

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,		IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee		
v.		
PETER A. GRUJICH,		No. 97 WDA 2012
Appellant		

Appeal from the Judgment of Sentence November 30, 2011
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CP-02-CR-0016127-2010

BEFORE: STEVENS, P.J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY STEVENS, P.J.

Filed: January 15, 2013

This is an appeal from the judgment of sentence entered by the Court of Common Pleas of Allegheny County after Appellant Peter A. Grujich was convicted of ten counts of Acquisition by Misrepresentation of a Controlled Substance,¹ ten counts of Distribution by Practitioner in Bad Faith,² and one count of Theft by Deception – False Impression.³ Appellant claims his convictions were against the weight of the evidence. We affirm.

The trial court aptly summarized the factual background and procedural history of this case as follows:

* Former Justice specially assigned to the Superior Court.

¹ 35 Pa.C.S.A. § 113(a)(12).

² 35 Pa.C.S.A. § 113(a)(14).

³ 18 Pa.C.S.A. § 3922(a)(1).

This matter arises out of the arrest of [Appellant] who, at the time of the occurrence, was a pharmacist employed by Rite Aid Pharmacy. The Commonwealth alleged that [Appellant] had acquired and distributed over 2,800 hydrocodone pills, a Schedule II controlled substance, from Rite Aid on 10 separate occasions between August 1, 2009 and January 4, 2010. At trial [Appellant] stipulated that the Commonwealth could proceed by proffer of the evidence, as the facts regarding [Appellant's] acquisition and distribution of the hydrocodone were not in dispute. Instead, [Appellant] intended to rely on an affirmative defense.

The Commonwealth then proffered the testimony of Joel Edwards, a loss prevention manager for Rite Aid Pharmacy, who investigated 10 separate transactions or prescriptions dispensed by [Appellant]. It was determined that the 10 prescriptions, some in his own name and some in his wife's name, were never written or approved by a physician. Each of the fraudulent prescriptions purportedly originated from a local physician's office, however, it was confirmed that neither the physician nor anyone in his office ever authorized the prescriptions. In addition, Rite Aid was required to reimburse an insurance company \$2,009.82 for the 2,840 hydrocodone pills fraudulently obtained and dispensed by [Appellant].

The Commonwealth further established that when Mr. Edwards confronted [Appellant] concerning his investigation, [Appellant] admitted that he had fraudulently filled the prescriptions under his name and his wife's name. [Appellant] prepared a written statement on July 23, 2010 in which he stated he obtained the prescriptions because his brother had undergone a double knee replacement and bypass surgery, was in severe pain, and had no prescription coverage for pain medication. [Appellant] contended that he wrote the prescriptions in order to obtain the medications for his brother until his brother's pain was relieved.

The Commonwealth also proffered the testimony of Officer Albert Elway of the Ross Township Police Department who would testify that he responded to the Rite Aid Pharmacy on July 23, 2010 at which time he spoke with [Appellant] who indicated that he was willing to cooperate in the investigation. [Appellant] was given his *Miranda* warnings and executed a *Miranda* waiver form. At that time, [Appellant] wrote out a written statement ... in which he again stated that he had fraudulently obtained the prescriptions in order to assist his brother, who had knee replacement surgery and undergone quadruple bypass surgery

and was without insurance to purchase pain medications. [Appellant] stated he started filling the prescriptions in August of 2009 and originally was going to stop in November of 2009. However, his brother was in a motor vehicle accident in November of 2009, which aggravated the condition of his knees and, therefore, [Appellant] continued to fill the prescriptions for his brother until January of 2010 and then stopped. [Appellant] further indicated that he filled the prescriptions as "phone in" prescriptions as a doctor's signature was required. [Appellant] further contended that both his brother and wife were unaware of the fraudulent prescriptions and that [Appellant] never used or sold the medications.

