

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CHRISTOPHER K. SALMON,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2269 EDA 2012

Appeal from the Judgment of Sentence entered February 27, 2012,
in the Court of Common Pleas of Chester County,
Criminal Division, at No: CP-15-CR-0004498-2010

BEFORE: DONOHUE, ALLEN, and MUSMANNO, JJ.

MEMORANDUM BY ALLEN, J.:

FILED JULY 29, 2013

Christopher K. Salmon, ("Appellant"), appeals from the judgment of sentence imposed after a jury convicted him of forgery, access device fraud, identity theft, theft by unlawful taking, receiving stolen property and theft by deception.¹

The victim in this case was Appellant's elderly mother. Appellant argues that the trial court erred in denying his motion for acquittal and motion for reconsideration where the charges of forgery, access device fraud, theft by unlawful taking, receiving stolen property and theft by deception were barred by the statute of limitations. Appellant also argues that the trial court erred in denying his motion for acquittal and motion for

¹ 18 Pa.C.S.A. §§ 4101, 4106, 4120, 3921, 3925 and 3922, respectively.

reconsideration as to the same five charges where Appellant held a valid power of attorney from 2003 to 2007 that permitted him access to his mother's finances.

After considering the record, the parties' briefs, the trial court's opinion and the applicable law, we conclude that the trial court seamlessly addressed in its opinion the issues raised by Appellant on appeal, such that further discussion by this Court would be redundant. Accordingly, we adopt the trial court opinion of the Honorable David F. Bortner entered on December 26, 2012 in its entirety. In the event of future proceedings, the litigant shall attach a copy of Judge Bortner's opinion to any filings.

Judgment of sentence affirmed.
Judgment Entered.

A handwritten signature in black ink, appearing to read "Karen Gambett", written over a horizontal line.

Prothonotary

Date: 7/29/2013

COMMONWEALTH OF PENNSYLVANIA : IN THE COURT OF COMMON PLEAS
: :
: CHESTER COUNTY, PENNSYLVANIA
vs. :
: NO. CR 4498-10
: :
CHRISTOPHER K. SALMON : SUPERIOR CT. NO. 2269 EDA 2012

MEMORANDUM OPINION

An appeal having been taken, pursuant to Pa.R.A.P. 1925(a), the following statement is submitted:

PROCEDURAL HISTORY

On September 2, 2011, following a five-day jury trial, Defendant, Christopher K. Salmon, was found guilty of four counts of Forgery in violation of 18 Pa.C.S. §4101(a)(2)(3); two counts of Access Device Fraud with property value in excess of \$500 in violation of 18 Pa.C.S. §4106(a)(1)(ii),(iv); one count of Identity Theft with a property value in excess of \$2,000 and a victim 60 years of age or older in violation of 18 Pa.C.S. §4120(a); four counts of Theft by Unlawful Taking or Dispositive with a property value of \$200 to \$2,000 in violation 18 Pa.C. §3921(a); four counts of Receiving Stolen Property with property value of \$200 to \$2,000 in violation of 18 Pa.C.S. §3925(a); and four counts of Theft by Deception with property value in excess of \$2,000 in violation 18 Pa.C.S. §3922(a)(1).

On February 27, 2012, Defendant was sentenced to a total of not less than 1 ½ months nor more than 23 months of imprisonment, followed by 24

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months consecutive probation.¹ Defendant filed a Post-Sentence Motion on March 7, 2012 and, after several continuances, oral argument was conducted on July 23, 2012. Defendant's Motion was denied by Order dated July 24, 2012.

Defendant filed a Notice of Appeal on August 21, 2012 and a Concise Statement of Matters Complained of on Appeal on November 5, 2012.

