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Commonwealth v. Clary

COMMONWEALTH OF PENNSYLVANIA
v. DANIEL ALLEN CLARY, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Criminal Action No. 118 of 2005

Criminal; Appeal of Commonwealth; Character Evidence; Evidence of Prior Bad Acts

1. A court's exclusion of the Commonwealth's proffered evidence must be evaluated on appeal by a review of the contents of the offer at the time it was made.

2. Evidence is inadmissible if it is not probative of issues in this case or necessary for the Commonwealth to sustain its burden of proof and it is highly prejudicial to Defendant in that the jury is very likely to convict on irrelevant matters.

3. When the intended testimony references Defendant's status as a parolee and prior drug use, Pa.R.E. 404(b) determines its admissibility.

Appearances:

Dwight C. Harvey, Esq., *District Attorney*

Barbara L. Weiss, Esq., *Counsel for Defendant*

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

Walsh, J., June 22, 2006

Background

The Commonwealth charged Defendant with one count of possession of cocaine after Defendant's state parole officer discovered cocaine in Defendant's bedroom on June 14, 2006 during a search. On October 4, 2005, the Commonwealth filed a Notice to Defendant that it intended to introduce at trial evidence of other crimes, wrongs or acts, through the testimony of Parole Officer Roger Leidy. Specifically, the Commonwealth informed Defendant that it intended to introduce evidence that Defendant had been convicted previously in Fulton County, that Defendant was on supervision pursuant to sentence, that Defendant was likely to continue to be using drugs and attempting to hide that usage from his parole officer and that Defendant may in fact have been selling cocaine.

The Commonwealth filed a Motion in Limine in which it sought to admit testimony of Defendant's parole officer consistent with the parole officer's written statement made following the June 14, 2005 search. It filed a brief in support of its Motion on March 17, 2006. Defendant filed an Answer to the Commonwealth's Motion on April 10, 2006 and he filed a brief in support of his Answer on April 13, 2006.[1]

On May 9, 2006, the Court denied the Commonwealth's Motion because it determined that the Commonwealth had not carried its burden of establishing that the evidence it sought to introduce was more probative than prejudicial. The Court stated in its Order of that date "the evidence sought to be admitted by the Commonwealth is not admissible at trial for the reason that its prejudicial value far outweighs its probative value." In making this determination the Court relied on Commonwealth v. Santiago, 822 A.2d 719 (Pa. Super. Ct. 2003), and Commonwealth v. Matthews, 783 A.2d 338 (Pa. Super. Ct. 2001).

The Commonwealth filed a Notice of Appeal on May 17, 2006, notifying the Court that the Commonwealth was appealing the May 9, 2006 Order denying its Motion in Limine to the Superior Court pursuant to Pa.R.A.P. 311(d). In its Notice, the Commonwealth stated that the May 9, 2006 Order excludes prosecution evidence and will therefore terminate or substantially handicap the prosecution. The Commonwealth timely filed its Statement of Matters Complained of on Appeal on May 30, 2006.

Discussion

The Commonwealth sets forth the following in its Statement of Matters Complained of on Appeal:> [2]

1. The Court misapplied the law of Commonwealth v. Santiago, 822 A.2d 716 (Pa. Super. Ct. 2003) and Commonwealth v. Matthews, 783 A.2d 338 (Pa. Super. Ct. 2001);

2. The Court erred in determining that the evidence proffered would be far more prejudicial than probative; and

3. The Court erred in failing to distinguish between the various facts proffered by the Commonwealth.

We will address each in turn, starting with the third issue because determination of that issue influences the first two issues.

When we received the Commonwealth's Motion, we treated it as we would an offer of proof:[3] if one part of the offer proves inadmissible, the entire offer fails.[4] Purcell v. Metropolitan Life Insurance Co., 10 A.2d 442 (Pa. 1940). Further, we believed that it is not the duty of the court to sort through and to separate the good from the bad in the Commonwealth's offer. Jones v. Dubuque Fire & Marine Ins. Co., 176 A. 208 (Pa. 1934); Cockcroft v. Metropolitan Life Ins. Co., 3 A.2d 184 (Pa. Super. Ct. 1938). Finally, this court's exclusion of the Commonwealth's proffered evidence must be evaluated on appeal by a review of the contents of the offer **at the time it was made**. Commonwealth v. Newman, 555 A.2d 151 (Pa. Super. Ct. 1989).

The Commonwealth's offer, contained in its Motion, simply states:

> 2. At trial, the Commonwealth intends to introduce testimony by Defendant's parole officer in another case, consistent with his written statement to police, attached hereto as Exhibit A and incorporated by reference.

