



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

**ON APPEAL FROM THE SUPERIOR COURT
IN AND OF NEW CASTLE COUNTY**

Santino Ceccotti, Esquire [#4993]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5150

Attorney for Appellant

DATE: June 2, 2013

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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.

The State argues that “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.” Ans. Br. at 5. Not so. Rather, the State agrees with Mays that “for both the felony and lesser-included misdemeanor, the *mens rea* is knowingly”. Ans. Br. at 6. Without supporting authority, the State goes astray with its contention that the portion of 11 *Del. C.* § 1256 that elevates promoting prison contraband to a felony from a misdemeanor is a strict liability penalty enhancement. Therein lies the dispute.

By its terms, 11 *Del. C.* § 251(c)(2) provides a catch-all for any offense defined by a statute outside of Title 11, and requires a state of mind as defined in section 251(b), *unless* a legislative purpose to impose strict liability “plainly appears.” *Hoover v. State*, 958 A.2d 816, 819 (Del. 2008). There is no language in 11 *Del. C.* § 1256 that plainly appears to impose strict liability. That analysis should prevail in this case. When a crime, in this case the felony variety of promoting prison contraband, lacks an explicit *mens rea*, the Legislature likely intended the standard to be that the accused acted “knowingly”. *Gov't of Virgin*

Islands v. Rodriguez, 423 F.2d 9, 12-14 (3d Cir. 1970). Moreover, strict liability criminal statutes that lack *mens rea* requirements are generally reserved for public welfare offenses or statutory sexual crimes. *Id.*

For the reasons discussed above, 11 *Del. C.* § 1256 must be construed to require a *mens rea* of “knowing” conduct, which in the present context means that the State needed to prove that Mays knew that the contraband he possessed was in fact a cell phone. Based on the State’s own evidence at trial, a juror could have believed that the evidence showed that Mays did not knowingly possess the cell phone. Officer Howard testified that the “cell phone and charger were pressed up against each other wrapped inside the ripped sheets.” (A-12). 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 Mays’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).

That being so, if a juror could find that, based on the required statutory definition, although Mays knowingly possessed contraband, he did not knowingly possess a cellular phone, the distinctive element elevating promoting prison contraband misdemeanor to a felony would be lacking and there would be a rational basis for charging the included offense of promoting prison contraband misdemeanor. Therefore, because there was a “rational basis” for the jury to have

convicted Mays 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 foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that James Mays's convictions should be reversed.

\s\ Santino Ceccotti
Santino Ceccotti, Esquire

DATE: June 2, 2013