

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

IN THE INTEREST OF: E.P.L., A MINOR

IN THE SUPERIOR COURT OF
PENNSYLVANIA

APPEAL OF: E.P.L., A MINOR

No. 2207 EDA 2012

Appeal from the Adjudication of Delinquency July 23, 2012
In the Court of Common Pleas of Philadelphia County
Family Court at No.: CP-51-JV-0002182-2012

BEFORE: SHOGAN, J., WECHT, J., and COLVILLE, J.*

DISSENTING MEMORANDUM BY WECHT, J. **FILED DECEMBER 17, 2013**

The esteemed Majority affirms the July 23, 2012 dispositional order. I respectfully dissent. The Majority approves something which our law does not countenance: punishment for a particular criminal offense that was neither charged nor even litigated, much less adjudicated.

It is undisputed that the Commonwealth produced insufficient evidence at hearing to sustain a conviction pursuant to 18 Pa.C.S. § 6111(a)(1), which was the relevant offense charged.¹ Specifically, the Commonwealth

* Retired Senior Judge assigned to the Superior Court.

¹ I note that Appellant does not challenge that portion of the juvenile court's determination that adjudicated Appellant delinquent for a violation of 18 Pa.C.S. § 6110.1 (possession of firearm by minor). I would remand for disposition on that adjudication of delinquency.

failed to establish that the minor, E.P.L. (“Appellant”), was a “seller” under subsection 6111(a)(1) of the Crimes Code. Consequently, I believe that the law compels us to vacate Appellant’s adjudication of delinquency with respect to that offense.

The Majority has aptly set forth the factual and procedural history of this case. **See** Majority Mem. at 1-4. Although the Majority begins its memorandum with a recitation of our standard of review for a claim challenging the sufficiency of the evidence, the lion’s share of that memorandum addresses a purported variance between the delinquency petition and the adjudication of delinquency, as well as the validity of the Commonwealth’s delinquency petition. **Id.** at 5-12. The Majority agrees with the learned juvenile court that Appellant’s claim should be judicially recharacterized as an assertion that there was a fatal variance between the Commonwealth’s delinquency petition charging Appellant with a violation of subsection 6111(a)(1) and the juvenile court’s adjudication order. The Majority accepts and even adopts the juvenile court’s new claim on this appeal that “[Appellant] was actually found guilty of 18 Pa.C.S. § 6111(g)(2).” **Id.** at 9 (quoting and adopting the juvenile court’s discussion of variance).²

² 18 Pa.C.S. §§ 6111(a)(1) and 6111(g)(2) provide as follows:

§ 6111. Sale or transfer of firearms.

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Ultimately, the Majority does not determine whether there actually was a variance in this case. Instead, the Majority concludes that any potential variance was not fatal because Appellant was somehow on notice that he was actually being charged with a violation of subsection 6111(g)(2). **Id.** at 9 (“[I]t is evident from the certified record that any error to the listing of the subsection of the statute in the delinquency petition did not hamper the defense presented by Appellant at the time of the delinquency hearing.”). The Majority adopts the juvenile court’s discussion of Appellant’s claims related to sufficiency of the evidence and concludes that, because Appellant

(Footnote Continued) _____

(a) Time and manner of delivery.--

(1) Except as provided in paragraph (2), no seller shall deliver a firearm to the purchaser or transferee thereof until 48 hours shall have elapsed from the time of the application for the purchase thereof, and, when delivered, the firearm shall be securely wrapped and shall be unloaded.

* * *

(g) Penalties.--

* * *

(2) Any person, licensed dealer, licensed manufacturer or licensed importer who knowingly or intentionally sells, delivers or transfers a firearm under circumstances intended to provide a firearm to any person, purchaser or transferee who is unqualified or ineligible to control, possess or use a firearm under this chapter commits a felony of the third degree and shall in addition be subject to revocation of the license to sell firearms for a period of three years.

assertedly was adjudicated delinquent pursuant to subsection 6111(g)(2), the evidence produced by the Commonwealth was sufficient to sustain Appellant's adjudication of delinquency. *Id.* at 12-14.

