

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

HILTON PEREZ-PAGAN,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 942 MDA 2013

Appeal from the Judgment of Sentence entered December 19, 2012,
in the Court of Common Pleas of Lebanon County,
Criminal Division, at No(s): CP-38-CR-0000629-2012

BEFORE: ALLEN, LAZARUS, and FITZGERALD*, JJ.

MEMORANDUM BY ALLEN, J.:

FILED DECEMBER 20, 2013

Hilton Perez-Pagan ("Appellant") appeals from the judgment of sentence imposed after a jury convicted him of theft by unlawful taking and conspiracy to commit theft by unlawful taking.¹

The trial court summarized the facts as follows:

On February 13, 2012, Trooper Huffstutler, of the Pennsylvania State Police, responded to 71 Sweetbriar Lane, Swatara Township, Lebanon County, Pennsylvania, for a report of a theft of a propane tank belonging to Thomas Eddinger, from a construction lot owned by Berks Homes in a residential neighborhood. A second propane tank was also damaged and left actively leaking propane into the air. After an investigation, [Appellant] and Julio Aviles were charged.

Trial Court Opinion, 4/18/13, at 3.

¹ 18 Pa.C.S.A. §§ 3921 and 903.

Appellant presents a single issue for our review:

Whether Appellant should be acquitted because there was not sufficient evidence presented at trial to prove beyond a reasonable doubt that he committed the crimes of Theft by Unlawful Taking and Conspiracy to commit Theft by Unlawful Taking?

Appellant's Brief at 4.

When examining a challenge to the sufficiency of the evidence, our standard of review is as follows:

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [finder] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Jones, 874 A.2d 108, 120 (Pa. Super. 2005).

Pennsylvania law provides that a person is guilty of theft by unlawful taking if he "unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof." 18 Pa.C.S.A. §

3921(a). A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he: (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. 18 Pa.C.S.A. § 903(a).

Appellant does not deny his involvement with Mr. Aviles and the propane tanks. However, Appellant argues that his convictions were unsupported by sufficient evidence because he had no intent to deprive the owner of his propane tanks. Appellant's Brief at 10. Appellant avers that he "believed the propane tanks to be abandoned property." *Id.* To support his claim that he did not intend to commit theft or conspire to commit theft, Appellant references his statements to the police that he "was scrapping metal." *Id.*

In responding to this claim, the trial court explained:

[Appellant] argues that the evidence presented at trial was insufficient to find him guilty of Theft by Unlawful Taking, and subsequently the conspiracy, because there was no evidence presented at trial to indicate he had the intent to deprive the owner of the propane tanks because [Appellant] believed the propane tanks to be abandoned property. We find there was sufficient evidence for the jury to find that [Appellant] was guilty.

In the case at hand, each element of Theft by Unlawful Taking was established by the Commonwealth. [Appellant] testified that he took the propane tank intending to sell it as scrap. (N.T. at 70-97). [Appellant] also testified that the

second tank had propane in it and was too heavy for the men to lift. (N.T. at 9-13 and 40). [Appellant] also stated that the propane tanks were near the dumpster, and had rust on them; therefore, he believed they were garbage. (N.T. at 70-97).

Under Pennsylvania law, abandoned property may not be subject to larceny. ***Commonwealth v. Meinhart***, 98 A.2d 392 (Pa. Super. 1953). Furthermore, a bona fide reasonable mistake of fact will negate criminal intent to steal, provided that the actor would have been justified in his actions had the facts really been what he supposed they were. ***Id.*** We find the evidence established at trial supports the Commonwealth's argument that [Appellant] could not have reasonably believed the items were garbage.

At trial, Thomas Eddinger testified that his company owns the tanks, that his name and number were printed on the tanks, and that [Appellant] did not have permission to take them. (N.T. at 33). As stated above, [Appellant] testified one tank still contained propane. Todd Herb, who lives across the street from the lot, testified he saw [Appellant] and Julio Aviles take the propane tank. (N.T. at 7-14). Mr. Herb also testified that the propane tanks were approximately ten to fifteen (10-15) feet away from the dumpsters, further onto the land. (N.T. at 5). Mr. Herb also characterized the property as an active construction lot and various construction materials were stored on the property and described the condition of the tanks as fairly new or freshly painted. (N.T. at 10). Mr. Herb also testified that when the mail carrier delivering mail to his house honked his car horn, [Appellant] and Mr. Aviles got into the pick-up truck and sped away. (N.T. at 11).

The jury heard conflicting evidence about the condition of the propane tanks and where they were located. It is up to the jury to decide who they believe and make a judgment as to what happened. It is within the jury's purview to determine the credibility of the witnesses and the Court will not substitute its own judgment for the jury's. In this case, it is reasonable for the jury to believe that marked propane tanks in good condition would not be left out for garbage. It is not reasonable to believe a four to five foot tall tank still containing propane would be thrown out. The jury could have reasonably determined from the evidence that all of the necessary elements of the crime were established. Therefore, in viewing the evidence in the light

most favorable to the Commonwealth, we find that [Appellant's] convictions were supported by sufficient evidence.

Trial Court Opinion, 4/18/13, at 4-6.

We have reviewed the record, particularly the notes of testimony from the October 9, 2012 jury trial, and find no error in the trial court's reasoning. The trial court accurately described the testimony of Mr. Herb, Mr. Eddinger, and Trooper Huffstutler. Trooper Huffstutler testified that when he encountered Appellant and Mr. Aviles in the neighborhood near where the propane tanks were taken, "they related to me that they were out scrapping...they came upon these tanks and decided to take them." N.T., 10/9/12, at 44, 53.

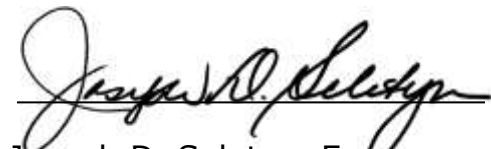
In addition to the testimony presented by the Commonwealth, the defense presented the testimony of Mr. Aviles and Appellant. Mr. Aviles testified unequivocally that he and Appellant went looking in garbage and dumpsters for scrap metal. *Id.* at 71-72. When Mr. Aviles saw the propane tanks, he and Appellant "thought they were scrap because of the condition and that location [by the dumpsters]." *Id.* at 75. Mr. Aviles testified that "we thought we [weren't] doing [anything] wrong." *Id.* at 76. Appellant likewise testified that he and Mr. Aviles were "scrapping" for metal by looking into dumpsters and garbage. *Id.* at 92. Appellant testified, "there was no sign that said no trespassing or not to touch the garbage." *Id.* at 93. He said he took the propane tanks because he thought "they were trash because they were next to the dumpster." *Id.* When asked about the name

and phone number on the propane tank, Appellant replied, "When I scrap sometimes there's things that are thrown away by rich people. I don't take notice or I don't focus on what it says or the name on it because it's in the garbage." *Id.* at 96.

Unfortunately for Appellant, the jury did not credit his testimony or the testimony of Mr. Aviles. The trial court correctly stated that "the jury heard conflicting evidence about the condition of the propane tanks and where they were located. It is up to the jury to decide who they believe and make a judgment as to what happened." Trial Court Opinion, 4/18/13, at 6. The jury in this case ultimately concluded that Appellant agreed and intended to unlawfully take the propane tanks. We may not substitute our judgment for the jury. ***Jones, supra.*** We must therefore affirm the trial court.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/20/2013