J. S65004/13

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSEPH J. OLACK,	:	No. 1577 WDA 2012
Appellant	:	

Appeal from the Judgment of Sentence, July 19, 2012,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0014053-2010

BEFORE: FORD ELLIOTT, P.J.E., OTT AND WECHT, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED DECEMBER 18, 2013**

This is an appeal from the judgment of sentence entered in the Court of Common Pleas of Allegheny County. Following a bench trial on April 30, 2012, appellant was convicted of criminal attempt-theft, criminal mischief, and criminal trespass. On July 19, 2012, appellant was sentenced to a period of incarceration of not less than 15 days nor more than 30 days in the Allegheny County Jail, and a concurrent period of 3 years' probation. After the denial of post-sentence motions on September 12, 2012, this timely appeal followed. After careful review, we affirm.

We adopt the factual history as set forth by the trial court:

> Dale Campbell testified that on July 29, 2010 he was a contract well tender for WHC Operating, LLC (hereinafter "WHC"). WHC is a producer of natural gas in Pennsylvania. Mr. Campbell's responsibilities as a well tender required him to

check the various gas wells operated by WHC for leaks, malfunctions and other possible maintenance issues. He testified that he checked the wells approximately twice a week. Mr. Campbell testified that WHC owned wells in Lincoln Township, Pennsylvania and in Glassport, Pennsylvania. On July 29, 2010, Mr. Campbell travelled to Glassport, Pennsylvania to check on the McClure Wells and the Childs Well. He testified that these wells were located on a parcel of property adjacent to Washington Road. The wells were located hundreds of feet back from Washington Road. People wanting to access the wells would have to travel down a slag road for approximately 40 feet. Once there, the property was protected by a locked gate marked with a "No Trespassing" sign. Only nine people affiliated with WHC were permitted access to the property. Mr. Campbell further explained that after the incident in question, he learned that there was another way to access the wells. There was another road to the wells that could only be accessed by traveling through the Glassport Dump. WHC did not own this property. The Glassport Dump entrance was also marked with a sign that stated "Private Property, No Trespassing, Borough of Glassport." The Washington Road access and the Glassport Dump access were the only ways a pickup truck could access the wells. Mr. Campbell testified that the defendant was not permitted on the WHC site. He further explained that he had been checking these wells for a period of about three years.

Mr. Campbell testified that he went to check on the wells on July 29, 2010. He accessed the wells through the locked gate off Washington Road. He unlocked the gate and proceeded to the wells. As he was driving up the road, he came across a pickup truck blocking the road approximately 400 feet from Washington Road. The pickup truck was parked against a bailing machine that was stacked on top of an old Power Wagon truck.[Footnote 1] Mr. Campbell parked his vehicle about 50 feet from the truck, exited his vehicle and walked toward two men who were loading items into the pickup truck.

When Mr. Campbell got to the truck, he noticed sections of a bailer, some sand line, some roller chain, a roll of steel and some guy lines inside the bed of the truck. The toolbox, which had been welded to the bailer, was cut from the bailer. Mr. Campbell had seen the bailer with the tool box still attached to it before this date and he testified that the bailers were nearly new and had only been used a few times. He also observed some scrap iron that had been cut up. Mr. Campbell noticed a cutting torch next to the pickup truck.

Mr. Campbell approached the two men at the scene and asked them what they were doing. The defendant, prior to identifying himself, said "we're taking stuff[."] Mr. Campbell responded by advising both men that they were stealing. The defendant then stated that he wasn't stealing, he was "taking[."] The defendant indicated that "Port Vue" gave him permission to take the items. Mr. Campbell asked the men for their names. The defendant identified himself. The other man simply responded by stating, "I'm not part of this." Mr. Campbell then ordered the men to unload the items from the truck. Both men then unloaded the items into the middle of the road. Mr. Campbell told the men to move the items off the road and they complied. Mr. Campbell then told the men to leave. The men loaded the cutting torch into the truck and they "bled" the torch back to atmospheric pressure. As they drove away, toward the Glassport Dump, Mr. Campbell took the license number of the pickup truck. The license number was traced to a pickup truck owned by the defendant.

