J. A35038/12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DUANE JEMISON, JR.,	:	
Appellant	:	No. 1588 WDA 2011

Appeal from the Judgment of Sentence entered August 31, 2011, in the Court of Common Pleas of Allegheny County, Criminal Division, at No(s): CP-02-CR-0009708-2010.

BEFORE: PANELLA, ALLEN, and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: Filed: January 4, 2013

I.

Appellant, Duane Jemison, Jr., appeals from the judgment of sentence of an aggregate term of five to 10 years' imprisonment after a jury convicted him of persons not to possess a firearm.[1] After careful review, we affirm.

The trial court summarized the underlying facts as follows.

> The charges against Appellant stem from an incident that occurred on May 16, 2010, in the Strip District area of the City of Pittsburgh. Pittsburgh Police Office[r] Larry Mercurio testified he was on foot patrol when he came upon a Buick LeSabre backed into a handicapped spot. He checked the license plate and discovered the vehicle was not licensed for handicapped parking. He also looked inside the vehicle but did not see a handicapped

[1] 18 Pa.C.S. § 6105(a)(1). Appellant also pled guilty and was sentenced, pursuant to a negotiated plea agreement, to carrying a firearm without a license (18 Pa.C.S. § 6106(a)(1)), resisting arrest (18 Pa.C.S. § 5104), and the summary offense of driving without a license (75 Pa.C.S. § 1501(a)).

*Retired Senior Judge assigned to the Superior Court.

> placard. Officer Mercurio ran the license plate and discovered the vehicle had been carjacked a few days prior.
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> Once Officer Mercurio became aware that the car had recently been carjacked, he informed the other officers in the area. As other officers arrived on the scene, an individual, later identified as Appellant, entered the vehicle and pulled out of the parking spot. Police stopped the vehicle two spaces from where it had been parked by blocking its path with a police car. When officers approached, Appellant was the lone occupant of the vehicle.
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> Officer Mericurio testified Appellant was ordered out of his vehicle, but Appellant did not comply. Instead, Appellant took his right hand, which was up, and reached it downward to the floorboard. Officer Mercurio ordered Appellant to keep his hands up and then observed a gun on the floor of the car where Appellant had been reaching. Officer James Zigarella also testified that he observed Appellant in the vehicle reach downward toward the area from which the gun was recovered. The gun was found with the hammer back, with the safety off and a round in the chamber.

Trial Court Opinion, 1/20/2012, at 3-4.

Appellant was charged with the aforementioned counts stemming from this incident. In his omnibus pre-trial motion, Appellant requested that the trial court sever the trial on the persons not to possess a firearm charge from the trial on the rest of charges. The trial court granted that motion.[2] On June 29, 2011, Appellant proceeded to a jury trial on the persons not to possess a firearms charge. Prior to the start of trial, Appellant requested that the trial court recognize a stipulation as to the existence of Appellant's

[2] There is no order in the certified record granting that motion, but the trial transcript, along with all actions of the parties, indicates that it was indeed granted. ***See*** N.T., 6/29/2011, at 3 (The trial judge stated, "You have already severed the case from the other charges, I gave you that.").

prior robbery conviction, rather than have the Commonwealth introduce the evidence and prejudice the jury. N.T., 6/29/2011, at 3. The Commonwealth would not agree to such a stipulation.

By way of background, the sole charge being tried before the jury provides as follows: "[a] person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth." 18 Pa.C.S. § 6105(a)(1). Appellant was not contesting that he had been convicted previously of robbery, one of the enumerated offenses in subsection (b), but he argued that he "would really like that part to be left out, the only element really in this case would be possession, there's no doubt about that." N.T., 6/29/2011, at 5.

The trial court ruled that "the Commonwealth is not required to accept any stipulation and that proof of a prior felony is an element of the offense, therefore, the Commonwealth is permitted to offer evidence of that when this charge is severed from all other charges and tried alone." ***Id***. at 10-11. Accordingly, the trial court allowed the Commonwealth to introduce robbery as the prior felony offense. ***Id***. at 12.

During trial, the Commonwealth offered evidence of Appellant's 2008 robbery conviction. Immediately thereafter, the trial court read the

following instruction to the jury: "Ladies and gentlemen, I now instruct you not to consider Defendant's prior conviction as evidence of his propensity to commit a crime but only as proof of the element of this specific offense." ***Id***. at 50-51.[3]

The jury returned a guilty verdict for this charge. Appellant then pled guilty to the remaining charges. On August 31, 2011, Appellant was sentenced. Appellant filed a timely notice of appeal. Both Appellant and the trial court complied with Pa.R.A.P. 1925.

