Franklin County Legal Journal

Volume 20, Issue 27, Pages 153-160

Commonwealth v. Daniels

COMMONWEALTH OF PENNSYLVANIA v. ADIN FORREST DANIELS, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Criminal Action No. 118 of 2001

Post-sentence motions; Pro se defendant; Allegations of prejudice caused by late providing of discovery

1. A defendant who chooses to represent himself cannot later assert his own ineffectiveness as a basis for acquittal or a new trial.

2. A defendant who was denied court-appointed counsel and refused to maximize his income in order to raise money for private counsel was himself responsible for having to proceed pro se.

3. A defendant who, after firing prior counsel, repeatedly represented to the court and the Commonwealth as a basis for a continuance that he intended to retain new counsel, will be held to those representations and was not entitled to a second continuance on the eve of trial on the ground that he needed more time to retain counsel insofar as the real purpose of his request was to delay and manipulate the proceedings.

4. Late-provided discovery does not require acquittal or a new trial where the defendant failed to prove that the lateness caused him prejudice insofar as he knew of key portions of the evidence against him, he defended himself ably, was acquitted of the charges related to the late discovery, and was convicted only of the charges involving conduct which at trial he admitted having committed against the victim.

OPINION

Herman, J., November 22, 2002

Introduction

The defendant was charged with rape, kidnapping, unlawful restraint, terroristic threats, indecent assault, simple assault, and involuntary deviate sexual intercourse arising from an incident which occurred on July 12, 2001. He was convicted of kidnapping, terroristic threats and simple assault, and acquitted of rape, involuntary deviate sexual intercourse, indecent assault and unlawful restraint after a two-day jury trial on April 23 and 24, 2002.

The defendant filed post-sentence motions for a new trial, for "Acquittal," [sic] and for modification of sentence. The court held a hearing on the motions of September 3, 2002. Subsequently, the Commonwealth and counsel for the defendant filed briefs. This matter is ready for decision.

Background

The defendant retained Attorney Christopher Sheffield, Esquire, after the charges were filed in July 2001. On October 3, 2001, counsel served on the Commonwealth a request for discovery and for a bill of particulars pursuant to Pa.R.Crim.P. 573. The Commonwealth filed a motion on October 17, 2001 to amend the information to add a count for involuntary deviate sexual intercourse. The Commonwealth wrote to defense counsel on October 22 indicating a desire to wait to answer the discovery until after the November 27 hearing unless defense counsel requested otherwise.

The court held the hearing as scheduled and the defendant appeared with Attorney Sheffield. Expressing dissatisfaction with counsel's representation, the defendant orally moved to continue the hearing to retain new counsel. The defendant told the court he was already in the process of consulting other attorneys. The court denied his last-minute motion and took evidence on the motion to amend. Counsel filed briefs in fourteen days as directed.

The court issued an Opinion and Order on January 7, 2002 granting the Commonwealth's motion to amend. In the interval between the hearing and the Order, Attorney Sheffield moved to withdraw as counsel at the defendant's request. The defendant had contacted three other attorneys by that time, although he had not yet retained new counsel. By way of an Order of Court, the court granted Attorney Sheffield's motion to withdraw on December 18 and directed the defendant to "take steps necessary to obtain other counsel or to proceed pro se in this matter...The defendant shall appear on January 22, 2002 at 9:00 a.m. for the call of the list and on January 28, 2002 at 9:00 a.m. for the trial term." The defendant filed a motion to continue the case to the April 22, 2002 trial term so as to have more time to retain counsel. The court granted his motion on January 8, 2002.[1]

According to testimony at the post-sentence hearing, the defendant asked the District Attorney in either late February or early March to drop or reduce the charges, asserting he could not afford private counsel. The District Attorney declined this request. During that conversation, the defendant did not renew the request for the discovery which Attorney Sheffield had made in October. The defendant applied for a public defender on March 26, 2002. The application was denied because he was not financially eligible.

