NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. RONALD JOSEPH CURLEY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1609 MDA 2013

Appeal from the Judgment of Sentence August 6, 2013
In the Court of Common Pleas of Cumberland County
Criminal Division at No(s): CP-21-CR-0002328-2012

BEFORE: LAZARUS, J., STABILE, J., and MUSMANNO, J.

MEMORANDUM BY LAZARUS, J.: **FILED JULY 02, 2014**

Ronald Joseph Curley appeals from the judgment of sentence imposed in the Court of Common Pleas of Cumberland County after he was convicted of the summary offenses of disorderly conduct[1] and public drunkenness.[2] Upon careful review, we affirm.

The trial court set forth the facts of this matter as follows:

> At approximately 1:00 a.m., on the night of August 5, 2012, [Curley] and William Ilgenfritz were involved in a physical altercation outside the Coliseum, a megaplex that has a restaurant, bowling alley and sports bar inside, on St. John's Church Road in Cumberland County, Pennsylvania. [Curley] testified that he and Mr. Ilgenfritz exchanged words. [Curley] testified that Mr. Ilgenfritz raised his fist and lunged. [Curley]

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[1] 18 Pa.C.S.A. § 5503(a)(1).

[2] 18 Pa.C.S.A. § 5505. Curley had also been charged with two counts of simple assault, but was found not guilty by a jury.

> testified that he then punched Mr. Ilgenfritz three times causing him to fall.
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> At approximately 1:07 a.m., Officer [Jason] Julseth and Officer [Matthew] Grunden of the Hampden Township Police Department responded to the scene. Officer Julseth found Mr. Ilgenfritz sitting on the curb with blood coming from his nose. [Curley] flagged down Officer Grunden as he arrived on the scene. Officer Grunden described [Curley] as visibly intoxicated. Officer Grunden observed that [Curley] was slurring his speech, had an odor of alcoholic beverage about his person, and was missing a shoe. [Curley] testified to having consumed between six and eight beers that night. Officer Grunden instructed [Curley] to go across the street to a McDonald's and wait for a ride home. After being told a second time to go across the street, [Curley] complied. Officer Julseth and Officer Grunden left the scene at approximately 1:34 a.m. without issuing any citations. The officers were called back to the Coliseum approximately eleven minutes later.
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> Sometime during that eleven minute period, [Curley] went back to the Coliseum. [Curley] testified that after witnessing Seth Harrold punch his cousin, [Curley] responded by punching Mr. Harrold. After [Curley] struck Mr. Harrold, a fight broke out during which [Curley] testified to striking Mr. Ilgenfritz a second time. After the fight ended, Mr. Ilgenfritz left the Coliseum in a vehicle.
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> When Officer Grunden arrived at the Coliseum the second time, he found [Curley] sitting in a van. Officer Grunden ordered [Curley] out of the van and placed him in custody. Officer Grunden observed that [Curley's] shirt was ripped and that he was bleeding from his knuckles. Officer Grunden also observed that Mr. Harrold was visibly injured, was bleeding from his nose, and was having problems with his mouth. Mr. Harrold suffered serious damage to his false teeth as a result of the punch [by Curley]. Officer Julseth located and stopped Mr. Ilgenfritz's vehicle on East Trindle Road. Officer Julseth noted that Mr. Ilgenfritz had more blood coming from his nose, blood smeared on his face, and a puffy lip.

Trial Court Opinion, 11/7/13, at 2-4.

On August 6, 2013, Curley was sentenced to two concurrent terms of 90 days' probation, as well as a fine, costs of prosecution, and restitution to Seth Harrold in the amount of $2,665. Curley did not file post-sentence motions; he filed a timely notice of appeal on September 5, 2013. By order dated September 9, 2013, the trial court ordered Curley to submit a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Curley filed such a statement on September 24, 2013, in which he raised the same two issues he now raises on appeal:

1. The disorderly conduct verdict was against the weight of the evidence.

2. The trial court erred in sentencing Curley to pay Harrold restitution for physical injuries suffered during the incident giving rise to these charges.

Brief of Appellant, at 5.

Curley has waived his first claim, alleging that the verdict was against the weight of the evidence. Pennsylvania Rule of Criminal Procedure 607 mandates that a challenge to the weight of the evidence be preserved in the trial court either before sentencing or in a post-sentence motion. Curley did not comply with this requirement. The fact that Curley included an issue challenging the verdict on weight of the evidence grounds in his Pa.R.A.P. 1925(b) statement and the trial court addressed that claim in its Rule 1925(a) opinion did not preserve the claim for appellate review in the absence of an earlier motion. ***Commonwealth v. Sherwood***, 982 A.2d 483, 494 (Pa. 2009).