It is evident to me that this analysis is profoundly infirm as a matter of law. Accordingly, I must disagree with today's decision.

The root of my divergence from the Majority's approach stems from its approval of the juvenile court's novel and retrospective assertion that, *mirabile dictu*, Appellant actually was adjudicated delinquent of subsection 6111(g)(2). Indisputably, Appellant was charged under subsection 6111(a)(1). In the absence of any contemporaneous pronouncement to the contrary by the juvenile court at the time of adjudication, a delinquency adjudication is entered pursuant to the same section of the Crimes Code that the Commonwealth charged. The crime cannot be reinvented and relabeled after the fact.

Months after the delinquency hearing, in its opinion pursuant to Pa.R.A.P. 1925(a), the juvenile court announced (for the first time) that "[Appellant] was actually found guilty of [subsection] 6111(g)(2), which is the illegal transfer of a firearm to an ineligible person." Juvenile Court Opinion ("J.C.O."), 12/7/2012, at 5. The juvenile court's retrospective statement that Appellant was actually adjudicated delinquent of subsection 6111(g)(2) is plain error. Indeed, it contradicts the juvenile court's own orders.

The delinquency petition filed by the Commonwealth on May 17, 2012, specified that Appellant was charged with a violation of 18 Pa.C.S. § 6111(a)(1), graded as a felony of the third degree. **See** Delinquency Petition, 5/17/2012, at 1 (unpaginated). The juvenile court's July 2, 2012 order adjudicated Appellant delinquent of that identical offense. **Compare** Juvenile Order, 7/2/2012, at 1 (unpaginated) ("Finding of guilt as to . . . Deliver Firearm After 48 Hours Elapsed 6111 [*sic*] (F3).") **with** Delinquency Petition, 5/17/2012, at 5 (charging Appellant with a violation of 18 Pa.C.S. § 6111(a)(1), identified as "Deliver Firearm After 48 Hours Elapsed [*sic*]"). A thorough review of section 6111 reveals that the only provision which includes any language whatsoever related to a forty-eight hour time limit is, in fact, subsection 6111(a)(1). Stated plainly, and with reference to the juvenile court's own express statement in its adjudication order, Appellant simply was not adjudicated delinquent of subsection 6111(g)(2) at trial. Rather, Appellant was adjudicated delinquent pursuant to subsection 6111(a)(1).

That the juvenile court did not cite a specific statutory subsection of section 6111 in its July 2 order adjudicating Appellant delinquent is of no moment. The juvenile court's unambiguous description of the offense as "Deliver Firearm After 48 Hours Elapsed" forecloses any possible inference that Appellant was convicted pursuant to 18 Pa.C.S. § 6111(g)(2). Significantly, the certified record reveals no motion by the Commonwealth to amend the petition against Appellant to include a charge pursuant to

subsection 6111(g)(2).³ In fact, I have found no citation to, nor mention of, subsection 6111(g)(2) whatsoever anywhere in the certified record prior to the juvenile court's novel and subsequent claim in its Rule 1925(a) opinion that, *mutatis mutandis*, Appellant actually had been adjudicated delinquent of subsection 6111(g)(2) at hearing, notwithstanding the complete absence from the record of any reference to that provision.

In Pennsylvania criminal trials, the indictment is vital: "A trial judge in a criminal case should never lose sight of the indictment. It has been aptly said that the indictment is the star and compass of a criminal trial." ***Commonwealth v. Petrillo***, 12 A.2d 317, 324 (Pa. 1940). To this end, "the indictment must be drawn with meticulous accuracy[.]" ***Commonwealth v. Komatowski***, 32 A.2d 905, 908-09 (Pa. 1943). Our Supreme Court, as well as this Court, consistently have held that a