In his defense, [Appellant] asserted the affirmative defense of duress. [Appellant] testified, contrary to the statements given to the Rite Aid investigator and the Ross Township Police, that he, in fact, fraudulently obtained the prescriptions as a result of physical threats by an individual that he knew from prison, John McCleavey. As background, [Appellant] testified that he obtained his pharmacy degree in 1982 and then worked for various pharmacies in Pennsylvania, Virginia, and the District of Columbia. [Appellant] also claimed that during the summer of 1979, he was assaulted at knife point by five individuals who beat and raped him. As a result, he indicated that he suffered from severe and continuing post traumatic stress disorder (PTSD). [Appellant] testified that as a result of his PTSD, he was subject to flashbacks in certain circumstances, which led him to drink in excess. His excessive drinking led to six DUI convictions which resulted in his incarceration in SCI Houtsdale facility. [Appellant] testified that during his incarceration, he met another inmate, John McCleavey, with whom he developed an acquaintance. McCleavey was apparently serving a sentence for "some type of aggravated assault." ...

[Appellant] testified that in February 2001 ... he again became employed as a pharmacist. At an unspecified time thereafter, [Appellant] coincidentally met McCleavey while walking in Pittsburgh and the two spoke, at which time McCleavey asked [Appellant] for his phone number, which [Appellant] gave him. Sometime later in the summer of 2009, [Appellant] contends that McCleavey approached him unexpectedly outside [Appellant's] place of employment and told him that he needed money for an attorney, as he was facing charges for armed robbery, and ... McCleavey wanted [Appellant] to provide him the drugs. [Appellant] testified that at that time

he told McCleavey that he would not provide him with the drugs. However, McCleavey showed [Appellant] a gun and McCleavey, who knew about the prior alleged assault and rape of [Appellant], had arranged for others to assault [Appellant] in a similar manner. [Appellant] claimed that McCleavey also threatened his wife, brothers, nieces, and nephews. [Appellant] testified he did not go to the police because of McCleavey's threats. However, it was only after "a month or a month and a half" that [Appellant] eventually relented and provided the drugs to McCleavey.

[Appellant] acknowledged that the statements that he gave to the investigator and to the police were false, claiming that he was scared and did not want them to know that McCleavey was involved. [Appellant] claimed that he took "a real live situation with my brother and his knee replacement and accident and twisted it to cover the prescriptions."

On cross-examination, [Appellant] acknowledged that despite the fact that he knew of McCleavey's conviction for violent offenses, he willingly gave his cell phone number to McCleavey when he encountered him some years later. He again acknowledged that he never told the investigator or the police of McCleavey's involvement and lied about supplying the drugs to his brother.

[Appellant] requested the Court take judicial notice of the prior criminal record of McCleavey, as well as a certified copy of a sentencing order indicating that McCleavey had been sentenced for an offense in Allegheny County on April 6, 2011, to 10 to 20 years [imprisonment]. ... After considering all the evidence, [Appellant] was found guilty on all counts.

Trial Court Opinion, 7/12/12, at 2-5 (citations omitted).

On November 30, 2011, the trial court sentenced Appellant to an inexplicably lenient sentence of seven years probation and ordered him to undergo evaluations for mental health issues and drug/alcohol abuse. On December 12, 2011, Appellant filed a timely post-sentence motion, which the trial court subsequently denied. This timely appeal followed.

Appellant's sole claim on appeal is that his convictions were against the weight of the evidence. When presented with a weight of the evidence claim, our standard of review is well established:

the weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Shaffer, 40 A.3d 1250, 1253 (Pa. Super. 2012) (quoting ***Commonwealth v. Champney***, 574 Pa. 435, 444, 832 A.2d 403, 409 (2003)).

After reviewing the record, the parties' briefs, and the relevant case law, we find Appellant's challenge to the weight of the evidence to be meritless. The trial court found Appellant's claim that he acted under duress was "incredible and [was] directly contradicted by the evidence of his prior inconsistent statements as produced by the Commonwealth." Trial Court Opinion, 7/12/12, at 7-8. We agree with the trial court's thorough analysis in its July 12, 2012 opinion, which we adopt as our own for purposes of further appellate review. Accordingly, we find the trial court properly exercised its discretion in finding Appellant's convictions were supported by the weight of the evidence.