Curley next claims that the trial court erred in sentencing him to pay restitution to Seth Harrold for the physical injuries Harrold suffered as a result of Curley's punch. Curley asserts that the "victim" in his case was not Harrold, but rather the community at large. He also argues that, because a jury found him not guilty of simple assault, there was no proven connection between Curley's actions and Harrold's harm. We find Curley's claim to be meritless.

"An order of restitution is a sentence, whether it is imposed as a direct sentence or as a condition of probation." ***Commonwealth v. Griffiths***, 15 A.3d 73, 77 (Pa. Super. 2010) (citation omitted). Because Curley's claim implicates the trial court's authority to impose restitution under the facts of his case, it is a challenge the legality of his sentence. ***See Commonwealth v. Barger***, 956 A.2d 458, 464 (Pa. Super. 2008) (en banc) (challenge to court's authority to impose restitution concerns legality of sentence). When evaluating a legality claim, this Court's standard of review is *de novo* and our scope of review is plenary. ***Commonwealth v. Stokes***, 38 A.3d 846, 858 (Pa. Super. 2011) (citation omitted).

The trial court sentenced Curley to pay Harrold the sum of $2,665[3] for dental work required as a result of Curley's punch. His claim on appeal is essentially twofold. First, he asserts that disorderly conduct is a crime

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[3] Curley does not challenge the amount of the restitution imposed.

against the public, not an individual, and, as such, restitution to an individual is inappropriate. We disagree with Curley's analysis.

A person commits the offense of disorderly conduct if, "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (1) engages in fighting or threatening, or in violent or tumultuous behavior[.]" 18 Pa.C.S.A. § 5503(a). Our Supreme Court has described the intent of legislature in enacting the disorderly conduct statute as follows:

> Certainly, [s]ection 5503 is aimed at protecting the public from certain enumerated acts. Under the statute, whether a defendant's words or acts rise to the level of disorderly conduct hinges upon whether they cause or unjustifiably risk a public disturbance. The cardinal feature of the crime of disorderly conduct is public unruliness which can or does lead to tumult and disorder. . . .
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> Although [s]ection 5503 as a whole is aimed at preventing public disturbance, it accomplishes this aim by focusing upon certain individual acts, which, if pursued with the intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, constitute the offense of disorderly conduct. These individual acts focus upon the offender's behavior.

Commonwealth v. Dorek, 946 A.2d 93, 100 (Pa. 2008) (internal citations and quotation marks omitted).

Here, Curley committed the offense of disorderly conduct by, while intoxicated, engaging in two separate incidents of fighting, which caused the

police to respond.[4] During those two fights, Curley admitted that he struck both William Ilgenfritz and Seth Harrold, as a result of which Harrold suffered damage to his dentures.

Section 1106 of the Crimes Code provides that "[u]pon conviction for any crime . . . **wherein the victim suffered personal injury directly resulting from the crime**, the offender shall be sentenced to make restitution in addition to the punishment prescribed therefor." 18 Pa.C.S.A. § 1106(a) (emphasis added). Section 1106 applies to "those crimes to property or person where there has been a loss that flows from the conduct which forms the basis of the crime for which a defendant is held criminally accountable." ***Barger***, 956 A.2d at 465 (citation omitted). Moreover, there must be a "direct causal connection between the crime and the loss." ***Id.*** (citation omitted). It is well-established that the "primary purpose of restitution is rehabilitation of the offender by impressing upon him that his criminal conduct caused the victim's loss or personal injury and that it is his responsibility to repair the loss or injury as far as possible." ***Commonwealth v. Runion***, 662 A.2d 617, 618 (Pa. 1995) (superseded by statute on other grounds).

Here, it is clear that Harrold suffered an injury as a direct result of the conduct which "form[ed] the basis of the crime for which [Curley was] held

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[4] Curley does not challenge the sufficiency of the evidence to sustain his conviction for disorderly conduct.

criminally accountable," i.e. the fight during which Curley punched him in the face. ***Barger***, ***supra***. Thus, although the public at large may have been the entity the legislature sought to protect in enacting the disorderly conduct statute, Harrold nonetheless was entitled to restitution because he suffered injury as a direct result of Curley's crime.