After the men left, Mr. Campbell looked at the items that had been unloaded from the pickup truck. Parts of the cut up bailer were very hot to the touch near the area where they had been cut. He also noticed that no rust has formed at the edge of the cuts. According to Mr. Campbell, the bailers were made of porous metal and when it is cut, rust appears within minutes. The absence of rust is an indicator that the metal was recently cut. He noticed

> that the roller chain had been cut and was of no further use to WHC. The wire line and sand line were cut, rendering them worthless to WHC.[Footnote 2] The wire line and sand line were both functional days before the incident. Mr. Campbell reported the incident to his superiors and to the Glassport Police Department.
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> On August 1, 2010, Mr. Campbell returned to the Glassport site. When he got there, he noticed that all of the items that were cut up were gone. A pickup truck was fleeing the area toward the Glassport Dump. Mr. Campbell could not identify the occupants of the pickup truck. He did note, however, that the pickup truck was similar to the truck operated by the defendant on July 29, 2010.
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> Mr. Campbell calculated the financial loss as a result of the damage to WHC's property to be $2,650. This amount was not challenged by the defendant. At the conclusion of trial, the defendant was convicted as set forth above.
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> [Footnote 1] Mr. Campbell testified that a bailing machine is used to remove water from gas wells.
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> [Footnote 2] The sand line attaches to the bailer and brings it back from the depths of the well.

Trial court opinion, 4/26/13 at 1-4.

Appellant raises a single issue for our consideration:

> 1. WAS THE EVIDENCE PRESENTED AT TRIAL SUFFICIENT TO ESTABLISH, BEYOND A REASONABLE DOUBT[] THAT [APPELLANT] SPECIFICALLY INTENDED TO DEPRIVE ANOTHER OF HIS PROPERTY WHERE THE ENTIRETY OF THE EVIDENCE REVEALED THAT [APPELLANT] REASONABLY BELIEVED THE PROPERTY AT ISSUE WAS ABANDONED?

Appellant's brief at 5.

We begin our analysis of this issue by stating our standard of review:

> 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 trier 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. Brown, 23 A.3d 544, 559-560 (Pa.Super. 2011) (***en banc***) (citations omitted).

Our statute defines theft by unlawful taking as follows:

> **§ 3921. Theft by unlawful taking or disposition**
>
> **(a) Movable property.--**A person is guilty of theft 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). ***See also Commonwealth v. Dombrauskas***, 418 A.2d 493 (Pa.Super. 1980) (to be guilty of theft by unlawful taking, actor's

intention or conscious object must be to take unlawfully property of another for purposes of depriving another of his or her property).

Appellant argues the evidence supports his belief that the items he loaded onto his truck were abandoned. In support thereof, appellant points to the facts that he openly acknowledged that he was "taking" and not stealing the items, and he complied with Campbell's instructions to unload the items from his truck and place them on the side of the road. As such, appellant contends the evidence was insufficient to establish that he had the intent to unlawfully deprive another of his property. (Appellant's brief at 15.)

In support of his argument, appellant relies on ***Commonwealth v. Wetmore***, 447 A.2d 1012, 1014 (Pa.Super. 1982), citing ***Commonwealth v. Meinhart***, 98 A.2d 392 (Pa.Super. 1953), for the proposition that, "It is well settled law that abandoned property cannot be the subject of larceny."[1] According to appellant, the defendant in ***Meinhart*** presented an identical claim as the one raised here. In ***Meinhart***, the defendant was convicted of larceny of fixtures as a result of his taking of "a quantity of cast iron in the form of wickets which constituted a part of the locks of a canal of the Lehigh

[1] Pennsylvania's theft statutes superseded the previous larceny statute which was based on the Model Penal Code. Official comment to 18 Pa.C.S.A. § 3902, effective June 6, 1973; ***see Commonwealth v. Adams***, 479 Pa. 508, 510, 388 A.2d 1046, 1047 (1978). Thus, any discussion of the ***mens rea*** element contained in the larceny statute "intent to steal" is similarly applicable to a discussion of the "intent to deprive him thereof" ***mens rea*** of theft by unlawful taking.

Coal & Navigation Company." ***Meinhart***, 98 A.2d at 393.[2] The defendant and another man had admittedly gone to the locks, removed the wickets, loaded the scrap iron into one of their vehicles, and subsequently sold the material for a sum of money that was divided between the two men. ***Id.*** At trial, the defendant testified that he had only taken the locks because they were in a dilapidated condition and that had he known the property belonged to the navigation company, as opposed to being abandoned, he would not have taken the scrap iron. ***Id.*** at 395.

