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SJC-12682

JOSE RIVERA vs. COMMONWEALTH.

March 9, 2020.

Constitutional Law, Sentence, Double jeopardy, Trial by jury.
Practice, Criminal, Sentence, Double jeopardy, Trial by jury.

Jose Rivera has been indicted on two counts of armed assault with intent to murder in violation of G. L. c. 265, § 18 (b); two counts of assault by means of a dangerous weapon in violation of G. L. c. 265, § 15B (b); and one count of illegal possession of a firearm in violation of G. L. c. 269, § 10 (a). Additionally, he has been charged as a subsequent offender pursuant to G. L. c. 269, § 10 (d), and as an armed career criminal pursuant to G. L. c. 269, § 10G (a), both of which would subject him to a sentencing enhancement on the firearm charge.

In the Superior Court, Rivera filed a motion to dismiss the armed assault with intent to murder indictments on the basis that the integrity of the grand jury was impaired; and the two sentencing enhancement charges on the basis of double jeopardy. A judge in that court allowed the motion as to the subsequent offender enhancement but denied it as to the armed career criminal enhancement and the armed assault with intent to murder indictments. Rivera then filed a petition in the county court for relief pursuant to G. L. c. 211, § 3, seeking review of the judge's decision. A single justice of this court denied the petition. Rivera now appeals from that part of the single justice's judgment that relates to the armed career criminal enhancement and his double jeopardy claim.

Background. During the grand jury proceedings that resulted in the indictments against Rivera, a single witness -- a police detective -- testified. He testified regarding the incident that led to the various assault and firearm charges and also provided testimony relevant to the armed career criminal charge. As to the latter, he testified that Rivera had been charged with murder in June 1986 and convicted of manslaughter in 1987. The docket sheet from that earlier case was admitted as an exhibit and indicated that Rivera had pleaded guilty "to so much of the indictment charging manslaughter." On the basis of the manslaughter conviction, the grand jury charged Rivera as an armed career criminal pursuant to G. L. c. 269, § 10G (a).

Discussion. General Laws c. 269, § 10G (a), provides in relevant part:

"Whoever, having been previously convicted of a violent crime . . . as defined herein, violates the provisions of [G. L. c. 229, § 10 (a),] shall be punished by imprisonment in the state prison for not less than three years nor more than [fifteen] years."

General Laws c. 229, § 10G (e), provides, in turn, that "'violent crime' shall have the meaning set forth in [G. L. c. 140, § 121]," which provides, as relevant here:

"'Violent crime', shall mean any crime punishable by imprisonment for a term exceeding one year . . . that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another"

The upshot of the statutory provisions is that to be sentenced as an armed career criminal, Rivera's prior manslaughter conviction must qualify as a "violent crime." In other words, at the sentencing enhancement trial on the armed career criminal charge, the Commonwealth must prove that manslaughter, as Rivera committed it, constituted a violent crime.

Rivera argues that at the time he pleaded guilty to manslaughter in 1987, manslaughter had several forms, including voluntary, involuntary, and unlawful-act. Because not all of the forms of manslaughter required or amounted to a "violent crime," and because there was no need to specify which form of manslaughter he was pleading guilty to, the Commonwealth would be required to prove that the crime that Rivera committed was in fact a "violent crime" for purposes of the armed career criminal

statute. Doing that, Rivera argues, would amount to a retrial for manslaughter, which would violate his double jeopardy rights. If this were in fact what a trial on the armed career criminal enhancement would entail, Rivera might well be correct. The picture that Rivera paints, however, is inaccurate.

His arguments are based on the premise that the armed career criminal statute defines an "offense," for double jeopardy purposes, rather than a sentencing enhancement. We have previously, and definitively, stated the opposite, which the single justice thoroughly addressed in her decision. She also thoroughly addressed the propriety of the Commonwealth's introducing additional evidence at a sentencing enhancement trial to prove that a prior conviction constitutes a "violent crime":

"[A]s the full court has said many times, statutes providing for enhanced sentences are not independent crimes, see Commonwealth v. Richardson, 469 Mass. 248, 252-253 (2014); Alicea v. Commonwealth, 466 Mass. 228, 230 n.6 (2013), and the proof necessary to support application of a sentence enhancement therefore does not implicate double jeopardy concerns. See Commonwealth v. Miranda, 441 Mass. 783, 789 n.9 (2004); Bynum v. Commonwealth, 429 Mass. 705 (1999); Plumbly v. Commonwealth, [2 Met.] 413, 415 (1841). See also, e.g., Commonwealth v. Burton, 35 Mass. App. Ct. 355, 358-359 (1993). . . .