Judgment of sentence affirmed.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF
PENNSYLVANIA,

vs.

PETER A. GRUJICH,
Defendant.

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CRIMINAL DIVISION

CC NO. 201016127

July 12, 2012

TODD, J.

OPINION

This is an appeal by Defendant, Peter A. Grujich, after being found guilty of ten counts of Acquisition by Misrepresentation of a Controlled Substance in violation of 35 Pa.C.S.A. § 113(a)(12); ten counts of Distribution by Practitioner in Bad Faith in violation of 35 Pa.C.S.A. § 113(a)(14); and one count of Theft By Deception-False Impression in violation of 18 Pa.C.S.A. § 3922(a)(1) following a non jury trial on September 14, 2011. On November 30, 2011 Defendant was sentenced to seven years probation and ordered to undergo a mental health and drug/alcohol evaluation. On December 14, 2011 Defendant filed a Post Sentence Motion which was denied by an Order of December 15, 2011. On January 13, 2012 Defendant filed a Notice of Appeal. An Order was entered on March 15, 2012 directing Defendant to File a Concise Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b). On March 21, 2012 Defendant filed his Concise Statement of Matters Complained of on Appeal setting forth the following:

- “A. The guilty verdicts at all counts were contrary to the weight of the evidence insofar as direct, credible and unrefuted evidence was presented

that Mr. Grujich acted under duress in committing the offenses, specifically he was threatened with death and/or serious bodily injury if he did not comply with demands of another person to do the acts which would otherwise be criminal. The Commonwealth failed to meet its burden of disproving the defense of duress beyond a reasonable doubt.”

BACKGROUND

This matter arises out of the arrest of Defendant who, at the time of the occurrence, was a pharmacist employed by Rite Aid Pharmacy. The Commonwealth alleged that Defendant had acquired and distributed over 2,800 hydrocodone pills, a Schedule II controlled substance, from Rite Aid on 10 separate occasions between August 1, 2009 and January 4, 2010. At trial Defendant stipulated that the Commonwealth could proceed by proffer of the evidence, as the facts regarding Defendant’s acquisition and distribution of the hydrocodone were not in dispute. Instead, Defendant intended to rely on an affirmative defense. (T., p. 9)

The Commonwealth then proffered the testimony of Joel Edwards, a loss prevention manager for Rite Aid Pharmacy, who investigated 10 separate transactions or prescriptions dispensed by Defendant. (T., p. 9) It was determined that the 10 prescriptions, some in his own name and some in his wife’s name, were never written or approved by a physician. (T., p. 10) Each of the fraudulent prescriptions purportedly originated from a local physician’s office, however, it was confirmed that neither the physician nor anyone in his office ever authorized the prescriptions. (T., p. 10) In addition, Rite Aid was required to reimburse an insurance company \$2,009.82 for the 2,840 hydrocodone pills fraudulently obtained and dispensed by Defendant. (T., p. 11)

The Commonwealth further established that when Mr. Edwards confronted Defendant concerning his investigation, Defendant admitted that he had fraudulently filled the prescriptions under his name and his wife’s name. Defendant prepared a written statement on July 23, 2010 in

which he stated he obtained the prescriptions because his brother had undergone a double knee replacement and bypass surgery, was in severe pain, and had no prescription coverage for pain medication. Defendant contended that he wrote the prescriptions in order to obtain the medications for his brother until his brother's pain was relieved. (T., p. 12)

