

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

OLIVER MERVIN BURBAGE

Appellant

No. 1219 EDA 2013

Appeal from the Judgment of Sentence March 21, 2013
In the Court of Common Pleas of Delaware County
Criminal Division at No(s): CP-23-CR-005041-2012

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY LAZARUS, J.:

FILED JUNE 03, 2014

Oliver Burbage appeals from his judgment of sentence imposed in the Court of Common Pleas of Delaware County following his conviction for escape (F3).¹ Burbage has filed a timely appeal challenging the sufficiency of the evidence to support his conviction. For the following reasons, we affirm.

This case involves an incident that occurred on June 22, 2011, on the 800 block of McDowell Avenue, in Chester, Delaware County. Pennsylvania State Trooper Robert Kirby testified that at approximately 11:00 a.m. that morning, he had conducted an interview regarding a separate matter in

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S. § 5121.

nearby Eddystone. Trooper Kirby was aware that a felony warrant² had been issued by Bucks County for Burbage's arrest. Trooper Kirby was also familiar with Burbage based upon prior investigations of other criminal activity in which Trooper Kirby had met Burbage face-to-face. At approximately 11:30 a.m., Trooper Kirby finished his interview in Eddystone and decided to drive by 835 McDowell Avenue, the address where Burbage's girlfriend was believed to reside.

Trooper Kirby testified that as he approached 835 McDowell Avenue, he spotted Burbage in the front yard and a four-year-old boy on the porch. Trooper Kirby stopped his unmarked patrol car approximately 50 feet from Burbage, exited the vehicle with his police baton, and walked toward Burbage. Trooper Kirby was not in full uniform, but he was wearing his badge in plain view on his belt. Once Trooper Kirby was within 20 to 25 feet of Burbage, he declared, "State Police, get on the ground, you're under arrest." N.T. Trial, 1/20/13, at 17-18. He yelled several times for Burbage to get on the ground. Instead of obeying the commands, Burbage stared at Trooper Kirby and took a stance as if he might draw a weapon. In response, Trooper Kirby drew his firearm and pointed it in Burbage's direction. Burbage then fled from Trooper Kirby and entered the residence at 835 McDowell Avenue.

² The Bucks County felony warrant was issued on June 15, 2011.

Trooper Kirby indicated that he was not assisted by any other police officers, and since the four-year-old boy was unattended on the porch, he called 911 to obtain backup before entering the residence. The residences on this block are connected row houses, preventing easy access to the rear of the homes from the front. Once additional officers arrived, Trooper Kirby entered the house and found the boy's parents, but Burbage had already exited the house. Although Trooper Kirby did not successfully detain Burbage, officers eventually took Burbage into custody on August 8, 2011.

Burbage testified at trial and recounted a completely different series of events. In Burbage's version, he had never met Trooper Kirby, and he claimed he was not present at 835 McDowell Street when Trooper Kirby allegedly detained him. According to Burbage, he was at work at a towing company when his girlfriend's daughter called him to inform him that police officers had broken into the 835 McDowell Avenue residence in an attempt to locate him. No additional witnesses testified to corroborate Burbage's alibi. On cross-examination, Burbage's multiple convictions involving *crimen falsi* were brought to light.³

The aforementioned testimony was presented at a one-day jury trial on January 29, 2013, after which the jury convicted Burbage of the offense

³ Burbage's criminal record spans approximately 20 years and includes multiple convictions for each of several offenses, including receiving stolen property, burglary, and theft.

of escape. On March 21, 2013, the court sentenced him to three to six years' incarceration, with credit for time served. The instant appeal challenging the sufficiency of the evidence was timely filed on April 17, 2013.

Where an appellant challenges the sufficiency of the evidence, this Court "must determine whether the evidence and all reasonable inferences deducible therefrom, when viewed in the light most favorable to the verdict-winner . . . are sufficient to establish all elements of the crime charged beyond a reasonable doubt." **Commonwealth v. Rakowski**, 987 A.2d 1215, 1217 (Pa. Super. 2010) (quoting **Commonwealth v. Parker**, 957 A.2d 311, 317 (Pa. Super. 2008) (citations omitted)). Further, "the Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence." **Commonwealth v. Abed**, 989 A.2d 23, 26 (Pa. Super. 2010) (citations omitted).

