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Case Number 33,2013D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES MAYS,)	
	Defendant – Below, Appellant,)	
v.)	No. 33, 2013
STATE O	F DELAWARE,)	
	Plaintiff – Below, Appellee.)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE'S ANSWERING BRIEF

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DATE: May 13, 2013

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NATURE AND STAGE OF THE PROCEEDINGS

On June 18, 2012, the New Castle County Grand Jury returned an indictment against James Mays alleging one count of felony Promoting Prison Contraband. A1, A3. A jury trial was held on January 2, 2013. A2. Prior to closing argument, Mays requested the Court to instruct the jury on the lesser-included misdemeanor Promoting Prison Contraband. A15. The Court declined Mays' request and instructed the jury on the single felony count. A16, A22-23. The jury found Mays guilty of the single charge alleged in the indictment. A2. Mays was sentenced immediately following the jury's verdict. A2. Mays timely docketed a notice of appeal. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

Appellant's argument is denied. The trial court properly declined to instruct the jury on the lesser-included misdemeanor Promoting Prison Contraband. There was no dispute at trial with regard to the element differentiating the charged felony offense and the lesser- included misdemeanor. Additionally, there was no rational basis in the evidence to support an instruction on the lesser-included offense.

STATEMENT OF FACTS

On May 10, 2012, Correction Officer Luis Gomez was working in his capacity as a "shake-down" officer at the James T. Vaughn Correctional Center ("JTVCC") located in Smyrna, Delaware. A6. As a "shake-down" officer, Gomez and other members of the "shake-down" team were responsible for searching for contraband in various areas of the correctional facility, including cells, as well as searching inmates. A6. James Mays was an inmate being housed at JTVCC. A6. On May 10, 2012, members of the "shake-down" team went to Mays' cell for the purpose of searching for contraband. A7. Mays was not present in his cell at that time. A7. Officer Gomez learned that Mays was in the prison infirmary. A7. Officer Gomez and Correction Officer Stephen Howard went to the infirmary and found Mays in the waiting area. A7. Officer Gomez directed Mays into a bathroom/shower area of the infirmary where Officer Gomez and Officer Howard conducted a strip search of Mays. A7. During the course of the strip search Mays removed an object from his underwear and handed it over to Officer Gomez. A7. The object was a sock which was knotted. A12. Inside the knotted sock Officer Gomez found a cell phone and a charger wrapped in bedding material. A12.

ARGUMENT

THE TRIAL COURT DID NOT ERR WHEN IT DECLINED TO INSTRUCT THE JURY ON THE LESSER-INCLUDED MISDEMEANOR PROMOTING PRISON CONTRABAND AS THERE WAS NO RATIONAL BASIS IN THE EVIDENCE FOR SUCH AN INSTRUCTION.

Question Presented

Whether Mays was entitled to a lesser-included misdemeanor Promoting Prison Contraband instruction when the contraband produced at trial was a cell phone which, by definition, elevates the offense to a felony.

Standard and Scope of Review

This Court reviews the denial of a request for a lesser-included jury instruction *de novo*. ¹

Merits of the Argument

To determine whether to give a lesser-included instruction, a trial judge must assess whether the following four criteria are met:

First, the defendant must make a proper request. Second, the lesser included offense must contain some but not all of the elements of the charged offense. Third, the elements differentiating the two offenses must be in dispute. Fourth, there must be some evidence that would allow the jury to rationally acquit the defendant on the greater charge and convict on the lesser charge.²

¹ Clark v. State, —A.3d.—; 2013 WL 1850165, at *6 (Del. May 2, 2013); Henry v. State, 805 A.2d 860, 863 (Del. 2002) (citing Capano v. State, 781 A.2d 556, 628 (Del. 2001)); Zebroski v. State, 715 A.2d 75, 82 (Del. 1998); Zimmerman v. State, 628 A.2d 62, 66-67 (Del. 1993).

² Bentley v. State, 930 A.2d 866, 875 (Del. 2007)(citing Henry v. State, 805 A.2d 860, 864 (Del. 2002). See Del. Code. Ann. tit. 11, § 206.

In Mays' case, the first two prongs are satisfied because Mays requested a lesser-included misdemeanor Promoting Prison Contraband instruction (A15) and misdemeanor Promoting Prison Contraband is a lesser-included offense of felony Promoting Prison Contraband.³ Mays contends that it is the *mens rea* that is in dispute with regard to the element differentiating the offenses.⁴ Mays claims that the *mens rea* required to commit the felony Promoting Prison Contraband is different than the *mens rea* required to commit the lesser-included misdemeanor.⁵ To that end, Mays argues that the felony Promoting Prison Contraband requires proof that he *knew* he was in possession of *specific* contraband, namely a cell phone, rather than contraband in general.⁶ However, the Promoting Prison Contraband statute makes no such distinction in the *mens rea*.⁷ For both the felony

A person is guilty of promoting prison contraband when:

(3) Being a person confined in a detention facility, the person knowingly and unlawfully makes, obtains or possesses any contraband.