³ The Pennsylvania Rules of Juvenile Court Procedure permit a juvenile court to allow amendments to delinquency petitions. **See** Pa.R.J.C.P. 334. Specifically, Pa.R.J.C.P. 334 allows amendments to, among other elements of the petition, "the description of the offense." Pa.R.J.C.P. 334(A)(1)(b). However, the juvenile court "shall not allow a petition to be amended if the petition alleges a different set of events or offenses, where the elements are materially different from the elements or defenses to the offense originally petitioned." Pa.R.J.C.P. 334(A)(2). Assuming that the Commonwealth's decision to charge Appellant under subsection 6111(a)(1) was inadvertent, the Commonwealth failed to avail itself of the procedural mechanism designed to allow correction of faulty delinquency petitions. To wit, the Commonwealth never filed a petition to amend pursuant to Pa.R.J.C.P. 334. Because the Commonwealth never petitioned for amendment, the juvenile court had no opportunity to cure any defect. Plainly, the juvenile court may not do so after concluding the hearing, and after entering an order of adjudication.

defendant may not be convicted for a crime of which he or she has not been charged. **See *Commonwealth v. Lee***, 312 A.2d 391, 392 (Pa. 1973); ***Commonwealth v. Hoffman***, 331 A.2d 805, 806 (Pa. Super. 1974) (“A defendant cannot be convicted and sentenced for a crime of which he is not indicted.”).⁴

⁴ I am reminded of the trial of our Commonwealth’s eponymous founder, William Penn:

Penn: I desire you would let me know by what law it is you prosecute me, and upon what law you ground my indictment.

Recorder (“Rec.”): Upon the common-law.

Penn: Where is that common-law?

Rec.: You must not think that I am able to run up so many years, and over so many adjudged cases, which we call common-law, to answer your curiosity.

Penn: The answer I am sure is very short of my question, for if it be common, it should not be so hard to produce.

Rec.: The question is, whether you are Guilty of this Indictment?

Penn: The question is not, whether I am Guilty of this Indictment, but whether this Indictment be legal. It is too general and imperfect an answer, to say it is the common-law, unless we knew both where and what it is. For where there is no law, there is no transgression; and that law which is not in being, is so far from being common, that it is no law at all.

Rec.: You are an impertinent fellow, will you teach the court what law is? It is “Lex non scripta,” that which many

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This body of precedent, and the circumstances attending the instant case, make plain that, the juvenile court's later claims to the contrary notwithstanding, Appellant was not – and indeed, given the offense charged, could not have been – adjudicated delinquent pursuant to 18 Pa.C.S. § 6111(g)(2). A plain reading of the certified record belies the juvenile court's assertions.⁵ I think it is incumbent upon us respectfully to reject the juvenile court's retrospective contention that there was some variance between the delinquency petition and Appellant's adjudication, as well as the juvenile court's unnecessary recharacterization of Appellant's issues on appeal. **See** J.C.O. at 5 (“[D]efendant’s true claim is that there was a fatal
(Footnote Continued) _____

have studied 30 or 40 years to know, and would you have me tell you in a moment?

Penn: Certainly, if the common-law be so hard to understand it is far from being common.

Trial of William Penn, 6 How. St. Trials 951, 958 (1670).

⁵ In its Rule 1925(a) opinion, the juvenile court writes: “It belies reality that the Commonwealth would allege the [Appellant] was in the business of selling firearms as defined in subsection [6111](a)(1).” J.C.O. at 6. I agree with the juvenile court's sentiment that the Commonwealth's decision to charge Appellant with an offense reserved for sellers of firearms makes little sense. **See** 18 Pa.C.S. § 6111(a)(1). Perhaps the Commonwealth made a charging error. If so, the Commonwealth never caught the error. And so the case proceeded to hearing, to adjudication, and to disposition. The juvenile court now is asking this Court effectively to explode and remake the parameters of the Commonwealth's delinquency petition, the content of the juvenile court's own order adjudicating Appellant delinquent of section 6111(a)(1), and Pennsylvania precedent regarding indictments. I think it is beyond peradventure that we cannot do so.

variance between the charges and what he was actually found guilty of.”). There was no variance. Appellant was charged and was adjudicated delinquent of a violation of subsection 6111(a)(1), not a violation of subsection 6111(g)(2). Put simply, there is exactly no support in the certified record for the juvenile court’s post-hearing protestations that, looking backwards in time, it actually had adjudicated Appellant delinquent not on the provision charged and litigated but, in fact, on subsection 6111(g)(2).^{6,7}