FACTS

The charges herein arise from incidents which occurred from on or about December 2003 through November 2006. Defendant, Christopher K. Salmon, is the son of the victim, Florence Salmon (Mrs. Salmon), who, at the time the charges were filed, was ninety-three years of age. Defendant had obtained a durable power of attorney pertaining to his mother's affairs on January 6, 2005. On December 18, 2006, Chester County Common Pleas Court Orphan's Court Judge Katherine B.L. Platt granted temporary guardianship of Florence Salmon to IKOR Corporation (IKOR), an organization that serves as professional guardian for elderly persons. After IKOR was granted temporary guardianship, it was discovered that funds were missing from Mrs. Salmon's bank accounts. Permanent guardianship of Florence Salmon was granted to IKOR on March 1, 2007 and the court revoked the January 6, 2005 power of attorney on March 2, 2007. Prior to Defendant obtaining power of attorney for Mrs. Salmon, his sister, Patricia Galvin, held power of attorney.

¹ Sentencing was deferred several times due to a medical condition requiring Defendant to have surgery.

The Commonwealth alleged at trial that Defendant acted improperly with respect to Mrs. Salmon's finances before, during and after his appointment as attorney-in-fact. Mrs. Salmon owned multiple bank accounts, including at First Financial Bank and Citizens Bank, a MetLife account and a First Colony Life Insurance account. The jury found Defendant guilty of forging four checks from Mrs. Salmon's MetLife account: (1) to First Financial Bank on September 20, 2005 in the amount of \$1,500; (2) to Chris Salmon in the amount of \$1,500; (3) to Florence Salmon December 19, 2005; and (4) to Florence Salmon on January 3, 2006. Defendant was also convicted of Theft by Unlawful Taking and Receiving Stolen Property related to those same MetLife checks. Further, Defendant was convicted of Access Device Fraud and Identity Theft related to the fraudulent opening and use of a CitiBank credit card in Mrs. Salmon's name. Similarly, Defendant was convicted of Access Device Fraud related to the fraudulent opening and use of a Bank of America credit card in Mrs. Salmon's name. Finally, Defendant was convicted of committing four counts of Theft by Deception.

The first Theft by Deception count relates to \$7,500 he received in December 2003. Defendant requested the funds from Patricia Galvin, who was then acting as Mrs. Salmon's power of attorney, for the purpose of building an addition to his residence in which Mrs. Salmon would live. No addition was ever built. The second Theft by Deception count relates to an additional \$7,500 Defendant requested from Mrs. Salmon's then power of attorney, Patricia Galvin, upon the premise that the funds were necessary to keep Mrs.

Salmon comfortable while he was building the addition. The third count relates to funds from Mrs. Salmon's First Colony Life account in the form of a check, written by Defendant and issued to Alfred Gilbert, in the amount of \$37,516.34. Defendant wrote the check to repay Mr. Gilbert for a personal loan he had taken out with him. Finally, the fourth count of Theft by Deception relates to Defendant writing a check for \$7,500 from Mrs. Salmon's First Colony Life account to Shimon Guy, for engineering work relative to 426 Conestoga Road, East Whiteland Township. Defendant owned a contracting company, Suburban Group, which was building an addition at 426 Conestoga Road.

The Commonwealth brought additional charges in case number 976-10 which were tried at the same time as case number 4498-10. However, the entirety of those charges were dismissed by the trial court in granting Defendant's motion for judgment of acquittal at the close of the Commonwealth's case-in-chief. These charges concerned certain transactions alleged to have been performed by Defendant during the period when the January 6, 2005 power of attorney was in effect. Paragraph 29 of the durable power of attorney document granted the agent broad powers to make unlimited gifts, including to the agent.

DISCUSSION OF ERRORS COMPLAINED OF ON APPEAL

Defendant's Statement of Matters Complained of on Appeal sets forth three (3) errors. Each alleged error is addressed below.

1. "The trial court erred in denying Appellant's Motion for Judgment of Acquittal as to the charges of Forgery, Access Device Fraud, Theft, Receiving Stolen Property and Theft by Deception because those charges exceeded the statute of limitations under Pa.C.S.A. §5552."
2. "The trial court erred in denying Appellant's Motion for Reconsideration of Judgment of Acquittal as to the charges of Forgery, Access Device Fraud, Theft, Receiving Stolen Property and Theft by Deception because those charges exceeded the statute of limitations under Pa.C.S.A. §5552."