Promoting prison contraband is a class A misdemeanor except that if the prison contraband is a deadly weapon or any mobile, phone, cellular telephone, or other prohibited electronic device of any kind, it is a class F felony.

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³ See Del. Code. Ann. tit. 11, § 206.

⁴ Open. Brf. at 4.

⁵ *Open. Brf.* at 4.

⁶ *Open. Brf.* at 7.

⁷ Del. Code. Ann. tit. 11, § 1256 provides, in part:

and lesser-included misdemeanor, the *mens rea* is "knowingly." The fact that Mays was charged with possessing a cell phone simply accounts for a strict liability element of the offense that acts as a penalty enhancement. The State was required to prove that the item was a cell phone for the penalty enhancement. However, because the cell phone is a stand-alone element of the offense, the State was not required to prove Mays knew he possessed a cell phone; the State needed only to prove that he knowingly possessed contraband.

Under Mays' theory, it is the *mens rea* that differentiates the charged offense from the lesser-included. However, if the *mens rea* for both the charged offense and the lesser-included is identical, there can be no dispute with regard to the element differentiating the two. Mays, therefore, has failed to satisfy the third prong of the analysis.

The final prong of the analysis requires a trial judge to determine whether there is "a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense." Based on the evidence presented at trial in Mays' case, there was no rational basis for a

⁸ Del. Code Ann. tit. 11, § 1256.

⁹ Wiggins v. State, 902 A.2d 1110, 1113 (Del. 2006).

jury to convict Mays of the lesser-included misdemeanor rather than the charged felony offense.

The State clearly established that correction officers recovered a cell phone and a charger which were being secreted in Mays' underwear. In order to convict, the jury had to decide the *mens rea* issue in the State's favor. Taking into consideration the location of the cell phone prior to Mays removing it from his underwear, its size and its shape, the jury could not rationally convict Mays of the misdemeanor lesser-included without convicting him of the greater charged offense. Mays contends that because the cell phone was wrapped in a piece of bedding and placed inside a sock, the jury could have rationally found that Mays did not possess the requisite *mens rea* to convict him of the charged offense. ¹⁰ The State disagrees. As the State has argued above, the requisite *mens rea* for both the lesser-included and the charged offense is identical. The uncontroverted evidence presented at trial consisted of the testimony of two corrections officers who both testified that Mays was concealing the cell phone in his groin. A7, A11. Given the evidence presented, the trial judge correctly instructed the jury when defining both "contraband" and the *mens rea* for the offense. 11 The Court's instruction was an accurate statement of the law to which Mays was entitled.¹²

Open. Brf. at 7.The jury was instructed as follows:

There is no evidence in the record to support Mays' claim that he could have been unaware that he was hiding a cell phone in his groin area. As such, there was no rational basis upon which the jury could have acquitted Mays of the charged offense and convicted him of the lesser-included misdemeanor.

Mays has failed to satisfy two of the four criteria required to have the trial judge instruct the jury on the lesser-included misdemeanor Promoting Prison Contraband. The *mens rea* under both the charged offense and the lesser-included misdemeanor are identical and therefore cannot be in dispute. Furthermore, there was no rational basis for the jury to acquit Mays of the charged felony offense and convict him of the lesser-included misdemeanor.

... to find the Defendant guilty of promoting prison contraband, you must find that that each of the following three elements have been established beyond a reasonable doubt:

One, Defendant at the time alleged ion the indictment was confined in a detention facility, and possessed contraband; and Defendant acted knowingly and unlawfully.

"Contraband" as a matter of law includes any cellular telephone.

Defendant "possessed" the contraband if it was consciously within his dominion and control. Or in other words, he knew then contraband was in his actual possession, meaning it was on his person and he knew it was there.

"Detention facility" means any place used for the confinement of a person who has been charged with or convicted of any criminal offense. As a matter of law a Delaware correctional facility, or prison. Is a "detention facility."

"Knowingly" means Defendant knew or was aware that he possessed contraband in a detention facility. A22-23.

¹² See Brown v. State 49 A.3d 1158, 1160 (Del. 2012) (citing Floray v. State, 720 A.2d 1132, 1138 (Del.1998)).

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be affirmed.

/s/ Andrew J, Vella

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