NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
JASON LEE HOOVER, Appellant	No. 55 WDA 2013

Appeal from the Judgment of Sentence of December 4, 2012
In the Court of Common Pleas of Clearfield County
Criminal Division at No(s): CP-17-CR-0000541-2012

BEFORE: PANELLA, OLSON AND MUSMANNO, JJ.

MEMORANDUM BY OLSON, J.: **FILED DECEMBER 13, 2013**

Appellant, Jason Lee Hoover, appeals from the judgment of sentence entered on December 4, 2012. We vacate and remand.

The factual background of this case is as follows. On April 5, 2012, RES Coal Company ("RES") noticed that several items were missing from its jobsite along Knobs Road in Goshen Township, Pennsylvania. Pennsylvania State Police Trooper Adam Gibson responded to the call. Kevin Adams, an employee of RES, provided a list of stolen items to Trooper Gibson. Trooper Gibson also observed that there was a set of tire tracks near the location of the stolen items.

Trooper Gibson believed that it was likely the thieves would take the stolen property to Novey's Recycling ("Novey's") in Clearfield, Pennsylvania. Therefore, Trooper Gibson went to Novey's to investigate the theft. Trooper

Gibson's instincts were correct as earlier that day two loads of stolen materials had been sold to Novey's. However, Barry Martell ("Martell") and D.M., a juvenile, Appellant's co-conspirators, had left prior to Trooper Gibson arriving.

Martell and D.M., this time accompanied by Appellant, returned to Novey's later on April 5, 2012 with a third load of stolen items. Novey's refused to pay them for the items. Pennsylvania State Police Trooper Dewaine R. Kephart, Jr. responded to Novey's and spoke with D.M., Martell, and Appellant. Trooper Kephart took photographs of the materials that were in Appellant's truck. He also took photographs of the truck's tires.

The procedural history of this case is as follows. A complaint was filed against Appellant on April 20, 2012. The information in this case was filed on July 12, 2012. On October 1, 2012, the Commonwealth provided Appellant with a written statement from D.M. stating that Appellant was with D.M. and Martell on the night that the items were stolen from RES. On October 4, 2012, Appellant filed a motion *in limine* seeking to preclude the introduction of Appellant's prior *crimen falsi* conviction. The trial court ultimately denied the motion and permitted evidence of the prior conviction to be introduced at trial.

On October 22, 2012, the morning of jury selection, Appellant filed a notice of alibi, informing the Commonwealth and trial court that he intended to call his girlfriend, Angel Cole, to testify as to his whereabouts on the night

of April 4-5, 2012. The Commonwealth objected to this testimony, and the trial court sustained the objection.

The jury found Appellant guilty of theft by unlawful taking - value of property at least $2,000.00,[1] criminal conspiracy to commit theft by unlawful taking - value of property at least $2,000.00,[2] receiving stolen property - value of property at least $2,000.00,[3] criminal conspiracy to commit receiving stolen property - value of property at least $2,000.00,[4] and corruption of minors.[5] On December 4, 2012, Appellant was sentenced to an aggregate term of 21 to 60 months' imprisonment. This timely appeal followed.[6]

Appellant presents two issues for our review:[7]

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[1] 18 Pa.C.S.A. § 3921(a).

[2] 18 Pa.C.S.A. §§ 903(a)(1), 3921(a).

[3] 18 Pa.C.S.A. § 3925(a).

[4] 18 Pa.C.S.A. §§ 903(a)(1), 3925(a).

[5] 18 Pa.C.S.A. § 6301(a)(1)(i).

[6] On January 3, 2013, the trial court ordered Appellant to file a concise statement of errors complained of on appeal ("concise statement"). ***See*** Pa.R.A.P. 1925(b). Appellant filed his concise statement on January 18, 2013. The trial court filed its Rule 1925(a) opinion on March 21, 2013. Both issues raised on appeal were included in Appellant's concise statement.

[7] Appellant included three issues in his brief, however, he stated that he was withdrawing the third issue, relating to the legality of the sentence imposed. ***See*** Appellant's Brief at 6. Counsel for Appellant confirmed at oral
(Footnote Continued Next Page)

1. Did the [trial] court abuse its discretion when it allowed the Commonwealth to present rebuttal testimony of a crime of *crimen falsi* when that evidence was over ten [] years old?

