SJC-12900

COMMONWEALTH vs. GADIEL RAMOS-CABRERA.

Hampden. September 10, 2020. - December 10, 2020.

Present: Lenk, Gaziano, Budd, Cypher, & Kafker, JJ.[1]

Controlled Substances. Parks and Parkways. Evidence, Guilty plea. Practice, Criminal, Plea, Instructions to jury.

Complaint received and sworn to in the Holyoke Division of the District Court Department on February 16, 2017.

The case was tried before Laurie MacLeod, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Deirdre A. Gleason for the defendant.
Travis H. Lynch, Assistant District Attorney, for the Commonwealth.

BUDD, J. The defendant, Gadiel Ramos-Cabrera, was arrested following a sale of heroin to an undercover police officer. The defendant subsequently was charged with distribution of a class

[1] Justice Lenk participated in the deliberation on this case prior to her retirement.

A controlled substance in violation of G. L. c. 94C, § 32 (a), and with committing the crime within one hundred feet of a public park in violation of G. L. c. 94C, § 32J (§ 32J or park zone statute). After a failed plea colloquy, the defendant was tried by a jury and found guilty of both offenses. We transferred the defendant's appeal to this court on our own motion, and we now affirm the defendant's convictions.

Background. We summarize the facts the jury could have found, reserving some details for later discussion. On February 15, 2017, an officer who sought to purchase drugs pursuant to an undercover operation made contact with the defendant and asked for "brown," a street term for heroin. The defendant entered the officer's vehicle, and the officer drove to a nearby building adjacent to an area known as Valley Arena Park, which is owned by the city of Holyoke (city). There, the defendant met a second individual and the two entered the building for a short period of time.

Soon thereafter, both individuals approached the officer's vehicle, where the defendant handed the officer four bags of heroin, and the second individual accepted the officer's money in payment. The officer drove away, and other officers participating in the operation apprehended both individuals.

Discussion. 1. Rejection of guilty plea. Prior to trial, the defendant and the Commonwealth reached an agreement pursuant

to which the Commonwealth would dismiss the § 32J "park zone" charge in exchange for the defendant's plea of guilty to heroin distribution. At the hearing on the defendant's change of plea, the prosecutor recited the facts that the Commonwealth was prepared to prove at trial, including the specific role the defendant played in the drug transaction.[2] See Mass. R. Crim. P. 12 (d) (3) (B), as amended, 482 Mass. 1501 (2019).

Through counsel, the defendant indicated that although he agreed that "he was part of the joint enterprise," and that he "facilitat[ed]" the transaction by "[m]aking the arrangements with [the codefendant]," he denied that he got into the undercover officer's vehicle, and he claimed that it was the codefendant who gave the heroin to the officer. The plea judge, who was not the trial judge, subsequently rejected the defendant's guilty plea, concluding that the substance of the defendant's admissions did not provide a factual basis for the plea. On appeal, the defendant contends that he admitted to distribution of heroin as a joint venturer, and that the judge abused his discretion by rejecting the defendant's guilty plea. We disagree.

[2] At one point, the prosecutor stated that the codefendant handed the heroin to the officer, but later clarified that the defendant did so.

Before accepting a defendant's plea of guilty pursuant to a plea agreement, a judge must, among other things, find that the plea is supported by an "adequate factual basis." Mass. R. Crim. P. 12 (d) (5). See Commonwealth v. Hart, 467 Mass. 322, 325 (2014), quoting Commonwealth v. DelVerde, 398 Mass. 288, 297 (1986) ("A judge may not accept a guilty plea 'unless there are sufficient facts on the record to establish each element of the offense'"). To find the defendant guilty of joint venture heroin distribution, the fact finder must find that the defendant knowingly participated in the distribution of heroin. See Commonwealth v. Zanetti, 454 Mass. 449, 467 (2009). Here, the defendant did not admit to any specific actions that he took to commit the crime of heroin distribution, instead characterizing his involvement in the transaction vaguely as "facilitating" the transaction by "[m]aking the arrangements" with the codefendant.

"A judge is afforded wide discretion in determining whether to accept a plea of guilty." Commonwealth v. Watson, 393 Mass. 297, 301 (1984). Further, "there is no constitutional right to have [one's] plea accepted." Commonwealth v. Dilone, 385 Mass. 281, 285 (1982). The judge did not abuse his discretion by rejecting the defendant's plea. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) (abuse of discretion is "a clear error of judgment in weighing the factors relevant to the

decision . . . such that the decision falls outside the range of reasonable alternatives" [quotation and citation omitted]).

2. Park zone statute. The defendant was convicted of violating § 32J because the sale of heroin to the undercover officer occurred within one hundred feet of Valley Arena Park. The defendant appeals from the denial of his motion for a required finding of not guilty, claiming that the evidence was insufficient to prove that the area was a public park within the meaning of the statute. He also claims that the jury instructions were inadequate and created a substantial risk of a miscarriage of justice. We examine each argument in turn.

a. Sufficiency of the evidence. We review the denial of a defendant's motion for a required finding of not guilty to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (emphasis in original; citation omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). A "public park" under § 32J is a "tract of land that is (1) set apart or dedicated for public enjoyment or recreational use, and (2) owned or maintained by a governmental entity." Commonwealth v. Boger, 486 Mass. , (2020).

At trial, an employee from the city's parks and recreation department described the park as "frightful, basically blight."

She further testified that in the late 1990s, the Department of Environmental Protection informed the city that no activities were to be held there because the soil was declared to be contaminated. The defendant argues that because the park was not being maintained and the soil there was contaminated, a reasonable juror could not conclude beyond a reasonable doubt that it was a public park within the meaning of § 32J. We disagree.

In addition to testifying that the park was in poor shape, the witness also testified that it was open, accessible, and in use. As there is no requirement that an area be well maintained to be a park under the statute, the evidence presented was sufficient for the jury to find that the park at issue here was a park within the meaning of § 32J. Latimore, 378 Mass. at 677.

b. Jury instructions. The defendant further argues that the trial judge's jury instructions were inadequate because they failed to define the term "public park"; thus, the jury were not required to determine whether the park actually qualified as a "public park" under the park zone statute. The judge instructed the jury in relevant part:

> "Now, if you find the defendant guilty of the charge of distribution of a Class A substance, you must go on to consider whether the Commonwealth has proven beyond a reasonable doubt that the offense was committed within [one hundred] feet of a public park or playground. It is not necessary for the Commonwealth to prove that the defendant

> knew that he was within that distance from a public park or playground."

As defense counsel did not object to the instructions, we review the defendant's claim on appeal to determine whether any error created a substantial risk of a miscarriage of justice. Commonwealth v. Kelly, 470 Mass. 682, 699 (2015).

It is true that the judge's instructions did not include a definition of "public park." However, the term "'park' as used in § 32J is 'sufficiently clear to permit a person of average intelligence to comprehend what conduct is [made criminal],' . . . without guesswork or speculation." Commonwealth v. Davie, 46 Mass. App. Ct. 25, 29 (1998), quoting Commonwealth v. Spano, 414 Mass. 178, 180 (1993). Further, the defendant did not contest that the park is owned by a governmental entity. Given the evidence presented regarding the characteristics of the park, we have no serious doubt as to whether the outcome of the trial would have been different had the judge provided a definition of public park. Thus, the instructions provided did not result in a substantial risk of a miscarriage of justice. See Commonwealth v. Azar, 435 Mass. 675, 687 (2002), quoting Commonwealth v. LeFave, 430 Mass. 169, 174 (1999).

Judgment affirmed.