Our conclusion is supported by the decision of this Court in ***Commonwealth v. Fuqua***, 407 A.2d 24 (Pa. Super. 1979). There, the defendant was driving drunk, lost control of his vehicle, and crashed into the victim's house, causing damage to the front porch and foundation. The trial court imposed restitution. On appeal,[5] the defendant argued that the homeowner did not qualify as a victim as defined by section 1106. In rejecting Fuqua's argument, the Court stated that "[i]t is true that the Commonwealth was the victim of the crime of driving under the influence, but this fact does not bar [the victim's] recovery . . . [because she] was a person whose property was damaged as a direct result of the crime." ***Id.*** at 28 n.10.

Similarly, here, while disorderly conduct may technically be a crime against the Commonwealth and/or the public at large, Harrold is entitled to

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[5] In its opinion, the Court notes that this particular issue was not raised on appeal, but rather in Fuqua's application for modification of his sentence in the court below. However, the Court addressed the issue because it implicated the legality of Fuqua's sentence, an issue which cannot be waived on appeal. ***See Fuqua***, 407 A.2d at 28 n.10.

restitution because his injuries were the direct result of Curley's crime. ***See also Commonwealth v. Walker***, 666 A.2d 301 (Pa. Super. 1995) (affirming sentence of restitution for conviction of DUI in which victims suffered injury after swerving out of lane to avoid defendant's car, which was traveling in the wrong lane).

The second component of Curley's claim appears to be based upon principles of collateral estoppel.[6] Curley argues that he was acquitted by a jury on the simple assault charge and

> the [c]ourt should not undermine [that verdict] by assigning restitution for a crime against the public based on bodily injury of one victim that the Commonwealth did not establish flowed directly and only from . . . Curley's conduct. The [c]ourt

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[6] In criminal law, collateral estoppel typically arises in situations where a court must decide "whether or to what extent a general verdict of acquittal can be interpreted in a manner that affects future proceedings, that is, whether it reflects a definitive finding respecting a material element of the prosecution's subsequent case." ***Barger***, 956 A.2d at 462 (punctuation and quotation marks omitted). In order to determine the applicability of collateral estoppel, a court engages in a three-part inquiry:

> (1) an identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine;
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> (2) an examination of the record of the prior case to decide whether the issue was "litigated" in the first case; and
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> (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.

Id.

> overstepped its discretion by disregarding the jury's acquittal of the charges and assuming . . . Curley is responsible for bodily harm caused to the alleged victim.

Brief of Appellant, at 17. Essentially, Curley argues that the jury's acquittal on the charge of simple assault against Harrold foreclosed the judge, as finder of fact for the summary offense of disorderly conduct, from finding that Curley punched Harrold, causing him injury. Curley is not entitled to relief.

The courts of this Commonwealth have held that inconsistent verdicts are permissible in Pennsylvania. ***See Barger***, 956 A.2d at 460-61. As Curley himself concedes, "the [c]ourt does not know why the jury acquitted [him] of the [s]imple [a]ssault charges." ***Id.*** For this reason, "an acquittal cannot be interpreted as a specific finding in relation to some of the evidence. The acquittal may be no more than the jury's assumption of a power which they had no right to exercise, but to which they were disposed through lenity." ***Commonwealth v. Yachymiak***, 505 A.2d 1024, 1027 (Pa. Super. 1986) (citation and some punctuation omitted).

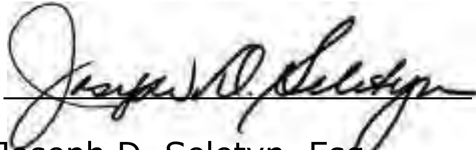
Moreover, disorderly conduct is a summary offense, as to which the trial judge sits as finder of fact. ***See*** Pa.R.Crim.P. 454(B) (issuing authority shall try case in same manner as trials in criminal cases conducted in courts of common pleas when jury trial is waived). As such, interpreting a jury's acquittal as a specific finding of fact would "abrogate the criminal procedural

rules that empower a judge to determine all questions of law and fact as to summary offenses." ***Barger***, 956 A.2d at 461.

Because the trial court was free to make its own evaluation of the facts with regard to the summary offenses, ***see id.***, it was not foreclosed from concluding that Curley punched Harrold, causing injuries for which restitution was appropriate under section 1106.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/2/2014