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Commonwealth v. Galbreath

Commonwealth of Pennsylvania v.
Ronald Jermaine Galbreath, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch Criminal Action No. 1168-2012, 1202-2012

HEADNOTES

Evidence: Authentication

1. To authenticate a piece of evidence, the proponent must produce evidence sufficient to show that the item is what the proponent claims it is. Pa. R.E. 901(a).
2. A proponent of a voice-recording may authenticate it through the testimony of a witness who is familiar with that voice. Pa. R.E. 901(b)(5).
3. Commonwealth properly authenticated a voice recording of defendant where police officer testified that he was familiar with defendant's voice through listening to hours of defendant's recorded jailhouse phone conversations.

Evidence: Preliminary Questions

1. The trial judge must make a preliminary determination of whether evidence is admissible. Pa. R.E. 104.
2. The court must conduct a hearing on a preliminary question of admissibility outside of the jury's hearing if justice so requires. Pa. R.E. 104.
3. Where authentication of a recording of the defendant's voice required the authenticating witness to testify about defendant's incarceration, the court properly heard the authentication evidence outside of the jury's presence.

Evidence: Hearsay: Non-Hearsay

1. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement. Pa. R.E. 801.
2. A statement is not hearsay if it is offered for a reason other than its truth.
3. The Court properly admitted recorded statements of a confidential informant. Statements were admitted not for their truth, but rather to prove that meetings between defendant and confidential informant occurred, that no other person met with defendant, and that the defendant's voice was on the recordings as well.

Criminal Law: Jury Charge: Objections

1. A defendant must specifically object on the record to preserve any claimed error in the jury instructions. Pa. R. Crim. P. 647.
2. Defendant waived appellate review of adequacy jury instructions. Defendant did not object to jury charge on the record.

Appeal: Record on Appeal

1. Appellate review is limited by the contents of the certified record. Pa. R.A.P. 1921.
2. Defendant could not raise appellate issue regarding Commonwealth's list of proposed witnesses, because the list was not a part of the record.

Criminal Law: Chain of Custody

1. The Commonwealth does not need to produce every single witness who came into contact with a piece of evidence to establish chain of custody.
2. Gaps in the chain of custody for a piece of physical evidence go to its weight, not its admissibility.
3. Court properly admitted crack cocaine into evidence even though Commonwealth did not produce person who sent evidence to police lab for testing.

Criminal Law: Mistrial

1. A defendant may move for a mistrial when something prejudicial occurs.

2. A defendant cannot be prejudiced by evidence that the jury does not hear.
3. Defendant's claim that trial court erred in failing to declare mistrial when witness testified about defendant's pretrial incarceration was frivolous. Testimony occurred while jury was not in the courtroom.

Appeal: Waiver of Issues

1. An appellant must preserve any errors in the trial court. Pa. R.A.P. 302.
2. Defendant could not challenge failure of court to declare mistrial when he did not move for a mistrial in the trial court.

Criminal Law: Sufficiency of the Evidence

1. To preserve a challenge to the sufficiency of the evidence, a defendant must specify in the concise statement on which elements of a crime the evidence is insufficient.
2. Defendant waived appellate review of sufficiency of the evidence where he failed to state on which elements of his convictions the evidence was insufficient.

Appearances:

Ronald Jermaine Galbreath, Defendant
Brian O. Williams, Esq., Counsel for Defendant
Franklin County District Attorney's Office

OPINION SUR Pa.R.A.P. 1925(a)

Before Meyers, J.

STATEMENT OF THE CASE

On March 5, 2013, a jury convicted the Defendant, Ronald Jermaine Galbreath, of two counts each of unlawful delivery of a controlled substance and criminal use of a communications facility.¹ Represented by new counsel, Galbreath now appeals from the judgments of sentence.