On appeal, the defendant argued that the trial court erred by failing to charge the jurors that if they believed that the defendants had taken the scrap iron "under a mistaken belief that the same was abandoned," they must acquit. ***Id.*** at 394. This court found the defendant's claim meritorious, and stated that if the locks were abandoned, no crime was committed and, as a result, the credibility of the defendant's testimony and a determination as to whether his misapprehension was reasonable under the circumstances were matters for the jury. ***Id.*** at 394-395. Therefore, a

[2] The crime of larceny, pursuant to then-statute 18 P.S. § 4813, stated,

> Whoever steals or rips, cuts or breaks, with intent to steal, any glass or woodwork belonging to any building, or any lead, iron, copper, brass or other metal, or any utensil or fixture whether made of metal or other material, fixed in or to any building, or anything made of metal fixed in any land, being private property, or used for a fence to any dwelling house, garden or area . . . is guilty of larceny.

new trial was ordered in which the jury was to be given the instruction sought by the defendant. ***Id.*** at 395.

Herein, appellant contends as was true in ***Meinhart***, the property he initially loaded onto his truck belonged to someone else. However, as ***Meinhart*** demonstrated, this finding does not address the ultimate inquiry of whether appellant acted under a ***bona fide*** and reasonable belief that the property was abandoned. Appellant asserts that the evidence at trial demonstrated that he was acting under a ***bona fide*** and reasonable belief that the property he was taking was abandoned until he was notified otherwise. Appellant points out that he openly stated they were "taking stuff." (Notes of testimony, 4/30/12 at 30.) When Campbell told appellant and his friend that they were stealing, appellant again stated he was not stealing, he was "taking." (***Id.***) Appellant points to the fact that he complied with Campbell's instructions to: (1) unload the items from the truck; (2) move the items to the side of the road; (3) provide his name; and (4) leave the same way they came. (***Id.*** at 31-33.) Appellant concludes that even though the property at issue had not been actually abandoned, based on the totality of the circumstances, appellant reasonably believed otherwise.

Our review of the record reflects that the case ***sub judice*** differs from ***Meinhart***. In ***Meinhart***, the fact-finder did not consider the possibility that appellant took the items in question under the mistaken impression they had

been abandoned. Instantly, defense counsel argued to the fact-finder that it is not illegal for an individual to take property that was abandoned and that the property appellant attempted to take reasonably appeared to him to no longer be in use. The trial court rejected this argument, and stated:

> THE COURT: Pivotal to the decision in the Court's view is the fact that in order to get to the point of the property was cut up and partially loaded, [appellant] had to go past a no trespassing sign, had to go past a no dumping sign there marked by Glassport Police Department, private property by the private property owner.
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> This isn't a case in which [appellant] was driving down the road and saw metal laying [sic] on the side of the road. He had to go with a vehicle, a standard size pickup truck, versus an ATV-type vehicle, through an area that's marked no trespassing, no dumping, et cetera, and in this Court's mind, that sets the tone for how to evaluate what he's doing.
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> Secondly, he brings with him cutting torches. The average person just stopping by a road, say, to collect some aluminum cans that were thrown out to there or some metal laying [sic] on the road for whatever reason on the roadside, wouldn't be carrying probably acetylene-type torches, torches that are sufficiently sophisticated to cut metal.
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> So there was planning involved here. A plan to go past no trespassing, no dumping signs, Borough of Glassport Police Department. That's critical because the evidence is that the defendant says something about Port Vue, which is a separate borough, though very close, giving him permission to do something. Port Vue is totally unrelated to anything in this case other than the defendant mentioned it.
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> . . . .

> The distance involved, they were to somehow have gotten around the gate on Washington Boulevard, which apparently he didn't, is substantial, and the distance involved in the way he did come was also substantial, so this isn't somebody happening upon something. This is somebody who invades a property, a substantial distance, to looking, finding -- coming back perhaps with torches or having been there before to know it's there. Either way, there was substantial effort made by [appellant] to accomplish this.
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> This is not a simple innocent, gee, look what's laying [sic] here. Nobody seems to own this. I'll take it. This was planned.

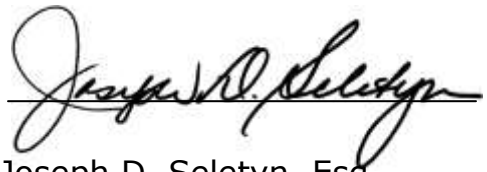
Trial court opinion, 4/30/12 at 90-92.

Based on the above excerpt, this was not a matter in which appellant was deprived of the fact-finder's determination as to his reasonable belief that the property at issue was abandoned; ***Meinhart*** is inapposite. Viewing the evidence in the light most favorable to the Commonwealth as verdict winner, we conclude the evidence was sufficient to establish that the property taken was not abandoned.

Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/18/2013