2. Did the [trial] court abuse its discretion when it prohibited the testimony of Angel Cole as an alibi witness when the Commonwealth only advised the [Appellant] that it was calling [D.M.] as a witness less than [30] days before the trial and Angel Cole was to rebut the testimony of [D.M.]?

Appellant's Brief at 6.

Both of Appellant's issues on appeal challenge discretionary evidentiary rulings made by the trial court. The trial court's "evidentiary rulings are subject to an abuse of discretion standard." ***Commonwealth v. Mendez***, 74 A.3d 256, 260 (Pa. Super. 2013) (internal quotation marks and citation omitted). "Where the evidentiary question involves a discretionary ruling, our scope of review is plenary, in that the appellate court may review the entire record in making its decision." ***Commonwealth v. Huggins***, 68 A.3d 962, 966 (Pa. Super. 2013) (citation omitted).

Appellant first challenges the trial court's decision to deny his motion *in limine* and permit the Commonwealth to introduce evidence of his conviction for receiving stolen property, which occurred in 1998. Pennsylvania Rule of Evidence 609 provides, in pertinent part, that evidence of a witness' prior conviction older than ten years is only admissible if "(1)

(Footnote Continued)

argument that Appellant was withdrawing that issue as he had determined the sentence imposed was legal. We have re-numbered the remaining two issues for ease of disposition.

its probative value substantially outweighs its prejudicial effect; and (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use." Pa.R.E. 609(b).

Appellant concedes that "he did have fair opportunity to contest [the conviction's] use." Appellant's Brief at 18. Therefore, he only contests whether the probative value of the conviction substantially outweighs its prejudicial effect. When determining whether to permit the introduction of a conviction from over ten years ago, trial courts must weigh the following factors:

> 1) the degree to which the commission of the prior offense reflects upon the veracity of the defendant-witness; 2) the likelihood, in view of the nature and extent of the prior record, that it would have a greater tendency to smear the character of the defendant and suggest a propensity to commit the crime for which he stands charged, rather than provide a legitimate reason for discrediting him as an untruthful person; 3) the age and circumstances of the defendant; 4) the strength of the prosecution's case and the prosecution's need to resort to this evidence as compared with the availability to the defense of other witnesses through which its version of the events surrounding the incident can be presented; and 5) the existence of alternative means of attacking the defendant's credibility.

Commonwealth v. Palo, 24 A.3d 1050, 1056 (Pa. Super. 2011) (citation omitted).

When ruling on the motion *in limine* to exclude the prior conviction, the trial court explained its balancing of these factors as follows:

And the balancing test has five factors, all right. The first one is the degree to which the commission of the prior offense reflects upon the veracity of the [Appellant]. . . .

[N]obody's going to argue that . . . receiving stolen property is not *crim[en] falsi*, so that first factor falls to the weight of the [C]ommonwealth.

The second factor is the likelihood, in view of the nature and extent of the prior record, that it would have a greater tendency to smear the character of the [Appellant] and suggest a propensity to commit the crime for which he stands charged, rather than provide a legitimate reason for discrediting him as an untruthful person.

Now, I think that factor falls to the defense because here the conviction from 1998 is for receiving stolen property, which is one of the same charges that we have here today.

Now, for example, I have been reading some different case law on this, and there's one case where a court, only looking at that factor, decided that, well, they could use a *crim[en] falsi* of the [C]ommonwealth against the person because the charges that were being tried were sex charges. . . . [*C*]*rim[en] falsi* isn't the same as sex charges, so the jury isn't going to think, well, you know, he committed theft before, then he's going to do it this time.

So that factor, I think, falls to the side of the defense.

The third factor is the age and circumstances of the [Appellant]. Well, by my calculations, [Appellant] would have been sentenced in 1998 he was 22 years old. So I think that factor falls to the prosecution.

Then we go to [the fourth factor], the strength of the prosecution's case and the prosecution's need to resort to this evidence as compared with the availability to the defense of other witnesses through which its version of the events surrounding the incident can be presented.

And interestingly enough, in the case of ***Commonwealth v. Cascardo***[], 981 A.2d 254[(Pa. Super. 2009), *appeal denied*, 12 A.3d 750 (Pa. 2010), this Court] talk[ed] about the fourth

factor. And [we discussed] in that case that the [C]ommonwealth's case depended, in large measure, on a particular witness, which is somewhat similar to [D.M.] here. And [we mentioned] about an alibi in that case.