When the defendant appeared without counsel at jury selection on April 22, the court sua sponte appointed the public defender as stand-by counsel for the purpose of jury selection only. The District Attorney then provided the defendant with the discovery previously requested by Attorney Sheffield. The next day, the court gave the defendant detailed guidelines and explanation as to how the trial would proceed and cautioned the District Attorney to be mindful of the defendant's pro se status. The court also gave the defendant guidance throughout the trial. The jury found the defendant guilty of kidnapping, terroristic threats and simple assault. He was acquitted of rape, involuntary deviate sexual intercourse, indecent assault and unlawful restraint.

The court sentenced the defendant to serve 22-84 months for kidnapping, 3-36 months for terroristic threats (to be served concurrently with the sentence for kidnapping), and 24 months probation for simple assault (to be served at the expiration of the sentence for kidnapping). The terms of incarceration, falling under the standard ranges, were to be served at a state correctional institution. Once the court imposed sentence, the defendant made oral motions for judgment of acquittal and for a new trial. The court denied the motions without prejudice on grounds of insufficient specificity.

Attorney James K. Reed, Esquire, entered his appearance for the defendant on June 27, 2002 and filed post-sentence motions. The defendant alleges (1) the court erred in denying his application for a public defender, which prejudiced him at trial: (2) the Commonwealth's failure to provide him as a pro se defendant with discovery until the eve of trial undermined his ability to prepare his defense; (3) the court erred in sentencing him in the standard rather than the mitigated ranges and in not making him eligible for boot camp.[2]

Discussion

The court is presented with several interrelated questions: (1) Was it error to deny the defendant court-appointed counsel? (2) Did that denial leave the defendant no alternative but to represent himself? (3) Was the defendant prejudiced because the District Attorney did not provide discovery until the day before trial?

The evidence shows the defendant engaged Attorney Sheffield when the charges were first filed. The District Attorney had objections to the informal discovery request and wanted reciprocal discovery, including a transcribed copy of an audio recording taken of the preliminary hearing by Attorney Sheffield. The District Attorney preferred to wait to provide the discovery until the court ruled on the motion to amend the information.

At the November 27 hearing on the motion, the defendant was very eager to have Attorney Sheffield removed from the case. He told the court he had already spoken to other attorneys and would retain other counsel. The court specifically warned him that "we can't have these last minute requests [for continuance or to substitute counsel] slowing down the schedule of the court." (N.T. p. 15). The defendant never told the court he intended to represent himself. (N.T. pp. 2, 18). The briefing schedule was designed to give new counsel time to file written argument. The defendant then did consult other attorneys, but, according to his post-sentence testimony, was "very skeptical about attorneys in general" at that point. When he appeared in court on January 8, 2002 to request a continuance, the court told him he needed to hire counsel as soon as possible because the April trial term was fast approaching. Once again the defendant did not tell the court he intended to proceed pro se. To the contrary, when the court asked him: "Are you going to get a new attorney?" he replied: "Absolutely." (N.T. p. 2).

More than two months later, the defendant applied for a public defender. The application was denied because he did not meet income guidelines. The defendant testified he was completely out of funds

at that time, was behind on his car and house payments and had a maximum monthly income of $400. However, according to information he himself supplied on the application, he earned $20,000 during the previous year. That income exceeded the $12,000 annual income limit set by Fulton County for public defender eligibility. That $8,000 disparity was simply too large for the court to ignore.

The defendant next contends he made every effort to retain private counsel, but that the court left him no alternative other than to represent himself. The facts show otherwise. The defendant is a self-employed builder, but voluntarily undertook no new construction projects in the months before trial. In addition to his earnings and earning potential from his business, he had the skills and experience to earn $8.00/hour as a framer and steel erector and $9.00/hour as a backhoe operator, jobs he held before becoming self-employed. He chose not to pursue those avenues because he did not want to give up his own business "just so I could raise money for this case." (N.T. Post-Sentence Hearing, September 3, 2002).

