

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania :
 :
 v. : No. 2287 C.D. 2009
 : No. 2288 C.D. 2009
 : No. 2289 C.D. 2009
 : Submitted: July 16, 2010
 Brian P. Simpson, :
 Appellant :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE P. KEVIN BROBSON, Judge
 HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY SENIOR JUDGE FRIEDMAN

FILED: September 1, 2010

Brian P. Simpson (Simpson) appeals from the July 29, 2009, judgment of sentence of the Lawrence County Court of Common Pleas (trial court) finding Simpson guilty of possessing several species of native Pennsylvania turtles in violation of various regulations of the Fish and Boat Code (Code) and sentencing him to pay a \$330.00 fine. 30 Pa. C.S. §§101 – 7314. We affirm.

On March 5, 2009, acting upon a tip provided by an officer who had been called in to remove a loose alligator from Simpson’s residence, the Pennsylvania Fish and Boat Commission (Commission) obtained warrants to search Simpson’s residence. (R.R. at 5a-6a.) During the search, a Commission officer discovered and seized three native Pennsylvania painted turtles and two native

Pennsylvania wood turtles.¹ On March 9, 2009, Simpson contacted the Commission and spoke with Thomas J. Kamerzel (Kamerzel), Director of the Commission's Bureau of Law Enforcement, about applying for permits in the hopes of regaining possession of his turtles. Kamerzel mailed out the permit applications, which were received by Simpson on March 11, 2009. However, on March 13, 2009, the Commission charged Simpson with three Code violations based on possession of the turtles: one for violation of 30 Pa. C.S. §2102(b) (possession of the wood turtles) and two for violations of 30 Pa. C.S. §2904(a) (possession of each painted turtle without a permit).² (Trial ct. op. at 1 – 3.)

On May 7, 2009, the Magisterial District Judge found Simpson guilty of all three charges and sentenced him to pay a fine of \$330.00 plus fees. On summary appeal, the trial court conducted a *de novo* review of the matter. At the trial, Simpson testified that he had not been aware of the relevant regulations until the Commission

¹ Section 2102(b) of the Code allows the Commission to regulate the possession of certain species of fish (where the term "fish" includes all reptiles and aquatic organisms) and provides that any person who violates such a rule or regulation commits a summary offense of the third degree. 30 Pa. C.S. §2102(b); 30 Pa. C.S. §102. Promulgated pursuant to section 2102(b) of the Code, 58 Pa. Code §79.3 prohibits the possession of any native Pennsylvania wood turtles.

Section 2904(a) of the Code states that the Commission's executive director may require permits for the possession of any species of fish. 30 Pa. C.S. §2904(a). Promulgated pursuant to section 2904(a) of the Code, 58 Pa. Code §79.4 requires a person to acquire a permit in order to keep a live reptile that was taken into possession prior to the creation date of the regulation. A person may possess one native Pennsylvania painted turtle without obtaining a permit but must obtain a permit for each additional turtle.

² The Commission charged Simpson with possessing an excess of two painted turtles over the regulatory limit of one, 58 Pa. Code §79.4, along with possessing two wood turtles, which is prohibited in any quantity. 58 Pa. Code §79.3.

searched his house and seized his turtles.³ Simpson had subpoenaed Kamerzel, but the Commonwealth objected to his testimony as lacking relevance, and the trial judge sustained the objection. Seeking to facilitate an amicable resolution of the matter, the trial judge held a brief off-the-record discussion with Simpson. However, the discussion failed, and the trial court, in an order dated July 29, 2009, affirmed the Magisterial District Judge's judgment of sentence. (Trial ct. op. at 2, 5.) Simpson filed an appeal to this court and submitted a Statement of Errors Complained of on Appeal pursuant to Pa. R.A.P. 1925(b). On October 1, 2009, the trial court issued its opinion addressing the issues raised by Simpson. Pa. R.A.P. 1925(a).

Before this court, Simpson argues that the trial court erred as a matter of law by excluding Kamerzel's testimony and by keeping discussion of that exclusion off the record. In spite of our willingness to overlook the deficiencies in Simpson's brief,⁴ we are not persuaded by his argument. This issue was fully addressed and correctly decided in the trial court's October 1, 2009, opinion.