⁶ As codified, subsection 6111(g) is confusing. Although subsection 6111(g) is entitled “Penalties,” its content is sundry. As currently written, subsection 6111(g) contains four provisions relating to the grading of offenses listed at other subsections, 18 Pa.C.S. §§ 6111(g)(1)-(3.1), two provisions relating to vicarious criminal and civil liability for sellers of firearms, 18 Pa.C.S. §§ 6111(g)(5)-(6), and one provision that this Court has recognized as a chargeable offense. 18 Pa.C.S. §§ 6111(g)(4)(i)-(iii); **see Commonwealth v. Taylor**, 63 A.3d 327, 330-31 (Pa. Super. 2013).

⁷ Although never explicitly saying so, in adopting the juvenile court’s opinion, the Majority implicitly has certified that 18 Pa.C.S. § 6111(g)(2) constitutes a separate, chargeable offense under Pennsylvania law. **See** Majority Mem. at 9 (adopting part of juvenile court’s opinion stating Appellant was found “guilty” under subsection 6111(g)(2)). The question of whether subsection 6111(g)(2) is a separate, chargeable offense (as opposed to a grading section relating to other offenses under section 6111) would be an issue of first impression before this Court in the event that the Majority’s pronouncement was rendered in a precedential opinion. It might prove problematic to base such precedent solely upon the *post-hoc* argument crafted by the juvenile court in the instant case. However, this Court need not decide here whether subsection 6111(g)(2) constitutes a separate, chargeable offense. The issue is immaterial to our disposition. Appellant never was charged with a violation of subsection 6111(g)(2), and Appellant never was adjudicated delinquent pursuant to subsection 6111(g)(2).

Having concluded that Appellant was not convicted of a violation of 18 Pa.C.S. § 6111(g)(2), I proceed to Appellant's claim challenging the sufficiency of the evidence needed to sustain a conviction under subsection 6111(a)(1):

Was not the evidence insufficient to find [A]ppellant guilty of the charged offense of 18 Pa.C.S.A. §[]6111(a)(1), which governs the delivery of firearms by a seller, as [A]ppellant was not proven to be a seller of firearms, and is not the trial court's contention, first asserted in [its] Rule 1925 opinion months after trial, that she found [A]ppellant guilty of §[]6111(g)(2) – a different, uncharged offense – a violation of [A]ppellant's state and federal due process rights and the Rules of Juvenile Court Procedure?

Brief for Appellant at 3. Although he styles his appellate claim as a single issue, Appellant assails his conviction on two grounds: a challenge to the sufficiency of the evidence and an allegation of a due process violation. With reference to the sufficiency of the evidence, Appellant argues that “the Commonwealth presented no evidence at trial that Appellant was a seller of firearms.” Brief for Appellant at 7. Appellant asserts that 18 Pa.C.S. § 6111(a)(1) applies only to sellers of firearms, and maintains that the Commonwealth failed to adduce any evidence at trial to establish that element of the crime. ***Id.*** I agree.

A claim challenging the sufficiency of the evidence presents a question of law. ***Commonwealth v. Widmer***, 744 A.2d 745, 751 (Pa. 2000). Our standard of review for a sufficiency of the evidence claim is clear:

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[’s]. 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 finder 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. Estep, 17 A.3d 939, 943-44 (Pa. Super. 2011) (citing ***Commonwealth v. Brooks***, 7 A.3d 852, 856-57 (Pa. Super. 2010)).

Appellant claims that the evidence was insufficient to find him guilty of the following offense:

§ 6111. Sale or transfer of firearms.

(a) Time and manner of delivery.

(1) Except as provided in paragraph (2), **no seller** shall deliver a firearm to the purchaser or transferee thereof until 48 hours shall have elapsed from the time of the application for the purchase thereof, and, when delivered, the firearm shall be securely wrapped and shall be unloaded.