The Commonwealth also proffered the testimony of Officer Albert Elway of the Ross Township Police Department who would testify that he responded to the Rite Aid Pharmacy on July 23, 2010 at which time he spoke with Defendant who indicated that he was willing to cooperate in the investigation. (T., p. 14) Defendant was given his *Miranda* warnings and executed a *Miranda* waiver form. (T., p. 15) At that time, Defendant wrote out a written statement, identified as Commonwealth Exhibit No. 3, in which he again stated that he had fraudulently obtained the prescriptions in order to assist his brother, who had knee replacement surgery and undergone quadruple bypass surgery and was without insurance to purchase pain medications. Defendant stated he started filling the prescriptions in August of 2009 and originally was going to stop in November of 2009. However, his brother was in a motor vehicle accident in November of 2009, which aggravated the condition of his knees and, therefore, Defendant continued to fill the prescriptions for his brother until January of 2010 and then stopped. (T., p. 16) Defendant further indicated that he filled the prescriptions as "phone in" prescriptions as a doctor's signature was required. Defendant further contended that both his brother and wife were unaware of the fraudulent prescriptions and that Defendant never used or sold the medications. (T., p. 16)

In his defense, Defendant asserted the affirmative defense of duress. Defendant testified, contrary to the statements given to the Rite Aid investigator and the Ross Township Police, that he, in fact, fraudulently obtained the prescriptions as a result of physical threats by an individual

that he knew from prison. John McCleavey. As background, Defendant testified that he obtained his pharmacy degree in 1982 and then worked for various pharmacies in Pennsylvania, Virginia and the District of Columbia. (T., pp. 19-20) Defendant also claimed that during the summer of 1979, he was assaulted at knife point by five individuals who beat and raped him. (T., p. 21) As a result, he indicated that he suffered from severe and continuing post traumatic stress disorder (PTSD). (T., pp. 21-22) Defendant testified that as a result of his PTSD he was subject to flashbacks in certain circumstances, which led him to drink in excess. His excessive drinking led to six DUI convictions which resulted in his incarceration in SCI Houtsdale facility. (T., p. 23) Defendant testified that during his incarceration he met another inmate, John McCleavey, with whom he developed an acquaintance. McCleavey was apparently serving a sentence for "some type of aggravated assault." (T., p. 25) Defendant was released on parole, but sent back to Houtsdale as a result of a parole violation.

Defendant testified that in February 2001, after being paroled a second time, he again became employed as a pharmacist. (T., p. 25) At an unspecified time thereafter, Defendant coincidentally met McCleavey while walking in Pittsburgh and the two spoke, at which time McCleavey asked Defendant for his phone number, which Defendant gave to him. (T., pp. 25-26) Sometime later in the summer of 2009, Defendant contends that McCleavey approached him unexpectedly outside Defendant's place of employment and told him that he needed money for an attorney, as he was facing charges for armed robbery, and that he had "girls working for him to make money" and that he needed some Vicodins "to keep his girls workable". McCleavey wanted Defendant to provide him the drugs. (T., p. 27) Defendant testified that at that time he told McCleavey that he would not provide him with the drugs. However, McCleavey showed Defendant a gun and McCleavey, who knew about the prior alleged assault and rape of

Defendant, had arranged for others to assault Defendant in a similar manner. (T., p. 28)

Defendant claimed that McCleavey also threatened his wife, brothers, nieces and nephews. (T., p. 28) Defendant testified he did not go to the police because of McCleavey's threats. However, it was only after "a month or a month and a half" that Defendant eventually relented and provided the drugs to McCleavey. (T., p. 30-31)

Defendant acknowledged that the statements that he gave to the investigator and to the police were false, claiming that he was scared and did not want them to know that McCleavey was involved. (T., p. 32) Defendant claimed that he took "a real live situation with my brother and his knee replacement and accident and twisted it to cover the prescriptions." (T., p. 32)

On cross-examination Defendant acknowledged that despite the fact that he knew of McCleavey's conviction for violent offenses, he willingly gave his cell phone number to McCleavey when he encountered him some years later. (T., p. 34) He again acknowledged that he never told the investigator or the police of McCleavey's involvement and lied about supplying the drugs to his brother. (T., pp. 34-36)

Defendant requested the Court take judicial notice of the prior criminal record of McCleavey, as well as a certified copy of a sentencing order indicating that McCleavey had been sentenced for an offense in Allegheny County on April 6, 2011, to 10 to 20 years. (T., p. 37) Defendant also presented the testimony of two character witnesses, Pamela Burse, a former coworker of Defendant at Rite Aid, and Joanne McKown, an acquaintance of Defendant from high school. (T., p. 39-43) After considering all of the evidence, Defendant was found guilty on all counts.