And frankly, I think a fairly decent argument can be made, looking at some of the factual circumstances in the ***Cascardo*** case, that it's somewhat similar to what we have here. [That factor weighs in favor of the Commonwealth] as well.

And the final factor . . . is the existence of alternative means of attacking the [Appellant's] credibility.

Well, I suppose the [C]ommonwealth does have the purported written statement that was made which they've called like Mr. Larson and Mr. Moyer and, to some extent, the [Appellant's] father . . . although he was certainly a reluctant witness, as one might expect. So that one might fall to the [C]ommonwealth, but slightly.

I would also note that you would assume that this rule that says that if the conviction is more than [ten] years old . . . you would think that's to reward someone for not getting into *crim[en] falsi* trouble. Okay, [ten] years has gone by and he's paid his debt to society so, you know, you shouldn't really be able to use that against him.

Now, that being said, to what extent [this Court] would take it into consideration, I don't know. But going through his priors, after that 1998 receiving stolen property . . . he did have some time he spent in state prison for aggravated assault by vehicle while DUI. He got 16 months to 5 years[' imprisonment].

Then on September 8[, 2008] on a DUI he [was sentenced to 15 months to 39 months' imprisonment].

So to a certain extent, he's probably spent two and a half, three, maybe three and a half years in prison during that period of time and it's a little bit harder to get in trouble, one would hope, while you're in prison.

So I've never seen any case law that says you can take the prison time and add it on, so to speak, to the [ten] years. And

> again, to what extent [this Court] would consider that to be a factor, I'm not completely sure.
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> * * *
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> OK, I did take a look at [***Commonwealth v. Randall***, 528 A.2d 1326 (Pa. 1987)], just so that's on the record. As I indicated, it seems to me that four out of the five factors fall to the [C]ommonwealth. It seems to me that the credibility is going to be of the essence of the situation here.

N.T., 10/22/12, at 166-170. In its Rule 1925(a) opinion, the trial court expanded upon its analysis, stating:

> For the first factor, the [trial court found it weighed] in favor of the Commonwealth. A *crimen falsi* conviction "involves the element of falsehood, and includes everything which has a tendency to injuriously affect the administration of justice by the introduction of falsehood and fraud." [***Cascardo***, 981 A.2d at 253,] *quoting* ***Commonwealth v. Jones***, 5 A.2d 804, 805 ([Pa.] 1939)[]. Receiving [s]tolen [p]roperty occurs when a person "intentionally receives, retains, or disposes of moveable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with intent to restore it to the owner." 18 Pa.C.S.A. § 3925(a). The [trial c]ourt f[ound] that [Appellant's] prior conviction reflects his own veracity as a witness at a high degree, and therefore this factor weighs in favor of the Commonwealth.
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> The [trial] court, however, [found] that the second factor weighs in favor of [Appellant]. The second factor concerns whether the conviction is being used to suggest a criminal propensity, or if it is instead being legitimately used to discredit [Appellant] as an untruthful person. In the instant case, [Appellant] is charged with the same crime as his past conviction. For this reason, the admission of [Appellant's] prior conviction is more likely to suggest criminal propensity.
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> The third factor asks the [trial court] to consider the age and circumstances of a defendant. At the time of the prior conviction, [Appellant] was [22] years[]old. As [Appellant] did not argue or present any unusual or otherwise noteworthy

circumstances, the [trial] court f[ound] that this factor weighs in favor of the Commonwealth. [Appellant] was of a sufficient age to have appreciated the consequences of his actions at the time of his prior conviction.

For the fourth and fifth factors, the [trial c]ourt must consider the strength of the Commonwealth's case, the Commonwealth's need to enter the evidence of the conviction versus [Appellant's] ability to offer other witnesses to tell his version of events, and the availability of other means to attack [Appellant's] credibility. Here, the Commonwealth's case rested mainly upon one witness, a juvenile co-conspirator — [D.M]. [D.M.]'s testimony of the events that occurred was completely different than those set forth by [Appellant].