We shall address alleged errors 1 and 2 together. Before the close of trial, Defendant moved for a judgment of acquittal, arguing that the statute of limitations had run on all charges. Defendant's motion was denied. Similarly, Defendant's Post-Sentence Motion requested a dismissal of all charges because the statute of limitations had expired.

Pursuant to 42 Pa.C.S. §5552, a criminal prosecution must commence within five years after a crime is committed for the above mentioned charges. Defendant argued in his post-sentence motion that Patricia and Larry Galvin testified at trial they knew in 2004 that Defendant had not used the victim's money for the proposed purpose, thus starting the clock for statute of limitations purposes. A criminal complaint was filed on October 14, 2010 for conduct that occurred between December 2003 through January 3, 2006.

First, as a matter of procedure, Defendant did not raise the statute of limitations as a defense prior to trial and should be precluded from raising the issue in a post-sentence motion. Commonwealth v. Darush, 459 A.2d 727 (Pa. 1983). The proper method to raise a statute of limitations defense is to file a pre-trial omnibus motion seeking dismissal of the charges. Id., see also, Commonwealth v. Vidmosko, 574 A.2d 96 (Pa.Super. 1990). Had Defendant

timely raised a statute of limitations defense, the Commonwealth would have had the opportunity to establish when specific information and records had been uncovered. Defendant's argument is therefore waived. Defendant's reliance in his post-sentence motion on Commonwealth v. Stover, 538 A.2d 1336 (Pa.Super. 1988) is misplaced, as Stover involved an entirely different statute, 42 Pa.C.S. §5553(e), pertaining to summary offenses under the Vehicle Code.

Second, as a matter of substance, Defendant's argument lacks merit. The testimony of Mrs. Galvin was not that she and her husband knew Defendant was not using the victim's money for the proposed purpose. Rather, Mrs. Galvin testified that, in August 2004, she met with Defendant about where the victim's money was going and he represented to her that "he had invested some of the money so that mother [the victim] could make more money and the rest of the money he was buying building materials for the addition." N.T. 9/1/11 pp. 60-61. Mrs. Galvin further testified that she "trusted that he [Defendant] was building an addition." N.T. 9/1/11 p. 62. Mrs. Galvin thus did not have any knowledge that a crime was being committed in 2004. Mr. Galvin's testimony similarly suggested that he did not know in 2004 that a crime was being committed. Accordingly, the statute of limitations to bring criminal charges did not commence in 2004.

3. "The trial court erred in denying Appellant's Motion for Reconsideration of Judgment of Acquittal as to the charges of Forgery, Access Device Fraud, Theft, Receiving Stolen Property and Theft by Deception because the evidence was insufficient to be presented to the jury for deliberations:
a) While the court correctly held that several charges could not be

presented to the jury because Appellant had a valid power of attorney, the Court erred in allowing the jury to deliberate over the remaining charges in spite of Appellant's valid power of attorney."

We observe preliminarily the lack of clarity with which this asserted error has been stated, particularly in the use of the phrase "in spite of."

The trial court ruled on Defendant's motion for judgment of acquittal, granting it in part and denying it in part. Upon defense counsel's motion for judgment of acquittal, the court did not grant any of the motions on statute of limitations grounds as set forth above. The court did, however, exclude those charges related to the time period for which Defendant had power of attorney and appeared to be acting under that authority, ruling that there was insufficient evidence to enable the jury to find that the defendant unlawfully took or exercised unlawful control over movable property of another with the intent to deprive her thereof - a required element for conviction upon the charges of theft and receiving stolen property. The court concluded that if, during the period the power of attorney was in effect (from January 6, 2005 through March 2, 2007) the Defendant, acting as the agent for the principal, his mother, did improperly exceed the scope of his authority under the power of attorney, then that is a legal determination to be made in the first instance by the Orphans' Court, and not a factual finding to be made by a criminal jury. Further, the court ruled that it is not proper for a criminal jury to decide the legal issue of whether a power of attorney, properly executed on its face in terms of form and content, is nevertheless void, or voidable, because of the

incapacity of the principal at the time of its execution, as that is also a legal issue solely to be determined by the Orphans' Court.