DISCUSSION

In his Concise Statement, Defendant asserts that the guilty verdict on all counts were contrary to the weight of the evidence as the direct, credible and unrefuted evidence was that Defendant acted under duress in committing the offenses. Specifically, Defendant contends his testimony establishes that he acted under duress as a result of the threats to him and his family of serious bodily injury by McCleavey and the Commonwealth failed to meet its burden of disproving the defense of duress beyond a reasonable doubt.

The defense of duress as set forth in 18 Pa.C.S.A. § 309 states:

“(a) General rule. - - It is a defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

(b) Exception - -The defense provided by subsection (a) of this section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.” 18 Pa.C.S.A. § 309

The Commonwealth has the burden of disproving the defense of duress.

Accordingly, a defendant cannot be found guilty of the crime unless the Commonwealth has proved beyond a reasonable doubt that Defendant did not act under duress. *Commonwealth v. Morningwake*, 595 A.2d 158, 163 (Pa. Super. 1991) It is also clear, however, that the trier of fact, when passing upon the credibility of witnesses and the weight to be afforded the evidence produced, is free to believe all, part or none of the evidence. *Commonwealth v. Petaccio*, 764 A.2d 582, 584 (Pa. Super. 2000)

In the present case, Defendant’s contention that the verdict was contrary to the direct, credible and unrefuted evidence and that the Commonwealth failed to disprove duress is contradicted by the record. The Commonwealth established, through the testimony of the Rite

Aid Investigator and the arresting officer, that Defendant gave a completely different account of his motivation in obtaining the fraudulent prescriptions. Contrary to his testimony at trial that he was subject to threats of serious bodily injury, Defendant repeatedly told the investigators and the police that his actions were motivated by a desire to help his brother. Rather than reflecting a credible account of duress, Defendant's account of McCleavey's threat is incredible and unworthy of belief. It appears that Defendant, realizing his version of events given to the police did not legally justify his actions, concocted the story of McCleavey's threats. Although the Commonwealth has the burden of disproving duress, it is telling that Defendant, in support of his testimony, did not produce any independent evidence to support the alleged assault he previously sustained, his alleged PTSD or for that matter, any encounters with McCleavey.

The Commonwealth's evidence of Defendant's prior statements disproves beyond a reasonable doubt that Defendant's account of the threats against him by McCleavey. In addition, Defendant's own testimony belies that he was coerced by the use of or threat of unlawful force, which a person of reasonable firmness in his situation would have been unable to resist. Despite the claim that Defendant believed he and his family were under the threat of physical injury, he testified:

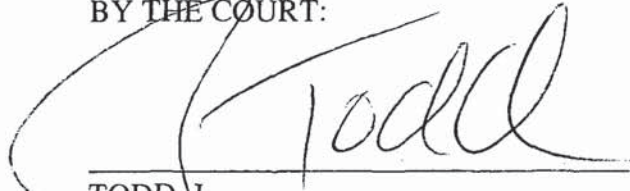
"He called me a number of times, and *within the next month, month and a half*, he stopped at the store a couple more times. And finally one time he called me, I said I would do it." (T., p. 31) (Emphasis added)

Therefore, despite the fact that Defendant claims he was subject to threats of violence, Defendant nonetheless testified that he initially refused for a period in excess of a month to obtain the drugs for McCleavey and yet nothing happened over that time period. Given that length of time, Defendant had ample opportunity to go to authorities. Consequently, Defendant's claim of duress is incredible and is directly contradicted by the evidence of his prior inconsistent

statements as produced by the Commonwealth. The Commonwealth met its burden of disproving the claimed duress by a preponderance of the evidence and the verdict against Defendant was appropriately entered.

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BY THE COURT:



TODD, J.