On appeal, Appellant presents one issue for our review:

> In a prosecution for possession of a firearm by a person not permitted to possess one, does the prosecution have a right to introduce the record of the disqualifying criminal conviction when the defendant is willing to stipulate that he is within the class of persons prohibited from possessing firearms?

Appellant's Brief at 3.

In reviewing a trial court's evidentiary rulings, we keep in mind the following:

> The admissibility of evidence is a matter of trial court discretion and a ruling thereon will only be reversed upon a showing that the trial court abused that discretion. An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous. Evidence is relevant if it logically tends to establish a material fact in the

[3] The trial court also repeated this instruction when instructing the jury at the close of trial. ("I will remind you that I instructed you when the evidence was offered, not to consider the defendant's prior conviction as evidence of his propensity to commit a crime, but only as proof of an element of this offense." N.T., 6/29/2011, at 137.).

> case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact. However, even relevant evidence may be excluded if its probative value is outweighed by the potential prejudice.

Commonwealth v. Williams, -- A.3d --, 2012 WL 5992138 (Pa. Super. Dec. 3, 2012) (internal quotations and citations omitted).

Instantly, Appellant contends that the trial court abused its discretion by admitting evidence of Appellant's prior conviction for robbery in this case where he was willing to stipulate to its existence. Appellant acknowledges that the trial court did not err under current Pennsylvania law,[4] but contends that these cases have been "undermined by the decision of the United States Supreme Court in ***Old Chief v. United States***, [519 U.S. 172 (1997)]." Appellant's Brief at 7.

It is well-settled that we are bound to follow precedential case law promulgated by the courts of Pennsylvania. In ***Stanley***, ***supra***, the appellant offered to stipulate that he had committed a crime of violence in connection with his trial for persons not to possess a firearm pursuant to 18 Pa.C.S. § 6105. The Commonwealth refused to accept the stipulation and the conviction was entered into evidence. On appeal, the appellant argued that the admission of that evidence was "unduly prejudicial." Our Supreme Court held that

[4] ***Commonwealth v. Stanley***, 446 A.2d 583 (Pa. 1982); ***Commonwealth v. Payne***, 463 A.2d 451 (Pa. Super. 1983))

> appellant's murder conviction was undisputedly material and relevant to proving that he committed a "crime of violence." As such, it was "proper" evidence, squarely within ***Commonwealth v. Evans***, 465 Pa. 12, 348 A.2d 92 (1975) which held that the Commonwealth may use any "proper" evidence to prove its case, and does not have to accept the accused's stipulations.

Stanley, 446 A.2d at 588. ***See also Payne***, 463 A.2d at 453 ("Evidence of a prior conviction of a crime of violence is both proper and *necessary* when a defendant is tried on charges stemming from an alleged violation of § 6105.") (emphasis in original).

> It is beyond peradventure that the Superior Court must follow [the Pennsylvania Supreme Court's] mandates, and it generally lacks the authority to determine that this Court's decisions are no longer controlling. Moreover, the intermediate appellate courts are duty-bound to effectuate [the Pennsylvania Supreme Court's] decisional law. ***See, e.g., Behers v. Unemployment Comp. Bd. of Review***, 577 Pa. 55, 842 A.2d 359, 367 (2004) (task of lower courts is "to effectuate the decisional law of this Court, not to restrict it through curtailed readings of controlling authority").

Walnut St. Associates, Inc. v. Brokerage Concepts, Inc., 20 A.3d 468, 480 (Pa. 2011) (certain citations omitted). Accordingly, we are bound to apply ***Stanley***, which is still controlling in Pennsylvania, and are constrained to affirm Appellant's judgment of sentence.

II.

We now consider Appellant's argument with respect to the United States Supreme Court's decision in ***Old Chief***. In that case, the United States Supreme Court held that

> [i]n this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper

> ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available.

Old Chief, 519 U.S. at 191.