We find the defendant failed to act promptly and in good faith to secure new private counsel after firing Attorney Sheffield in mid-late December 2001. He consistently represented to the court that he was on the verge of hiring counsel to represent him. This contradicts his testimony at the post-sentence hearing that he had become disillusioned with and skeptical of attorneys in general as early as November 2001. The very first time he told the court he would be proceeding pro se was at April 22 jury selection. He simply assumed he would be granted another continuance and his last-minute request was simply a tactic to put off having to face the charges, which he appeared not to take very seriously. This conclusion is supported by his refusal to adjust his employment situation in order to raise the necessary funds. Whether to grant or deny a second or third request for a continuance is a decision well within the trial court's discretion. A defendant cannot indefinitely delay proceedings by repeated requests for continuances for the purpose of obtaining counsel. Commonwealth v. Fleming, 480 A.2d 1214 (Pa.Super. 1984). There is no merit to the defendant's contention that the court's refusal to appoint him a public defender left him "no choice" but to proceed on his own. The defendant himself created that situation.

The defendant next contends he was prejudiced by the District Attorney withholding discovery until the day before trial. He contends the District Attorney deliberately took advantage of his pro se status to engage in gamesmanship, resulting in trial by ambush and unjust convictions. In this connection we note Pennsylvania Rule of Criminal Procedure 573 which provides that parties must make a "good faith effort to resolve all questions of discovery, and to provide information required or requested under the rules to which there is no dispute." The rule defines mandatory discovery materials as well as those materials discoverable at the court's discretion. Where the materials are not subject to mandatory discovery and an informal request is refused, the requesting party may file a motion to compel discovery within fourteen days of arraignment.

Attorney Sheffield made an informal request for discovery and a formal request for a bill of particulars on October 3, 2001. The District Attorney responded with the following letter:

> Dear [Attorney Sheffield], I was assuming we would wait and see whether the additional charge [involuntary deviate sexual intercourse] is going to be added before filing my answer to your discovery. I would agree to an extension of time for filing a motion to compel until after that issue is decided. But, if you want me to respond immediately, I will do so. I can have it to you the first of next week if you want me to respond now. Also, I understand that you tape recorded the preliminary hearing. Will you provide me with a copy of the transcript or of the tape recording itself.

(Defendant's post-sentence exhibit #1). The discovery at issue included the complaint with statements of the victim and witnesses, a statement by the defendant, and the report of James Rintoul, M.D., the physician who performed the sexual assault examination of the victim. The defendant did not know Dr. Rintoul was to be an expert witness until the eve of trial. This, he alleges, violated Rule 573 which mandates the disclosure of expert witnesses during discovery and prejudiced him because he had no time to interview Dr. Rintoul or to have his own expert testify. The defendant's argument is wholly unconvincing.

The defendant consistently represented to the District Attorney (and to the court, as discussed above) that he intended to retain counsel. The first time he asserted he was having trouble hiring counsel was early March when he asked that the charges be dropped or reduced. Despite having his case file, including the above letter which should have alerted him to the option of filing a motion to compel, the defendant did not ask the District Attorney during their conversation for the discovery, nor did he file a motion to compel. In addition, he said nothing to the court on January 8 about the discovery. According to his post-sentence testimony, he did not ask for the discovery again between November and April because he believed he should not have to. This testimony clearly reveals he knew all along that those materials existed but did not ask for them because he assumed the court would again continue the case.

The defendant argues the court erred in not conducting a searching inquiry on the record at jury

selection under Rule 121 as to whether his waiver of counsel was knowing, intelligent and voluntary. He also asserts the court should have appointed him stand-by counsel as a safeguard. These contentions are disingenuous and a red herring insofar as he never presented himself to the court as a pro se defendant during the five months leading up to trial. He failed to take the charges seriously and refused to reorganize his financial life in order to raise the necessary funds to hire counsel. Under those circumstances, the defendant knew it was imperative for him to act promptly to secure private counsel, but he dragged his feet under the unfounded assumption the matter would proceed according to his pace, rather than the court's. The court had no duty to conduct a lengthy inquiry into his understanding, motives and intentions, or to (again) appoint stand-by counsel where he was clearly ineligible financially for a public defender.