18 Pa.C.S. § 6111 (emphasis added). Specifically, Appellant contends that the Commonwealth failed to produce sufficient evidence to establish that Appellant is a “seller of firearms.” Brief for Appellant at 7. As shown by the

plain text of the statute above, a defendant charged pursuant to subsection 6111(a)(1) must be a “seller.” This is an element of the crime.

Section 6111 does not define the word “seller,” and the Pennsylvania Uniform Firearm Act⁸ does not provide a general definition. **See** 18 Pa.C.S. § 6102. We must, perforce, examine the word’s plain meaning. Black’s Law Dictionary defines “seller” as “[a] person who sells or contracts to sell goods; a vendor.” Black’s Legal Dictionary 1391 (8th ed. 2004). For the sake of completeness, I also note that Black’s Law Dictionary defines the word “sale” as “[t]he transfer of property or title for a price.” **Id.** at 1364. Placed in the context of 18 Pa.C.S. § 6111(a)(1), the word “seller” obviously refers to someone who exchanges firearms for value. Therefore, in order to sustain a criminal charge pursuant to subsection 6111(a)(1), the Commonwealth must prove beyond a reasonable doubt that the defendant sold a firearm.

Viewing the evidence admitted at trial in the light most favorable to the Commonwealth as the verdict winner, I am constrained to conclude that the evidence addressing Appellant’s putative status as a seller of firearms was so weak and inconclusive that it was insufficient to sustain an adjudication of delinquency. At trial, the Commonwealth presented testimony that Appellant transferred the handgun to, K.M., a minor. Under

⁸ 18 Pa.C.S. §§ 6101, *et. seq.*

direct examination by the assistant district attorney, K.M. testified as follows:

Q. Did you give anything to [Appellant] in exchange for the firearm?

A. No.

Q. Did he ask for anything in exchange for the firearm?

A. No.

Q. Did you observe him with any other guns that day?

A. No.

N.T. at 16-17. During the remainder of the testimony before the juvenile court, the Commonwealth never questioned any other witness concerning Appellant's status as a putative seller of firearms, and the Commonwealth proffered no additional exhibits or evidence related to that essential element of subsection 6111(a)(1). Consequently, the six-line exchange reproduced above is the only evidence of record that is at all responsive to the issue of Appellant's status, *vel non*, as a seller of firearms.

This is not a situation where the Commonwealth has attempted to sustain its evidentiary burden with weak or wholly circumstantial evidence. Even viewed in its most favorable light, this testimony contradicts any conclusion that Appellant was a "seller" pursuant to subsection 6111(a)(1). This undisputed testimony establishes that Appellant did not sell the handgun to K.M. for money, nor did he exchange it for other property. In sum, the Commonwealth presented no evidence indicating that Appellant

sold the handgun to K.M. and no evidence that Appellant had ever sold a firearm to anyone else. K.M.'s testimony establishes that Appellant received nothing in exchange for the handgun. Consequently, the evidence was insufficient to establish the "seller" element of subsection 6111(a)(1) beyond a reasonable doubt. "Where an element of the crime is not established beyond a reasonable doubt, then a verdict of guilt for that crime cannot stand." **Commonwealth v. Wagaman**, 627 A.2d 735, 741 (Pa. Super. 1993) (citing **Commonwealth v. Stein**, 585 A.2d 1048, 1053 (Pa. Super. 1991)). I would void Appellant's adjudication of delinquency with respect to 18 Pa.C.S. § 6111(a)(1).⁹

For the reasons I detailed earlier in this dissent, the juvenile court lawfully could not manufacture a different charge after the fact to better fit the circumstances that actually developed at the hearing. In our law, we make the punishment fit the crime. We do not make the statute fit the proof.

I respectfully dissent.

⁹ As the evidence was insufficient to support Appellant's conviction for a violation of 18 Pa.C.S. § 6111(a)(1), I do not address Appellant's due process challenge. **See P.J.S. v. Pennsylvania State Ethics Com'n**, 723 A.2d 174, 176 (Pa. 1999) ("When a case raises both a constitutional and a non-constitutional issue, a court should not reach the constitutional issue if the case can properly be decided on non-constitutional grounds.").