In ***Old Chief***, the defendant was arrested after an incident where there was at least one gunshot. He was charged under a statute that "makes it unlawful for anyone 'who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year' to 'possess in or affecting commerce, any firearm….'" ***Old Chief***, 519 U.S. 174 (citing 18 U.S.C. § 922(g)(1)). The defendant asked the trial court for an order that required the government to refrain, *inter alia*, "from offering into evidence or soliciting any testimony…regarding the prior criminal convictions of the [d]efendant, except to state that the [d]efendant had been convicted of a crime punishable by imprisonment exceeding one (1) year." ***Id***. at 175. The defendant "argued that the offer to stipulate to the fact of the prior conviction rendered evidence of the name and nature of the offense inadmissible under Rule 403 of the Federal Rules of Evidence, the danger being that unfair prejudice from that evidence would substantially outweigh its probative value." ***Id***. He also proposed a limiting jury instruction. The Assistant United States Attorney refused to enter into a stipulation and the district court ruled that if the Government "doesn't want to stipulate, [it] doesn't have to." ***Id***. at 177.

The jury found the defendant guilty of the aforementioned charge. The Ninth Circuit ruled that the district court did not abuse its discretion by admitting evidence of the prior conviction. The Supreme Court granted the petition for *writ of certiorari* because "the Courts of Appeals have divided sharply in their treatment of defendants' efforts to exclude evidence of the names and natures of prior offenses in cases like this." ***Id***.

The Supreme Court analyzed this under Federal Rule of Evidence 403, "which authorizes exclusion of relevant evidence when its 'probative value is **substantially** outweighed by the danger of unfair prejudice…." ***Id***. (citing F.R.E. 403) (emphasis added).[5] In balancing the probative value and the danger of unfair prejudice, the Supreme Court noted that "there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant." ***Id***. at 185. As to the probative value, the Supreme Court recognized that "although the name of the prior offense may have been technically relevant, it addressed no detail in the definition of the prior-conviction element that would not have been covered by the stipulation or admission." ***Id***.

However, the Supreme Court also weighed the "standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to

[5] We point out that F.R.E. 403 is slightly different from Pa.R.E. 403 in that the Pennsylvania rule eliminates the word "substantially."

present it." ***Id***. at 186-7. Still, the Supreme Court recognized that the doctrine that "the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story has … virtually no application when the point at issue is a defendant's legal status, dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him." ***Id***. at 190. As such, the Supreme Court reversed the Ninth Circuit.

Instantly, Appellant recognizes that ***Old Chief*** is not the law of Pennsylvania, but argues that we should make the law of Pennsylvania consistent with the holding in ***Old Chief***.[6] However, this panel is not the proper avenue to reach such a holding; nonetheless, we encourage our Supreme Court to revisit this issue and ***Stanley***, ***supra***, in light of ***Old Chief***, as has been done in many of our sister states.[7]

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[6] There is essentially no dispute that ***Old Chief*** was an interpretation of a federal rule of evidence, and therefore it can be persuasive, but is not binding on this Court when interpreting the Pennsylvania Rules of Evidence. ***See Cambanis v. Nationwide Ins. Co.***, 501 A.2d 635, 637 n. 4 (Pa. Super. 1985) (where Pennsylvania rule fashioned upon federal rule then federal case law is instructive).

[7] ***Old Chief*** has been followed by several of the state courts which have considered the matter. ***See, e.g., Brown v. State***, 719 So.2d 882 (Fla. 1998); ***State v. Lee***, 977 P.2d 263 (Kan. 1999); ***Carter v. State***, 824 A.2d 123 (Md. 2003); ***State v. James***, 583 S.E.2d 745 (S.C. 2003); ***State v. James***, 81 S.W.3d 751 (Tenn. 2002); ***People v. Walker***, 211 Ill. 2d 317, 334 (2004); ***Ferguson v. State***, 90 Ark. App. 119 *aff'd*, 362 Ark. 547 (2005); ***Anderson v. Commonwealth***, 281 S.W.3d 761 (Ky. 2009).

Other states have declined to follow ***Old Chief***: ***See, eg., State v. Ball***, 756 So.2d 275, 278 (La. 1999) (state statute required proof of a

Judgment of sentence affirmed.

Judge Panella concurs in the result.

Judge Allen concurs in the result.

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particular felony); ***State v. Jackson***, 535 S.E.2d 48 (N.C.App. 2000) (*rev'd* on other grounds, 546 S.E.2d 571 (N.C. 2001))(state statute specifically allowed prior felony to be proven by record of conviction); ***State v. Jackson***, No. 02AP–468, 2003 WL 1701188 (Ohio App., March 31, 2003) (to prove the offense of "possession of a weapon under disability," the prosecutor had to prove prior drug conviction).