These cases began when the Franklin County Drug Task Force suspected Galbreath of dealing crack cocaine. To investigate Galbreath, Detective Darren North of the District Attorney's Office employed a confidential informant and wiretaps. Detective North was assisted by Trooper Gerald Powell, formerly of Pennsylvania State Police Troop H Vice Unit. Galbreath and the informant exchanged several phone calls to set up a drug transaction. On June 21, 2011, Galbreath sold crack to the informant at the informant's residence in Fayetteville. During the exchange, the informant wore a wire, and police surreptitiously video-recorded the exchange. On June 22, 2011, a second sale occurred at the same place. The second exchange was also audio- and video-recorded. A forensic scientist at the Pennsylvania State Police Harrisburg Regional Crime Laboratory tested the substances that the informant gave to Detective after the exchanges with Galbreath. The substances tested positive for cocaine.

At trial, Detective North, Trooper Powell, and the forensic scientist testified. After Galbreath presented no evidence, the jury deliberated for 25 minutes and then convicted on all counts. N.T., 3/5/13 (Jury Trial), at 153-54. On April 24 2013, the Court sentenced Galbreath to an aggregate of 12 years and 10 months to 30 years in prison.

Trial counsel filed a timely motion to extend the time to file a post-sentence motion, which the Court granted. In the interim, Galbreath filed pro se a document entitled "Post-Sentence Motion for New Trial Based on Weight of Evidence: Pa.R.Crim.P. 103(a) [sic] and Ineffective Counsel." Trial counsel moved to withdraw, stating that he could not argue his own ineffectiveness. The Court granted the motion and appointed current counsel. Current counsel filed a notice of appeal on June 14, 2013 and a concise statement of errors complained of on appeal, as ordered, on June 26, 2013.

DISCUSSION

¹ 35 P.S. § 780-113(a)(30) and 18 Pa. C.S. § 7512(a).

Galbreath raises nine separate issues on appeal. The Court addresses them in order.

1. Authentication of the Audio Tapes

Galbreath first argues that the Court erred in admitting the recordings of the drug transactions because they were authenticated by the Detective North, and not the confidential informant.

To authenticate a piece of evidence, the proponent must produce evidence sufficient to show that the item is what the proponent claims it is. Pa. R.E. 901(a). “An opinion identifying a person’s voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.” Pa. R.E. 901(b)(5); see also Commonwealth v. Carpenter, 372 A.2d 806, 808-09 (Pa. 1977) (“[P]roving the identity of a party to a telephone conversation is no different than proving any other fact and may be accomplished by direct or circumstantial evidence.”).

This claim does not raise reversible error. During questioning on direct examination, Detective North told the jury that he was familiar with Galbreath’s voice. N.T. (Jury Trial) 38, 55-56. Trial counsel objected on the grounds that the Commonwealth failed to authenticate the recording as containing Galbreath’s voice. Id. at 39-40. The Court dismissed the jury and heard the objection outside of its presence. The Court noted that Detective North gave no basis for how he was familiar with Galbreath’s voice, and the Commonwealth responded that it did so to protect the defendant. Id. at 40-41. Detective North testified that he was familiar with Galbreath’s voice because he had listened to recordings of phone calls that Galbreath made or received from jail. Id. at 43-45. In fact, Detective North testified that he listened to over 100 phone calls averaging 20 minutes in length, including one recorded the night before trial. Id. Hearing previous phone calls coming from the Defendant while he was incarcerated qualifies as “hearing the voice under circumstances that connected it with the alleged speaker.”² Pa. R.E. 901(b)(5). And nothing in the rules of evidence requires a proponent of an audio recording to introduce the speaker to identify his own voice. The Court therefore properly overruled Galbreath’s objection.

2. The Confidential Informant’s Statements and Hearsay

Next, Galbreath contends that the audio-recordings of the drug transactions contain hearsay and were inadmissible. Galbreath argues that the informant’s statements are hearsay because he did not testify at trial.

