

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
v.	:	
	:	
HARVEY DUNCAN,	:	No. 169 WDA 2011
	:	
Appellant	:	

Appeal from the Judgment of Sentence, January 3, 2011,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0003907-2010

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E. AND MUNDY, J.

CONCURRING AND DISSENTING MEMORANDUM BY FORD ELLIOTT, P.J.E.:
Filed: February 26, 2013

I concur in the Majority's disposition of appellant's challenge to the sufficiency of the evidence to support his conviction of retail theft. However, I must respectfully dissent as to appellant's sufficiency challenge for providing police with false identification under Section 4914.

In this case, it appears that the police, who were in plainclothes and driving an unmarked vehicle, did in fact display their badges and identify themselves as police officers. They also activated their overhead lights and siren. Without question, appellant was aware that they were law enforcement officers.

Critically, however, they never actually informed appellant that he was the subject of an official investigation of a violation of law, as explicitly required by the plain text of the statute. The Majority basically holds that

under the totality of the circumstances, a reasonable person would assume that he was under investigation. Appellant fled from the store after having been caught stealing candy by store employees; appellant repeatedly told the employees that he was not going to jail; appellant led employees on a foot pursuit; and appellant brandished a knife, which he abandoned when police arrived.

Certainly, it could be reasonably inferred that appellant was under investigation for shoplifting at the time he furnished a false name and date of birth to police officers. However, just such an approach was recently rejected by our supreme court in *In the Interest of D.S.*, ___ Pa. ___, 39 A.3d 968 (2012). In that case, the juvenile offender and two other individuals were detained by plainclothes officers after an armed robbery in the area. The officers did not identify themselves as police, nor did they state their purpose. *Id.* at 970. D.S. gave a fictitious name, and was arrested. *Id.* at 970-971. This court affirmed the adjudication, finding that although there was no direct evidence that the police officers affirmatively identified themselves or indicated they were investigating a robbery, the totality of the circumstances established that the juvenile was aware of these facts when he provided police with a false name and birthdate. *Id.* at 971.

Our supreme court reversed, finding that the statute is unambiguous that the individual must be informed by the law enforcement officer that he

is the subject of an official investigation of a violation of law. *Id.* at 974. The court in *D.S.* expressly rejected the Commonwealth's argument that a person can be so "informed" by the surrounding circumstances:

We cannot agree with the Commonwealth's suggestion that an individual may be "informed" of an officer's identity and/or purpose by surrounding circumstances. In stating that an individual violates Section 4914 when he provides false information to law enforcement authorities "after being informed by a law enforcement officer" that he is the subject of an official investigation, the General Assembly made clear its intent that such information must be provided to the individual *by the law enforcement officer.*

Id. at 974-975 (emphasis in original). "In short, there is no language in the statute to suggest that the General Assembly intended that an individual's knowledge could be derived from the surrounding circumstances." *Id.* at 975. *See also Commonwealth v. Barnes*, 14 A.3d 128, 131 (Pa.Super. 2011) ("Literally read, the statute in question does not make it illegal to provide to a law enforcement authority false information as to one's identity unless and until one is first apprised that he is the subject of an official investigation of a violation of law. If one provides false information as to his identity prior to that point, he has not violated the statute.").

In the instant case, there is no evidence that appellant was informed by a law enforcement officer that he was the subject of an official investigation of a violation of law. Therefore, he cannot be found guilty of violating Section 4914. For these reasons, I am compelled to offer my

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dissent on the issue of appellant's conviction for providing false identification to law enforcement authorities.