Furthermore, a defendant who chooses to represent himself at trial cannot later assert his own ineffectiveness as a basis for acquittal or a new trial. Commonwealth v. Auker, 681 A.2d 1305 (Pa. 1996). In any event, as to the matter of Dr. Rintoul, the jury acquitted the defendant of rape, involuntary deviate sexual intercourse and indecent assault. It is therefore impossible to see how the defendant was prejudiced by the late disclosure of this expert witness, which the record shows the defendant ably cross-examined. Commonwealth v. Lawson, 658 A.2d 801 (Pa.Super. 1995).

As for the other discovery, the evidence shows the defendant was hardly in the dark about the nature of the remaining charges. He had a tape recording of the victim's testimony from the preliminary hearing, as well as statements she made in connection with a protection from abuse petition which she had filed against him. In addition, he admitted, both to the police and at trial, that he chased the victim and "marched her" back into his house (kidnapping). He admitted to putting a gun in his mouth while sitting next to the victim and threatening to kill himself in front of her (terroristic threats). He admitted he slapped the victim, pulled her hair and grabbed her by the throat (simple assault). It was for these very offenses that the jury returned verdicts of guilty. The defendant has failed to show how receipt of discovery on the eve of trial caused him specific, actual prejudice. Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987).

We find it was the defendant and not the District Attorney who tried to manipulate this case to cause delay by stringing along the District Attorney and the court through bad faith representations that retention of private counsel was imminent. His motive may have been to wear down the victim, with whom he had a long-term and volatile relationship, so she would capitulate and abandon her determination to testify against him. At any rate, it was the defendant's efforts to "put off the evil day" which left him without counsel at trial. Neither the court nor the District Attorney was responsible for the corner the defendant painted himself into with regard to discovery and trial preparation.

The defendant's last contention is the court erred in sentencing him in the standard rather than mitigated ranges, requiring him to be imprisoned at a state correctional institution rather than county prison where he could be eligible for work release. He also seeks a reduction in his maximum sentence for kidnapping so as to make him eligible for the boot camp program. However, a person convicted of kidnapping is ineligible for that program. A person convicted of an offense which triggers the deadly weapon enhancement, such as terroristic threats, is likewise ineligible for the program. As to standard vs. mitigated ranges, what the defendant overlooks, and what the record clearly reveals, is the court considered that matter at sentencing. Part of the mix was the defendant's prior convictions for harassment and physical violence toward women, including the same victim in this case. The defendant admitted he physically picked up the victim and put her into his truck after a struggle and drove her to his house. He admitted he ran after her when she fled the house and physically forced her back in, after which he put the gun in his mouth and threatened to kill himself in front of her. He admitted he pulled her hair, slapped her in the side of her head, grabbed her by the throat and pinned her to the floor. His conduct during this drawn-out incident was indeed outrageous, as noted by the Commonwealth in its brief. In addition, the crime of kidnapping is a felony with an offense gravity score of 10. A sentence of state incarceration was wholly appropriate as a message to him that this type of violent and threatening conduct is completely unjustified, regardless of the volatile nature of his personal relationship with the victim.

For the foregoing reasons, the court will enter an Order denying the defendant's post-sentence motions for acquittal, for a new trial, and for modification of sentence.

ORDER OF COURT

Now this 22nd day of November 2002, for the reasons stated in the Opinion, the court hereby denies the defendant's post-sentence motions for acquittal, for a new trial, and for modification of sentence.

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[1]The defendant waived the application of Pa.R.Crim.P. 600 in his motion.

[2]The defendant also alleged the evidence was insufficient to support the convictions for kidnapping, terroristic threats and simple assault. Insofar as he did not pursue this issue at the post-sentence hearing or in written argument, we find he has waived that issue for our purposes here.