The recordings were admitted into evidence as Commonwealth’s Exhibit 1. No transcript exists of the statements on the recordings. Exhibit 1 is a CD-R with four audio and two video files. The recordings, which were played for the jury, contain very little audible statements by the confidential informant. The statements consist mainly of grunts, inaudible sounds, and a few phrases here and there such as “you good?” Only one significant conversation between the confidential informant and Galbreath occurred, about a dog jumping out of the window of Galbreath’s car.

Hearsay, an out-of-court-statement offered for its truth, is not admissible unless an exception applies. Pa. R.E. 801, 802. An out-of-court statement offered for relevant reasons other than its truth is not hearsay. Commonwealth v. Busanet, 54 A.3d 35, 70 (Pa. 2012).

Because the recordings were not admitted for the truth of the informant’s statements, they were not hearsay. Rather, the recordings were admitted to prove that the meetings between the informant and Galbreath actually occurred, that no one else met with Galbreath, and that Galbreath is the person on the audio and video recordings. See N.T. (Jury Trial) 40, 50. Stated another way, the informant’s statements were offered merely for the fact that they were said—a reason unrelated to the statements’ truth. The Court believes it properly overruled Galbreath’s hearsay objection.

3. The Confidential Informant’s Failure to Testify and the Failure to Give a “Missing Witness” Instruction

Third, Galbreath contends that the Court erred in failing to charge the jury regarding the confidential informant’s absence at trial. “No portions of the charge nor omissions from the charge may be assigned as error,

2. The jury heard only evidence that Detective North knew Galbreath’s voice. It did not hear how, because of the highly prejudicial nature of that information (wiretapped jailhouse phone calls). The Court makes preliminary findings regarding admissibility and may do so outside of the jury’s presence. Pa. R.E. 104. Thus, a claim that the jury was not presented with sufficient facts to find that the recordings were authentic goes to the evidence’s weight.

unless specific objections are made thereto before the jury retires to deliberate.” Pa. R. Crim. P. 647. Trial counsel neither requested a missing-witness charge nor objected when the Court did not include one. See N.T. (Jury Trial) 152. This claim is waived.

4. Trooper Brumbaugh’s Failure to Testify and the Failure to Give a “Missing Witness” Charge

This issue is the same as the third, except it applies to the Commonwealth’s failure to call Trooper Brumbaugh. The legal analysis is identical. Trial counsel failed to request such a charge, and he failed to object on the record to the jury charge as given. Trial counsel’s failure to preserve the issue forecloses appellate review.³

5. Galbreath’s Confrontation Rights and Trooper Brumbaugh

In his fifth issue, Galbreath argues that his right to confront the witnesses against him was violated when the Commonwealth failed to call Trooper Brumbaugh as a witness.

This issue lacks merit. Galbreath did not object to the Commonwealth’s failure to call Trooper Brumbaugh. The issue is waived. Additionally, a defendant’s confrontation rights apply only to “witnesses against him.” Trooper Brumbaugh did not testify at trial. He is not the affiant. Nothing he said or did was used against Galbreath.⁴ Galbreath’s right to confront witnesses therefore did not apply.

6. Lack of Foundation for Introducing Lab Results

In his sixth issue, Galbreath challenges the admission of the laboratory test results which found that the substances sold to the informant contained cocaine. Counsel objected when the Commonwealth moved to publish the physical crack cocaine to the jury. N.T. (Jury Trial) 30-32. Counsel argued that the Commonwealth failed to prove chain of custody because another person who did not testify—and not Detective North—submitted the crack cocaine to the laboratory for testing. Id.

This issue has no merit. “There is no rule requiring the prosecution to produce as witnesses all persons who were in a position to come into contact with the article sought to be introduced in evidence. Physical evidence may be properly admitted despite gaps in testimony regarding custody.” Commonwealth v. Feliciano, 67 A.3d 19, 29 (Pa. Super. 2013) (en banc) (quoting Commonwealth v. Jenkins, 332 A.2d 490, 492 (Pa. Super. 1974)). And gaps in the chain of custody go to the weight of a piece of evidence—not its admissibility. Id.