By its Motion, the Commonwealth indicated that it had no plans to exclude from the parole officer's testimony any part of the officer's written statement. Accordingly, we evaluated the offer as a whole. The Commonwealth served its Motion upon defense counsel on January 4, 2006 and, though it appears the Commonwealth did not file its Motion, we note that its covering order was signed on January 17, 2006 and filed on January 23, 2006.[5] It was not until we received the Commonwealth's brief in support of its Motion on March 17, 2006 that we became aware that the Commonwealth had "distilled" its case to the parole offer testifying to the following:

1. that he was supervising Defendant Clary as a parolee;

2. that he became suspicious as to how Clary could be paying double on his fines and costs while failing to have regular employment;

3. that he administered urine tests to check for drug use, one of which appeared to be positive;

4. that when he showed up to administer the urine tests, on at least 2 occasions, the Defendant was drinking a liquid, and that such behavior is frequently engaged in by people using drugs to "flush" their system before a urine test

5. that he searched Defendant's room and found the cocaine in a jewelry box located on his dresser.

Commonwealth's Brief in Support of Motion in Limine, page 1.

In any event, whether we consider the Commonwealth's Motion at the time it was made, Newman, 555 A.2d at 151, or whether we consider the more specific offer contained in its Brief, the Commonwealth's offer fails. It continues to appear to us, as it did when we denied the Commonwealth's Motion, that its offers numbered (2), (3) and (4) above are inadmissible based on our judgment that such information is not probative of issues in this case or necessary for the Commonwealth to sustain its burden of proof, and it is highly prejudicial to the Defendant in that the jury is very likely to convict on irrelevant matters.

Therefore, when we determined that the majority of the information the Commonwealth intended to introduce was inadmissible, we ruled the entire offer was inadmissible.

In light of information contained in the Commonwealth's Statement of Matters Complained of on Appeal, which was not contained in the Commonwealth's Motion in Limine, it appears that the Commonwealth intended for the Court to parse through the parole officer's entire written statement and therefore undertake an evaluation of it to determine which parts of it were admissible and which inadmissible. We did not then and do not now believe it was our burden to do so, particularly given that the Commonwealth provided no guidance to this Court as to which "pieces" of the parole officer's written statement were more or less important.[6]

Nevertheless, to the extent we are required to address those portions of the Commonwealth's offer which we determined to be inadmissible, we do so below.

Because the intended testimony references Defendant's status as a parolee and prior drug use, we looked primarily to Pa.R.E. 404(b)[7] to determine its admissibility. The Commonwealth asserts that the parole officer's testimony is admissible "as being part of the transaction or 'the complete story' of the crime." See Commonwealth's Motion in Limine, 3. We agree with the Commonwealth as to items (1) and (5).

However, items (2), (3) and (4) of the parole officer's intended testimony violate Pa.R.E. 403, in that the information in those items is highly prejudicial and its probative value, if any, is outweighed by that prejudice.

In order to prove its case against Defendant, the Commonwealth must prove: (1) that the item is in fact a controlled substance; (2) that the item was possessed by Defendant; and (3) that Defendant was aware of the item's presence and that the item in fact was the controlled substance charged.>[8] Although part of the parole officer's intended testimony and part of his written statement are probative of these elements, other parts of the intended testimony and written statement are not probative and are, in fact, highly prejudicial to Defendant. Thus, those items are not admissible under Pa.R.E. 404(b).

Our analysis of the parole officer's statement follows. We have italicized those portions that we believe are admissible under Pa.R.E. 404(b), which correspond to items (1) and (5) in the Commonwealth's brief, and we have used ~~strikethrough~~ for those portions that we believe are not properly placed before the jury.

> "*On June 14, 2005 at approximately 6:30 p.m., I was meeting with Parolee Daniel Clary at his home in Needmore, PA. The address is 6447 Great Cove Road.* ~~During the time of this visit Offender Clary was explaining his current status. He relayed to this agent that he was not working regularly but was recently able to pay double on his costs and fine with Fulton County and also pay double on his supervision fees. This availability of money caused me to be suspicious. This was compounded by the fact that~~ *Offender Clary recently tested positive for the use of cocaine. When I began to question Offender Clary about his cocaine use he became nervous. This was evident in his body language and also his speach [sic].* ~~Additionally, Offender has recently submitted urinalysis samples that registered as abnormal.~~ *Offender Clary knew I was coming this evening* ~~and he was drinking the same liquid I noticed him drinking prior to past urinalysis tests. At that time I expressed my suspicion to Clary that he may be selling drugs for money an~~d *stated "Why don't we check our room out, alright." He stated "Whatever you want." At that point we went to Offender Clary's room. I asked Clary to pull out all of his drawers and move the clothes out of the way, he did. I then asked him to open a jewelry box located on top of his dresser. He [illegible] then opened the top. I asked him to move a tray that rested in the top. He did. This is when I saw a clear sandwich bag wrapped around two small packets with a red and white design. I asked Offender Clary if the packets contained cocaine. He said that they did. I asked what size they were called. He said $50.00 bags. At that point I took the suspected cocaine and the Offender into his dining room. I had the Offender, Mr. Clary, wait while I called for assistance from the PA State Police."*

We believe that the balance of the information contained in the statement, i.e., the portion stricken through, simply is not probative to the issue of possession. Further, we believe the balance of the information is highly prejudicial to Defendant for the reasons set forth below.

As to Item (2), the parole officer's suspicions as to Clary's finances and employment do not appear to this court to have any relevance to the elements of the offense or to the prosecution's burden. Whether the parole officer was suspicious or not is not relevant in this context - it has no tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Pa.R.E. 401.