"This principle extends to convictions where, as [Rivera] contends in this case, a bare certified record of conviction may be insufficient to support an enhanced sentence. See Commonwealth v. Eberhart, 461 Mass. 809, 815-816 (2012). . . . The defendant in [the Eberhart] case claimed that the 'evidence presented in support of one of his three prior convictions, assault and battery, failed to establish that he had committed a "violent crime" within the meaning of G. L. c. 140, § 121.' Eberhart, supra at 811. That evidence consisted of a certified copy of the assault and battery conviction, but no substantive information about the commission of the crime other than testimony describing it as '[a]ssault and battery domestic and intimidation of a witness.' Id. at 813. The full court reasoned that, while a 'categorical approach' is sufficient to determine whether some prior offenses qualify as a predicate offense, that approach does not produce conclusive results when a defendant 'may have been convicted under a broad statute that encompasses multiple

crimes, not all of which are "violent crimes.'" Id. at 816. Both assault and battery and manslaughter are examples of crimes where a 'categorical approach' may be inadequate. In such circumstances, additional proof is necessary to identify which definition formed the basis for the prior convictions. See Commonwealth v. Colon, 81 Mass. App. Ct. 8, 16 n.8 (2011).

"This additional procedure does not offend double jeopardy consideration because '[t]he prior offense is not an element of the crime for which a defendant is charged but [rather] concerns the punishment to be imposed' if he is convicted of the current offense, and the prior conviction is proved. See Bynum, 429 Mass. at 709."

Notwithstanding our law, Rivera continues to press the idea that any such procedure at a trial on the armed career criminal charge amounts to a trial on a new offense and, as such, would violate his double jeopardy rights. None of his arguments, nor the Federal precedents that he relies upon, persuades us that our existing approach is in any way unconstitutional.

He suggests, for example, that the single justice's "position" that G. L. c. 269, § 10G (a), is "merely" a sentencing enhancement cannot be reconciled with the United States Supreme Court's recent decision in United States v. Haymond, 139 S. Ct. 2369 (2019). The issue in that case, however, is not the same as the issue here. The Haymond case involved a defendant who violated the conditions of his supervised release and a Federal statute that, based on the particular crime committed, compelled the imposition of a new and additional sentence as a result. See id. at 2374-2375. As the court stated, the statute "compelled a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt. As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments [to the United States Constitution]." Id. at 2373.

No such violation would occur in the circumstances of Rivera's case under the existing, constitutionally sound, framework of Massachusetts law. Rivera is unquestionably entitled to a separate trial by a jury on the armed career criminal enhancement. See, e.g., Miranda, 441 Mass. at 787-788 (discussing second and separate trial procedure pursuant to G. L. c. 278, § 11A, for sentencing enhancement charges). That does not mean, however, even if the Commonwealth presents

additional proof that his manslaughter conviction constitutes a "violent crime," that the armed career criminal statute defines a separate offense or is anything other than a sentencing enhancement. The defendant, if found to be an armed career criminal, will receive but one sentence (albeit enhanced) for the charge to which the enhancement is attached. The second trial by jury is not a trial for a second, separate offense. Moreover, the Sixth Amendment right to a jury trial, and to be found guilty of crimes charged beyond a reasonable doubt, is separate and apart from a Fifth Amendment right not to be tried twice for the same crime. Rivera, if found to be an armed career criminal, will be guilty of just one crime and will receive just one sentence. Indeed, the Haymond case did not even involve a question of double jeopardy.

A second and subsequent trial on the armed career criminal sentencing enhancement, if Rivera is first convicted of the underlying firearm offense to which the enhancement applies, simply does not raise double jeopardy concerns. The single justice therefore did not err in denying relief pursuant to G. L. c. 211, § 3.

Judgment affirmed.

Jessica LaClair for the petitioner.

David L. Sheppard-Brick, Assistant District Attorney, for the Commonwealth.