The remaining charges, for which the court found that the Commonwealth set forth sufficient evidence to enable the jury to find the defendant guilty, related to incidents occurring (1) during the time frame the power of attorney was effective, but wherein the defendant made no indication that he was, at the time of a particular transaction, acting in his capacity as power of attorney for his mother, Florence Salmon;² and (2) at a time before or after the power of attorney was in effect.

The court crafted a jury charge specifically addressing the power of attorney issue, and the jury was instructed, immediately prior to receiving instructions on the elements of the crimes charged, as follows:

"During the time period from January 6, 2005 through March 2, 2007, Defendant, Christopher Salmon, was the appointed Power of Attorney for his mother, Florence P. Salmon. Because of certain legal rulings I have made, you are not being asked to make a determination of whether Christopher Salmon's conduct, when acting in his capacity as P.O.A., during that period from January 6, 2005 through March 2, 2007, was proper. You are also not being asked to make a determination whether, during the period from January 6, 2005 through March 2, 2007, when the P.O.A. was in effect, Christopher Salmon exceeded his authority to act under the P.O.A. document. Nor should you consider whether the power of attorney was validly given. As you will observe from the verdict slip, the charges being submitted to you for a verdict fall into two categories:

1. Those that are alleged to have occurred outside of the P.O.A. period, that is, either before the date of January 6, 2005, or after the date of March 2, 2007, OR,
2. Those that are alleged to have occurred during that period, but where the defendant made no indication that he was, at the time of that particular

² For example, with respect to a particular credit card application, Defendant applied for a credit card in his mother's name, indicated \$100,000 in income, but did not indicate that he was acting in his fiduciary capacity.

transaction, acting in his capacity as P.O.A. for his mother, Florence P. Salmon.

Therefore, with regard to the charges being submitted to you, I instruct that Christopher Salmon's status as P.O.A. for his mother must not be considered by you, one way or the other, in your deliberations. In the charges upon which you must render a verdict, the effect of the legal rulings made by me is to remove, as part of your consideration, the transactions allegedly conducted or performed by the defendant, while acting in the capacity of his mother's power of attorney during the January 2005 to March, 2007 period."

It is respectfully submitted that in crafting this instruction the court carefully and accurately delineated for the jury the proper context of Defendant's fiduciary capacity in this case.

Finally, the 10-page Verdict Slip sent out with the jury sets forth with specificity the 35 counts which remained after the court's ruling on Defendant's motion for judgment of acquittal. That degree of specificity includes the particular crime, and a designation of the particular accounts, check numbers, dates, or payees.³ Their mixed verdict, finding Defendant "Not Guilty" of 16 charges and "Guilty" of 19 charges, reflects this jury's level of sophistication, ability to perform careful analysis and their capacity to sort through the significant volume of financial evidence presented to them. To the extent that Defendant's "in spite of Appellant's valid power of attorney" assertion is somehow suggesting an inability of the jury to comprehend the court's instructions on the proper context of the power of attorney issue, that assertion would be baseless.

³ For example, Question 1 on the Verdict Slip identifies "First Colony Life Check #103 - Alfred Gilbert." Question 5 identifies "MetLife Check dated 9/20/05 to First Financial Bank."

Accordingly, for all of the foregoing reasons, Defendant's arguments are without merit.

BY THE COURT:

Date: December 26, 2012

David F. Bortner
David F. Bortner, J.

Certified From The Record
This 26 Day of Dec 2012
David F. Bortner
Deputy Clerk of Common Pleas Court