As to Item (3), a drug test that "appeared to be positive" is not a positive drug test and it, too, is not relevant to the elements of the charged offense or to the prosecution's burden. In addition, it seems

to the Court to be very prejudicial, certainly inviting the jury to speculate as to the defendant's "blackened character" in that he "might have been using drugs." There simply is no reason, other than to tarnish the Defendant's character before the jury, to have Defendant's parole officer testify that a urine drug test which he administered "appeared to be positive."

As to Item (4), it also describes conduct that caused defendant's parole officer to be suspicious. Much like item (2), it has no relevance to the elements of the charged offense or to the commonwealth's burden. It heightens the jury's awareness of what the parole officer considers to be suspicious activity and invites them to speculate as to the defendant's guilt, not because he possessed cocaine, but because he was doing what is observed in other people who use drugs. Moreover, simply "drinking a liquid" is also perfectly consistent with normal human conduct necessary for survival. The statement of the parole officer does not characterize the liquid by volume, color, odor, consistency or by anything else. Accordingly, such evidence does not substantially help the Commonwealth's case and it tarnishes the defendant more than is necessary - it is more prejudicial than probative.

In summary, it appears to this Court that in order to carry its burden, the Commonwealth needs to establish that the witness searched Defendant's room and found the cocaine in a jewelry box located on defendant's dresser. In addition, the Commonwealth needs to flesh out the occupation of its witness as a parole officer, the witness' nexus with this defendant, and perhaps provide some education as to what parole officers do - i.e., they get to search the homes of their parolees, among other things. It further seems that [1] suspicions about the defendant's finances and employment, [2] urine drug testing that did not produce positive results (even worse, produced results that only "appeared to be positive")[9] and [3] suspicious or curious behavior of the defendant resembling that observed in drug users - behavior like drinking liquids that is not inconsistent with normal, non-criminal human conduct - are all embellishments that are unnecessary to tell the "complete story."

Since we see no other motive for seeking its admission of such evidence other than to show action in conformity therewith, we judged that portion of the proffered evidence to be inadmissible.

Conclusion

In light of the foregoing discussion, we respectfully urge that the Superior Court affirm our decision denying the Commonwealth's Motion in Limine. In the alternative, we do respectfully urge that the Superior Court remand the matter to this court with instructions to grant the Commonwealth's Motion only as to its items (1) and (5) set forth in the Commonwealth's Brief in support of its Motion.

ORDER OF COURT

June 22, 2006, the Clerk of Courts is directed to transmit the record of these proceedings along with this Opinion and Order to the Superior Court.

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[1] Defendant's brief was due not later than March 24, 2006. By Order dated March 30, 2006, the Court ordered Defendant to file his brief not later than April 7, 2006 "or the Court will conclude that the defense has no objection to the Commonwealth's Motion."

[2] The following allegations of error are paraphrased by the Court.

[3] Pa.R.E. 103(a)(2).

[4] We note that in its Order covering its Motion in Limine, the Commonwealth itself characterized its Motion as an offer of proof.

[5] It should be noted that matters such as these sometimes lag in their routing and filing because we serve in a two-county judicial district. The undersigned-and indeed each of my colleagues-maintain staffed chambers in the Franklin County Branch. The instant matter is from the Fulton County Branch. Consequently, our need to use the U. S. Mail to receive matters from the Fulton County Clerk and to return matters to the clerk causes some of the delay evident in the record.

[6] Again, we note the Pennsylvania Supreme Court's guidance in Jones v. Dubuque Fire & Marine Ins. Co.,:

A part of appellant's offer might have been good, but the greater part was objectionable; the court below

refused to receive the offer as a whole. Where, in an offer of evidence, part is relevant and part is not, it is not necessary for the court to separate the good from the bad, but it may reject the entire offer.

Jones v. Dubuque Fire & Marine Ins. Co., 176 A. 208, 209 (Pa. 1934)

[7]Pa.R.E. 404(b) **Other crimes, wrongs, or acts** provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

(2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.

(4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

[8] We take these elements directly from the April 2005 Pennsylvania Bar Institute Criminal Jury Instruction 16.01: Possession of a Controlled Substance.

[9] The words "appeared to be positive" do not appear in the parole officer's written statement. In fact, the parole officer's written statement makes two discrete references to defendant's potential drug use: [1] "Clary recently tested positive for the use of cocaine" and [2] "offender has recently submitted urinalysis samples that registered as abnormal." We note that based on the Commonwealth's *Motion*, it appears that the Commonwealth wanted all of that to come in; and in the *Brief in Support of its Motion*, the Commonwealth asserts that it wants to introduce through the testimony of the parole officer "that he administered urine tests to check for drug use, one of which appeared to be positive." On the basis of the Commonwealth's *Brief* alone, the prosecution is not asking to introduce evidence that "Clary recently tested positive for the use of cocaine," a fact which we would suggest is probative of the offense charged, possession. Testimony regarding urine testing that only "appears to be positive" or that "registered as abnormal" is more scandalous-and therefore prejudicial-than it is probative of any fact the Commonwealth needs to prove in pursuit of a conviction for possession.