



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES MAYS,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 33, 2013D
	)	
STATE OF DELAWARE,	)	
	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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DATE: April 10, 2013

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NATURE AND STAGE OF PROCEEDINGS

The Defendant was charged by indictment with one count of promoting prison contraband.(A-3). The charge was elevated to a felony because the contraband turned out to be a cell phone. (A-3).

Jury trial was held on January 2, 2013 before the Honorable Fred S. Silverman. (A-2). Prior to jury instructions, defense counsel requested a lesser included instruction for misdemeanor promoting prison contraband. (A-15). The Court denied the request. (A-16). The jury found the Defendant guilty of the lone charge and he was sentenced after the verdict. (A-2).

The Defendant was placed in the custody of the Department of Corrections for six months at supervision level 5.

The Defendant docketed a notice of appeal. This is his opening brief on direct appeal.

Summary of Argument

1. Although the Defendant was charged and convicted of felony promoting prison contraband, the record reflects that there was a rational basis for the jury to find him guilty of the lesser-included offense of misdemeanor promoting prison contraband. Thus, because the trial court denied Defendant's request, his conviction must be reversed.

STATEMENT OF FACTS

James Mays was residing at James T. Vaughn Correction Institution on May 10, 2012. (A-6). During that day guards conducted a shakedown of Mays. (A-7). The Guards located Mays in the waiting room of the prison's infirmary. (A-7). When Mays heard his name being called by the corrections officers, he raised his hand and was escorted to the bathroom area and was subjected to a strip search. (A-7).

During the search, corrections officers found that Mays was holding a sock with a knot. (A-11). After careful examination and unraveling the sock, corrections officers discovered a cell phone and charger. (A-11). The sock was packed in such a way that the contents inside could not be ascertained unless untied and unraveled. (A-12)).

- I. THE TRIAL COURT ERRED IN REFUSING TO GIVE A LESSER INCLUDED OFFENSE INSTRUCTION BECAUSE THERE WAS A RATIONAL BASIS FROM THE EVIDENCE TO INSTRUCT THE JURY FOR THE LESSER OFFENSE OF PROMOTING PRISON CONTRABAND MISDEMEANOR.

Question Presented

The question was preserved in the trial court by the Defendant's request for a lesser included offense instruction. (A-15).

Scope of Review

The denial of requested included offense jury instructions is reviewed *de novo*. *Bentley v. State*, 930 A.2d 866, 875 (Del. 2007).

Argument

The record establishes that there was reasonable doubt as to whether the Defendant knowingly possessed a cell phone as required under the felony component of 11 Del. C. § 1256. The State presented evidence that the Defendant engaged in promoting prison contraband. However, the question of whether he had the requisite *mens rea* to be convicted of the misdemeanor variation and not the felony should have been decided by the jury. The record in this case establishes that there was a rational basis to provide the lesser-included instruction for misdemeanor promoting prison contraband. Under these circumstances, a jury could permissibly conclude that it was possible for the

Defendant to have known he was in possession of contraband yet not known it was a cell phone. Thus, reversal is required.

During the strip search of the Defendant, corrections officers noticed that he was holding a sock with a tightly sealed knot. (A-11). When Officers unraveled the sock, they discovered two bed sheets, a cell phone and a cell phone charger. (A-8,12). Officer Howard testified that the "cell phone and charger were pressed up against each other wrapped inside the ripped sheets." (A-12) Officer Howard admitted that prior to opening the sock, he could not identify what was inside the sock. (A-12). The State provided no evidence as to Defendant's knowledge of what was in the sock and the record is devoid of any evidence that the Defendant ever used the phone. (A-19).

After the State rested, defense counsel requested a lesser-included instruction for misdemeanor promoting prison contraband. (A-15). Defense counsel argued that based on the evidence advanced by the State, it was possible for the Defendant to have known that he was in possession of contraband yet not know it was a cell phone. The Court denied the lesser-included instruction request after ruling that 11 Del. C. § 1256 is a strict liability statute and a defendant, regardless of his or her *mens rea*, runs the risk that the contraband turns out to be felony-level contraband. (A-16).

The trial court manifestly erred. Counsel's request for

the lesser-included instruction, that the Defendant committed a promoting prison contraband misdemeanor, was hardly unjustified, and, in fact, warranted by the evidence. The constitutional importance of correct jury instructions as they relate to lesser-included offenses cannot be over-emphasized. As this Court has noted:

The United States Supreme Court has recognized that providing the jury with the third option of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard. This fundamental principle was developed in recognition that the extension of the full benefit of the concept of the reasonable doubt standard may be compromised if the jury had no alternative but to set free a defendant accused of a particularly heinous crime.

Henry v. State, 805 A.2d 860, 864 (Del. 2002).¹

A lesser included offense instruction is required to be given if a party requests it and there is a "rational basis" in the evidence, even if a trial judge might disagree with the inferences that a jury might draw from the evidence. *Henry*, 805 A.2d at 865 ("A defendant is entitled to an instruction on a lesser included offense if there is any evidence fairly tending to bear upon the lesser included offense, however weak that

¹ The Due Process Clause may guarantee a defendant a right to have the jury instructed on the lesser included offense if the evidence so warrants. *Gates v. State*, 424 A.2d 18, 21 (Del. 1980) (citing *Keeble v. United States*, 412 U.S. 205, 212-213 (1973)).

evidence may be.") (internal quotations omitted); see also *Bentley*, 930 A.2d at 875; *Wiggins v. State*, 902 A.2d 1110, 1113 (Del. 2006). "Such instructions provide the jury with a less dramatic alternative than the sharp choice between conviction of the offense charged and acquittal." *Henry*, 805 A.2d at 864. Providing the jury with the option of convicting the defendant of a lesser included offense supported by the trial evidence "ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." *Id* (internal citations and quotations omitted); see also *Johnson v. State*, 711 A.2d 18, 31 (Del. 1998).

In this case, a lesser included instruction which would allow the jury to choose between the misdemeanor and the felony version of promoting prison contraband was required. 11 Del. C. § 1256 allows for the elevating of a promoting prison contraband charge from a misdemeanor to a felony if the contraband is a cell phone. The Court erred by failing to recognize that the "Knowingly" condition of 11 Del. C. §1256 requires the State to prove that the defendant knew the contraband was a cell phone in order to obtain the felony conviction. Moreover, the State's own indictment supports Defendant's position by alleging that the Defendant "did knowingly and unlawfully make, obtain or possess any contraband, a cell phone." (A-3). The record thus makes clear that the jury should have been given the option to choose

between the misdemeanor and the felony version of promoting prison contraband.

Accordingly, because there was a "rational basis" for the jury to have convicted the Defendant of the lesser included offense of promoting prison contraband misdemeanor that he did not contest and requested instructions for, the trial court erred by not giving the jury the included offense instruction requested.

CONCLUSION

For the reasons and upon the authorities set forth herein, the Court should reverse the Defendant's conviction of promoting prison contraband.

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