³ Simpson notes that the regulations only took effect on January 1, 2007, over ten years after he took legal possession of his turtles.

⁴ We note that the Statement of the Questions Involved portion of Simpson's brief lacks the specificity required by Pa. R.A.P. 2116. Simpson merely states, without providing any basis for his argument, that the trial judge committed an error. However, the Commonwealth, in declining to file a responsive brief, has failed to raise an objection to this deficiency. Moreover, because we can discern the issues raised by Simpson, and because his non-compliance does not impede appellate review, we will overlook the deficiencies in his brief.

Therefore, we affirm on the basis of the well-reasoned opinion of Judge J. Craig Cox, Court of Common Pleas of Lawrence County, in the matter of *Commonwealth v. Simpson*, (Nos. 64, 65, and 66 of 2009, filed October 1, 2009).

ROCHELLE S. FRIEDMAN, Senior Judge

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ORDER

AND NOW, this 1st day of September, 2010, the judgment of sentence of the Court of Common Pleas of Lawrence County is affirmed upon the opinion of the Honorable J. Craig Cox in *Commonwealth v. Simpson* (Nos. 64, 65, and 66 of 2009, filed October 1, 2009).

ROCHELLE S. FRIEDMAN, Senior Judge

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OPINION NOT REPORTED

**DISSENTING OPINION BY
 JUDGE COHN JUBELIRER**

FILED: September 1, 2010

I respectfully dissent. Because I believe that the testimony of Thomas J. Kamerzel,¹ Director of the Bureau of Law Enforcement for the Pennsylvania Fish and Boat Commission (Commission), would have been relevant to Brian P. Simpson's

¹ I note that, in accord with Brian P. Simpson's subpoena, Mr. Kamerzel was at the hearing and brought with him the documents Mr. Simpson subpoenaed from the Pennsylvania Fish and Boat Commission (Commission) pertaining to the Commission's issuance of permits between February 2007 and July 1, 2009. (Hr'g Tr. at 3-4, R.R. at 3A-4A.) Although requested by Mr. Simpson, the Commission was unable to provide him with the documents from January 2007. (Hr'g Tr. at 3, R.R. at 3A.)

defense of selective enforcement or prosecution of Sections 2102(b) and 2904(a) of the Fish and Boat Code (Code), 30 Pa. C.S. §§ 2102(b) and 2904(a), and of the Commission's regulations, I would vacate the Court of Common Pleas of Lawrence County's (trial court) order and remand for further proceedings.

The trial court held that Mr. Simpson "attempted to present the testimony of Mr. Kamerzel regarding [Mr. Simpson's] request for permit applications. But, [Mr. Simpson] did not contact Mr. Kamerzel until March 9, 2009, and did not receive the applications until March 11, 2009." (Trial Ct. Op. at 4-5.) Noting that these events occurred after the Commission executed the search warrant and seized Mr. Simpson's turtles on March 5, 2009, the trial court concluded that any "[t]estimony regarding any permits or applications received *subsequent* to March 5, 2009, is irrelevant to the current inquiry as to whether [Mr. Simpson] illegally possessed the turtles at the time of the execution of the search warrant." (Trial Ct. Op. at 5 (emphasis added).) Citing Commonwealth v. Ventura, 975 A.2d 1128, 1140 (Pa. Super. 2009) (holding that a trial court properly excluded evidence that addressed the defendant's life history and mental state *after being incarcerated* but did not reflect his mental state at the time of his alleged self-defense), the trial court held that it properly excluded Mr. Kamerzel's testimony because that "testimony would have merely provided facts that transpired after the illegal act occurred and that is not relevant to prove whether [Mr. Simpson] violated the pertinent statutes." (Trial Ct. Op. at 5.) However, a review of the hearing transcript reveals that this is not the only, or even the primary, reason why Mr. Simpson sought to introduce Mr. Kamerzel's testimony.

