here, the trial court did not find Appellant's "mother's assertions, either at Traffic Court or at trial, to be credible." Trial Court Opinion, 8/29/2014, at 9. Based upon our deferential standard of review, we will not usurp that credibility

determination. Accordingly, we consider only the Commonwealth's evidence herein or the testimony of the deputy operating the x-ray machine; we must disregard the testimony of Appellant's mother.

Upon review of the trial transcript, three aspects of the deputy's testimony relate to Appellant's alleged knowledge that the bag he was carrying contained a firearm. First, Appellant physically placed the bag on the x-ray conveyor belt. N.T., 2/26/2014, at 9, 12-13, and 33. There was no identification in the bag. *Id.* at 23. The bag containing the firearm was a cloth, drawstring bag approximately 12 by 15 inches in size. *Id.* at 24-25, 32. Inside the bag, there was a box containing the firearm. *Id.* at 22. The box was made of black plastic and measured eight inches by eight inches. *Id.* at 22-24, 32. The deputy testified that the box was padded on the inside and consistent with packaging commonly used with firearms at the time of purchase. *Id.* at 24. The deputy and the trial court opined that the box occupied a little more than half of the bag. *Id.* at 24-25, 32. The firearm was not loaded. *Id.* at 22.

Here, there was no evidence establishing beyond a reasonable doubt that Appellant knew he was carrying a firearm based upon unique shape or feel of the bag. Quite the opposite, the firearm was packed in a closed container inside a closed bag. Pursuant to *Rambo*, the trial court could not infer that Appellant knew what was inside a closed container.

Next, the Commonwealth presented evidence of Appellant's reaction to the discovery of the firearm. Appellant "froze" and "looked shocked" upon

the deputy's discovery of the firearm. N.T., 2/26/2014, at 14. "The only thing [Appellant] said in [the deputy's] presence was -- once [Appellant and his mother] realized there was going to be an arrest made, [Appellant said:] 'Mom, I don't want you to get in trouble. I'll say the gun is mine.'" **Id.** at 30.

This evidence, however, does not demonstrate knowledge. Appellant "froze" and "looked shocked" upon the deputy's discovery of the firearm. We could consider these actions to be consistent with either being caught or being surprised by the firearm's presence. Moreover, Appellant's statement that he would take responsibility for the firearm, likewise, does not show that he initially knew the firearm was inside the bag. He claimed responsibility **after** the fact.

Finally, the deputy testified that Appellant's mother was adamant that the firearm should not have been in the bag, suggesting that it wound up there inadvertently while she was packing to move.² **Id.** at 17, 20. More specifically, the deputy stated that she was "very vocal" and repeatedly claimed, "the weapon shouldn't have been in the bag." **Id.** The deputy testified that Appellant's mother claimed ownership of the gun when it appeared that an arrest would be made. **Id.** at 26.

² The Commonwealth elicited this testimony on direct examination. The trial court found the deputy credible. Hence, based upon our standard of review, we may consider this evidence.

Thus, in examining the totality of the circumstances, we conclude that evidence of Appellant's knowing possession of a firearm was so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. Even accepting all reasonable inferences and reviewing the evidence in the light most favorable to the Commonwealth, the element of knowledge was not proven beyond a reasonable doubt to support Appellant's convictions under Sections 6106 and 6108 of the Uniform Firearms Act. Hence, we are constrained to vacate Appellant's convictions for carrying a firearm without a license and carrying a firearm on public property in Philadelphia.

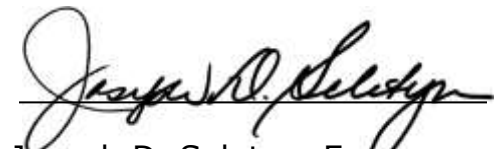
In his second issue presented, Appellant contends that the Commonwealth failed to present sufficient evidence to support his conviction for possession of a firearm in a court facility because there was no evidence of posted notice at all public entrances to the courthouse as required under 18 Pa.C.S.A. § 913(d). Appellant's Brief at 21. Both the trial court and the Commonwealth concede there was no evidence presented in this regard. Trial Court Opinion, 8/29/2014, at 8; Commonwealth's Brief at 10. We agree. Section 913 provides "no person shall be convicted of [carrying a firearm in] a court facility if [conspicuous] notice was not so posted at each public entrance to the courthouse or other building containing a court facility and at the court facility unless the person had actual notice." 18 Pa.C.S.A. § 913(d). Upon review of the trial transcript, there was no evidence of notice

presented. Hence, we vacate Appellant's conviction for possession of a firearm in a court facility.

Finally, in his last issue on appeal, Appellant avers the verdict was against the weight of the evidence. Having already determined that Appellant was entitled to relief on his first two claims and having vacated his convictions, we need not address this final contention.

Judgment of sentence vacated. Convictions reversed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/31/2015