In [] ***Cascardo***, [this Court] upheld the trial court's admission of a defendant's prior federal convictions for collection of extensions of credit by extortionate means and tampering with a witness for impeachment purposes during his murder trial. ***Cascardo***, 981 A.2d at 256. Th[is] Court weighed the factors and found that the purpose of the admission of the *crimen falsi* offenses did not suggest a propensity to commit murder, and that attacking the defendant's credibility was important because he was the only witness testifying for the defense regarding the murder. ***Id.*** Further, [d]efendant's version of the events was completely different than the version presented by the Commonwealth's witness. ***Id.*** The [***Cascardo***] trial court reasoned that,

> [b]ecause of the criticality of both Gerber's and Cascardo's testimony, [it] concluded that the jury should hear as much as possible about each man's believability. One piece of information impacting upon the believability of Cascardo was his prior convictions involving dishonesty. [The trial court] concluded at trial . . . that the information regarding Cascardo's prior record was probative of an extremely important issue — whether Cascardo should be believed by the jury.

Id.[,] *quoting* [***Cascardo***] Trial Court Opinion, 7/8/08, at 21-22 (footnote omitted)[].

Similarly, the [trial court] f[ound] that [Appellant's] credibility is of the utmost importance as he is the sole defense witness and

> his version of events is contrary to those of the Commonwealth's key witness. ***See*** [***Palo***, 24 A.3d at 1057] ("Commonwealth's need to introduce evidence of witness' old *crimen falsi* conviction was high, for the jury would decide between the credibility of a single Commonwealth witness and that of a single defense witness in order to reach a verdict."). Therefore, the [trial] court f[ound] this factor weighs in favor of the Commonwealth.
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> As for the Commonwealth's ability to attack the [Appellant's] credibility through alternate means, the [trial c]ourt f[ound] that this factor again weighs in favor of the Commonwealth but only slightly. The [trial c]ourt noted during arguments that the Commonwealth did have a purported written statement of the [Appellant] and the testimony of other witnesses. [N.T., 10/22/12, at 167.] However, the [trial C]ourt [did] not consider these alternate means of attack to be of the same or nearly the same strength of an attack on [Appellant's] credibility as impeaching him by his prior conviction.
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> Upon consideration of the five factors, th[e] trial c]ourt found . . . that the probative value of [Appellant's] *crimen falsi* conviction substantially outweighed its prejudicial effect, and was therefore admissible pursuant to Rule 609(b) of the Pennsylvania Rules of Evidence.

Trial Court Opinion, 3/21/13, at 4-7 (internal alterations and parallel citations omitted).

We agree with the trial court's discussion of the first, fourth, and fifth factors, which all weigh in favor of admitting Appellant's prior conviction. However, we disagree with the analysis set forth with respect to the second and third factors. We first address the third factor, relating to the age and circumstances of Appellant's prior conviction. The trial court simply focused on the fact that Appellant was an adult when he committed the previous offense. However, Appellant was only 22 years old when he committed the prior offense. As former Chief Justice Nix noted, the probative value of a

conviction when an individual is in his early twenties is small. ***Randall***, 528 A.2d at 1331 (Nix, C.J. dissenting).

Federal courts that have considered introduction of prior convictions pursuant to Federal Rule of Evidence 609(b) have likewise determined that if a defendant was young at the time of the prior conviction the probative value of such conviction is small. ***See United States v. Norton***, 26 F.3d 240, 244-245 (1st Cir. 1994) (probative value smaller when conviction occurred when witness was "very young man"); ***United States v. Williams-Ogletree***, 2013 WL 66207, *7 (N.D. Ill. Jan. 4, 2013) (fact witness was 18 years old when prior crime was committed weighed against admission).

As Appellant was 22 years old at the time that he committed the prior offense, we conclude that the third factor is neutral and neither weighs in favor nor against introduction of the prior conviction. We next consider the second factor, "the likelihood, in view of the nature and extent of the prior record, that it would have a greater tendency to smear the character of the defendant and suggest a propensity to commit the crime for which he stands charged, rather than provide a legitimate reason for discrediting him as an untruthful person[.]" ***Palo***, 24 A.3d at 1056.

The trial court correctly found that this factor weighs in favor of Appellant; however, the trial court understated the degree to which this factor weighs in favor of Appellant. The trial court noted that in the instant

case Appellant was charged with receipt of stolen property, the same crime he was convicted of in 1998. However, the trial court failed to recognize that in addition to one of the instant charges being the same as the prior conviction, one of the instant charges was for conspiracy to commit the same offense as the prior conviction and two other instant charges are closely related thereto. The only charge that arguably was not similar to Appellant's prior offense was the corruption of minors charge; however, even that charge was premised on conduct that was similar to the prior conviction.