7. Failure to Declare a Mistrial After Detective North Testified About Galbreath’s Incarceration

This issue is meritless. Galbreath suffered no prejudice by Detective North’s testimony, because it took place outside the presence of the jury. See N.T. (Jury Trial) 38-39 (noting that the jury left the courtroom). And at any rate, a defendant must move for a mistrial. Pa. R. Crim. P. 605(B). Trial counsel never did so, which waives the issue on appeal. Pa. R.A.P. 302; Commonwealth v. Ables, 590 A.2d 334, 340 (Pa. Super. 1991).

8. Galbreath’s Right to a Fair Trial and Testimony About His Imprisonment

Galbreath’s penultimate claim is frivolous. Detective North’s testimony regarding Galbreath’s recurrent use of the jail’s telephones took place while the jury was not in the courtroom. See N.T. (Jury Trial) 38-39, 42-45, 53-54. Galbreath cannot possibly have been prejudiced by testimony that the jury did not hear.

9. Sufficiency of the Evidence

The final paragraph of the Concise Statement reads: “Was the evidence sufficient to sustain a conviction when the Commonwealth’s only evidence was the recording conversations between the Confidential Informant and Mr. Galbreath, when the Confidential Informant was never cross examined by the Defense?”

“[W]hen challenging the sufficiency of the evidence on appeal, the Appellant’s 1925 statement must ‘specify the element or elements upon which the evidence was insufficient’ in order to preserve the issue for appeal.”

3. The Commonwealth’s proposed witness list is not part of the record, and any error based on that list is not grounds for appeal. Commonwealth v. Manley, 985 A.2d 256, 263 (Pa. Super. 2009).

4. In fact, the only time Trooper Brumbaugh’s name (the transcript spells his name “Bumbaugh”) was when trial counsel unsuccessfully attempted to cross-examine Detective North Trooper Brumbaugh’s report. N.T. (Jury Trial) 82-83.

Commonwealth v. Gibbs, 981 A.2d 274, 281 (Pa. Super. 2009) (quoting Commonwealth v. Williams, 959 A.2d 1252, 1257 (Pa. Super. 2008)). “Such specificity is of particular importance in cases where, as here, the Appellant *was convicted of multiple crimes each of which contains numerous elements* that the Commonwealth must prove beyond a reasonable doubt.” Id. (emphasis added).

By his vague concise statement, Galbreath waived appellate review of the sufficiency of the evidence. Galbreath fails to enumerate which conviction he challenges. He further fails to state on which elements the evidence is insufficient. The Court will not speculate for him. Gibbs is the same as this case. Id. (“Here, Appellant not only failed to specify which elements he was challenging in his 1925 statement, he also failed to specify which convictions he was challenging.”). Galbreath therefore waived a challenge to the sufficiency of the evidence.⁵

CONCLUSION

For the foregoing reasons, the Court did not commit reversible error pretrial, at trial, sentencing, or post-sentence. Therefore, this Court respectfully requests that the Superior Court affirm Galbreath’s judgment of sentence.

ORDER OF COURT

AND NOW THIS 6th day of August, 2013, the Clerk of Courts is directed to transmit this Opinion and Order together with the record in this case to the Superior Court.

Pursuant to the requirements of Pa.R.Crim.P. 114 (B)(1), (2) and (C)(1), (2), the Clerk shall promptly serve this Order or court notice on each party’s attorney, or the party if unrepresented; and shall promptly make docket entries containing the date of receipt in the Clerk’s office of the Order or court notice; the date appearing on the Order or court notice; and the date and manner of service of the Order or court notice.

5. If this issue is read as a challenge to the weight of the evidence (the language notwithstanding) it is waived. Galbreath failed to challenge the weight of the evidence in this Court. Pa. R. Crim. P. 607.