A person commits the offense of escape where he "unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period." 18 Pa.C.S. § 5121(a). The offense is graded as a third-degree felony where "the actor was under arrest for or detained on a charge of felony or following conviction of crime." **Id.** at § 5121(d)(i).

On appeal Burbage claims that the evidence presented in this matter was insufficient to demonstrate that Burbage was "officially detained" when

he fled from Trooper Kirby, who was executing the Bucks County felony warrant. Official detention may occur without physical restriction, such as by prison bars or handcuffs. **Commonwealth v. Stewart**, 648 A.2d 797, 798 (Pa. Super. 1994) (citations omitted). In **Stewart**, this Court held that the defendant was under official detention when a uniformed officer, in response to a domestic dispute, drew his gun and requested that the defendant turn off his car and put his hands on the dashboard. The defendant's escape conviction for driving away from the officer was therefore upheld. This Court indicated that a seizure occurs where "the police have restrained the liberty of a person by show of authority or physical force." **Id.** In determining whether an individual has been officially detained, all the circumstances must be considered, including "whether a reasonable person would have believed he or she was free to leave." **Id.** (quoting **Commonwealth v. Jackson**, 630 A.2d 1231, 1236 (Pa. Super. 1993)).

In **Commonwealth v. Colon**, 719 A.2d 1099 (Pa. Super. 1998), a police officer informed the defendant that there was a warrant for his arrest and that he was under arrest. This Court held that the warrant was "as compelling to establish requisite control and detention of defendant as were the drawn gun and directive to place defendant's hands on the dashboard of his automobile in **Stewart**." **Id.** at 1101. Further, the defendant could not reasonably have believed he was free to leave. In contrast, the circumstances presented in **Commonwealth v. Woody**, 939 A.2d 359 (Pa. Super. 2007), provide an example of what does not constitute official

detention. The charge of escape in **Woody** was based solely upon the defendant's failure to comply with a police officer's command to stop and get on the ground. This command, without an additional show of authority or force, was insufficient to establish that the defendant had been officially detained. **Id.** at 363.

In **Commonwealth v. Santana**, 959 A.2d 450 (Pa. Super 2008), this Court considered the facts of the case against the backdrop of the **Colon** and **Woody** decisions. In **Santana**, police surrounded the defendant's residence to execute an arrest warrant for a parole violation. The defendant fled by jumping from the roof; an officer yelled at the defendant to stop and that he was under arrest. An officer also fired a taser gun at the defendant, but missed. This Court held that these facts more closely resembled the facts of **Colon** rather than **Woody** because a warrant provided authority for the defendant's arrest and the police officers adequately demonstrated both the authority and physical force necessary for official detention. **Id.** at 453.

In the instant appeal, Burbage asserts that the facts of his case are most analogous to the facts in **Woody**. Burbage's argument is based upon the similarity of both cases involving a police officer commanding the defendant to "stop and get on the ground." Brief of Appellant, at 13. Burbage asserts that no official detention occurred because "Trooper Kirby never informed [Burbage] that there was a warrant for his arrest, nor did he ever lay hands on him." **Id.** However, as **Stewart** and **Santana** indicate,

neither the mention of a warrant nor physical restriction is required to determine that an individual has been officially detained.

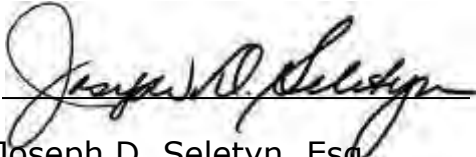
Indeed, Trooper Kirby testified to making a show of both authority and force toward Burbage. Unlike the situation in **Woody**, where the officer did not inform the defendant he was under arrest, Trooper Kirby clearly stated that Burbage was under arrest. Trooper Kirby's badge was in plain view, and he testified to prior dealings with Burbage, indicating that Burbage likely would have been aware of Trooper Kirby's position and authority as a police officer. Trooper Kirby made a show of force by aiming his weapon directly at Burbage and commanding him to get on the ground. As this Court noted in **Colon**, while a warrant demonstrates the requisite control and detention of a defendant to carry out an arrest, so does pointing a gun at the individual and requiring him or her to assume a position of surrender. Considering all the circumstances, Trooper Kirby's actions demonstrate that Burbage could not have reasonably believed he was free to leave the area.

Thus, the Commonwealth provided sufficient evidence to prove that Burbage fled from official detention during an arrest based upon a felony warrant.

Judgment of sentence affirmed.

J-S28017-14

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/3/2014