We find persuasive several cases from other jurisdictions. As the United States Court of Appeals for the Fourth Circuit has noted, "[t]he generally accepted view, therefore, is that evidence of similar offenses for impeachment purposes under Rule 609 should be admitted sparingly if at all." ***United States v. Sanders***, 964 F.2d 295, 297-298 (4th Cir. 1992) (citation omitted); ***see also South Carolina v. Howard***, 682 S.E.2d 42, 48 (S.C. Ct. App. 2009) (citations omitted) ("Although evidence of the prior convictions may be probative of [defendant's] credibility, they were highly prejudicial because they involved the same conduct for which [defendant] was on trial.").

In ***Leyba v. Texas***, as in the case *sub judice*, the court found that factors one, four, and five weighed in favor of the state, factor three was

neutral, and factor two weighed in favor of the defendant.[8] 2013 WL 4070770, *7-8 (Tex. App. Aug. 13, 2013). The court concluded that "[t]he prejudice associated with this conviction [for armed robbery] was high because it was similar to the charged offense [of murder.]" ***Id.*** at *8. When weighing these factors, the court found that factors one, four, and five did not substantially outweigh the prejudice caused by the similarity of the offenses. ***Id.*** Thus, the court found that the trial court erred by admitting the prior conviction, although it found that error to be harmless. ***Id.***

Likewise, in ***Minnesota v. Jones***, the court found that the probative value of a prior conviction for the identical offense for which the defendant was on trial did not substantially outweigh the prejudicial value of that prior conviction. 2009 WL 817273, *6 (Minn. Ct. App. Mar. 31, 2009) (unpublished). As the court stated:

> The greater the similarity between the impeachment crime and the charged crime, the greater the reason for not permitting use of the prior crime to impeach. Here, the prior conviction is not only similar, it is identical to the crime of possession of a firearm by an ineligible person for which [defendant] was on trial. Thus, this factor weighs very heavily against admission of the evidence for impeachment purposes.

Id. at *5 (internal alterations, quotation marks, and citation omitted). Although the court found this error to be harmless, it demonstrates the

[8] We reference the numbering scheme used in Pennsylvania with respect to the factors to be considered when determining whether to admit a prior conviction. Texas courts reverse the second and third factors.

extreme prejudice caused by introduction of a prior conviction for the same crime being introduced into evidence. ***Id.*** at *6.

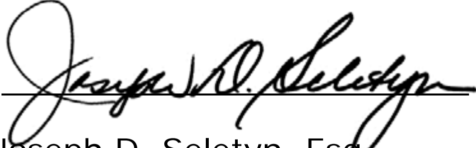
As our Supreme Court has recognized, "[e]vidence of prior criminal activity . . . is probably only equaled by a confession in its prejudicial impact upon a jury." ***Commonwealth v. Aponte***, 885 A.2d 800, 811 n.12 (Pa. 2004), *quoting* ***Commonwealth v. Spruill***, 391 A.2d 1048, 1050-1051 (Pa. 1978). The prejudice in the case at bar was extreme as the prior conviction entered into evidence was for the same offense with which Appellant was presently charged and was substantially similar to the other four charges. It is hard to imagine how the jury would not have inferred that Appellant had a propensity to commit the instant offenses because of his prior conviction. Although there was some probative value in the introduction of the prior conviction, it does not substantially outweigh the prejudice of its introduction.

We therefore conclude that the trial court abused its discretion in permitting Appellant's prior conviction for receipt of stolen property to be admitted into evidence. The Commonwealth does not argue, nor do we conclude, that such error was harmless. Therefore, we will vacate the judgment of sentence and remand for a new trial. As we remand for a new trial, we decline to address Appellant's second argument, relating to the proposed alibi testimony. ***See Banohashim v. R.S. Enters., LLC***, 77 A.3d 14, 27 n.6 (Pa. Super. 2013), *quoting* ***Commonwealth v. Oakes***, 392 A.2d

1324, 1326 (Pa. 1978) ("The grant of a new trial wipes the slate clean of the former trial.").

Judgment of sentence vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/13/2013