Throughout the hearing before the trial court, Mr. Simpson consistently argued that the Commission was selectively enforcing or prosecuting the Code and its regulations through the permitting process. “To establish a selective prosecution defense in Pennsylvania, the defendant must prove that[:] (1) others who are similarly situated are generally not prosecuted for similar conduct, and (2) the defendant was intentionally and purposefully singled out for an invidious reason.” Commonwealth v. Sanico, Inc., 830 A.2d 621, 629 (Pa. Cmwlth. 2003). Essentially, Mr. Simpson’s position was that similarly situated people, i.e., those who possessed turtles in violation of the Code and the Commission’s regulations, were not being prosecuted by the Commission once the violations became known to the owners and the Commission, but, instead, were being “grandfathered in” by receiving permits allowing them to keep their turtles. (Hr’g Tr. at 33, 36, R.R. at 33A, 36A.) In contrast, Mr. Simpson asserted that he was never given the opportunity to be grandfathered in or to comply with the Code once he became aware of the change in the Code but had his turtles seized and was prosecuted for possessing turtles without the required permits.

Mr. Simpson sought the testimony of Mr. Kamerzel, who is in charge of issuing these permits and whom Mr. Simpson subpoenaed as a witness to establish that the Commission continued to accept permit applications and issue permits beyond the deadline imposed by the Code and the regulations, thereby, choosing not to enforce the Code and regulations by prosecuting those individuals. (Hr’g Tr. at 26-29, 31, R.R. at 26A-29A, 31A.) Mr. Simpson explained the relevancy of Mr. Kamerzel’s testimony: “[i]t is relevant if they didn’t enforce the deadline with other people. They can’t pick and choose who they enforce the deadline for” and “[i]f [the

Commission], by [its] own admission, [is] ignoring the deadline to issue the permits, then that's discriminatory and I should be given the opportunity to apply for permits and receive the permits, also. Those turtles should be grandfathered in." (Hr'g Tr. at 31, 33, R.R. at 31A, 33A.) I would conclude that such testimony, if elicited, would be relevant to Mr. Simpson's defense in that it would "hav[e the] tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa. R.E. 401. "All relevant evidence is admissible, except as otherwise provided by law." Pa. R.E. 402. Thus, I would conclude that the trial court abused its discretion in excluding Mr. Kamerzel's testimony. See Cohen v. Albert Einstein Medical Center, Northern Division, 592 A.2d 720, 725 (Pa. Super. 1991) (stating that "unjustified exclusion of relevant evidence, otherwise admissible, is an abuse of discretion").

Moreover, I note that Mr. Simpson was unable to establish his defense through the testimony of Officer Joseph Morris (Officer Morris), the enforcement officer who cited Mr. Simpson and testified against him at the trial. Officer Morris was unable to provide any clear answers to Mr. Simpson's questions regarding the permitting process because, as an enforcement officer, he neither had personal knowledge pertaining to the issuance of permits after January 30, 2007, nor did he have anything to do with the issuance of permits. (Hr'g Tr. at 19, 21, R.R. at 19A, 21A.) Thus, Mr. Simpson suffered actual prejudice from excluding the testimony of Mr. Kamerzel. Furthermore, I note that Officer Morris testified that, other than the charges against Mr. Simpson, he had not filed charges against anybody else for possessing these species of turtles without a permit in his district. (Hr'g Tr. at 22, R.R. at 22A.) I also note that Mr. Simpson testified that he was told that the Commission had given

other people permits and would send him permit applications, and that he had, in fact, received five permit applications from the Commission. (Hr'g Tr. at 36, R.R. at 36A). However, because Mr. Kamerzel's testimony regarding the Commission's issuance of permits after the cut-off period was excluded, and Officer Morris had no personal knowledge of the permitting process, Mr. Simpson was unable to prove that anyone in Officer Morris' district had applied for and received a permit, rather than be cited as Mr. Simpson was.

Because I would conclude that the trial court abused its discretion by excluding Mr. Kamerzel's testimony and that Mr. Simpson suffered actual prejudice as a result, I would vacate the trial court's order and remand for further proceedings. See Cohen, 592 A.2d at 725 (stating that a trial court's ruling on the relevancy of evidence will be "reversed on appeal only where there has been an abuse of discretion and actual prejudice"). Accordingly, I respectfully dissent.

RENÉE COHN JUBELIRER, Judge