



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEREMY L. ROBINSON,

Defendant Below,
Appellant,

v.

No. 582, 2012

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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NATURE AND STAGE OF THE PROCEEDINGS

The Defendant was arrested and charged by indictment with, *inter alia*, the offenses of drug dealing, possession of a firearm by a person prohibited, and possession of drug paraphernalia. A1, 5-6.

The Defendant filed a motion to suppress evidence before trial, which was denied after a hearing. A2. D.I. 8, 12.

The Defendant, represented by John S. Malik, Esquire, was convicted of drug dealing, possession of a firearm by a person prohibited after a three day jury trial.

He was sentenced on the drug dealing offense to five years imprisonment at Level 5 suspended for 18 months supervision at Level 3 probation. On the firearm offense, he was sentenced to eight years imprisonment at Level 5 suspended after four years for six months Level 4 Work Release followed by two years Level 3 probation. See Exhibit B attached.

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

SUMMARY OF THE ARGUMENT

1. The Trial Court instructed the jury that a prior felony conviction was a prerequisite to the Defendant's conviction at trial of the charged offense of possession of a firearm by a person prohibited and that the Defendant had stipulated that he was a person prohibited from possessing a firearm. By effectively informing the jury that, by stipulating that he was a person prohibited, the Defendant was also effectively conceding that he was a convicted felon, the Trial Court unnecessarily deprived the Defendant of a fair trial through the admission of this unfairly prejudicial information from which the jury could draw an unfavorable character inference of the Defendant's criminal propensity, and more so in the absence of any limiting instruction explaining whatever limited relevance the Defendant's prior felony conviction had in the face of jury's ability to draw an unfavorable character inference of criminal propensity from the Defendant's felony criminal record.

STATEMENT OF FACTS

Detective Steven Barnes of the Wilmington Police Department Drug Unit was conducting surveillance on 1026 Pleasant Street in the City of Wilmington. He observed the Defendant enter and leave the address, a small, vacant row house, several times. Later, he observed the Defendant leave and enter a Cadillac vehicle which he drove around Wilmington for about an hour with no apparent destination according to Det. Barnes, who followed him. Because Det. Barnes had obtained information that the Defendant did not have a valid driver's license, he stopped and arrested the Defendant on his return to Pleasant Street. On searching the Defendant, police found a small bag containing crack cocaine in his pants pocket. (D.I. 26, 6/5/12, pp. 46-49).

The police officers obtained a search warrant for the Pleasant Street house. Inside, they found a small weight scale and plastic baggies on the counter in the kitchen. They also found a loaded revolver in the lower closed drawer broiler section of the kitchen range. Otherwise, the house appeared vacant. (D.I. 26, 6/5/12, pp. 50-53). Det. Barnes testified that no consumption paraphernalia was found on the Defendant, but that police did find \$182 in currency of various denominations on the Defendant. A key that locked and unlocked the front door of the house was also found on the Defendant's keychain. Det. Barnes testified that the Defendant was taken

to the police station and questioned, saying that he found the gun in a nearby alleyway, took it into the house, placed it in the stove, and never fired it. (D.I. 26, 6/5/12, pp. 62-64). Although it could have been, the Defendant's questioning was not recorded at the police station. (D.I. 25, 6/6/12, pp. 91-92).

Zyvli Miller, the mother of the Defendant's son, testified that she formerly resided at 1026 Pleasant Street but had moved to Claymont prior to November 2011. The Defendant had left more than a year before. She testified that after she left she sublet the house, but later discovered that someone she did not know was living there whom she told to leave. She never changed the locks and did not know if the windows were secure. (D.I. 25, 6/6/12, pp. 46-49).

The Defendant testified that he used to live on Pleasant Street, but that when he was arrested, he no longer lived there and lived on Washington Street. He testified that after he was arrested on Pleasant Street in November 2011, he was taken to the Wilmington Police Station and questioned. He admitted that he sold some drugs but that he did not make much money from it. When the officers asked him to "tell us about the gun," he said, "what gun?", because he did not know about a gun they said they found in the oven. He testified that the officers also told him that if he denied knowing about the hidden gun they had found, they could test its ballistics and

determine if it had been used in any recent homicides or other crimes for which he might be held responsible. He testified that he was scared at that point and made up a story about finding the gun in the alleyway, putting it in the stove, and never firing it. (D.I. 25, 6/6/12, pp. 46-49).

No identifiable latent fingerprints were found on the revolver, and officers swabbed the revolver for residual DNA but never submitted the samples for analysis before trial. (D.I. 26, 6/5/12, pp. 55, 78-78; A (D.I. 25, 6/6/12, pp. 28-33, 38).

- I. THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT THE DEFENDANT WAS A CONVICTED FELON WHEN HE HAD ALREADY STIPULATED THAT HE WAS A PERSON PROHIBITED FROM POSSESSING A FIREARM, AND IN THE ABSENCE OF A LIMITING INSTRUCTION EXPLAINING ANY PROPER PURPOSE FOR INFORMING THE JURY THAT THE DEFENDANT WAS A CONVICTED FELON, INVITED AN UNNECESSARY RISK THAT THE JURY WOULD IMPERMISSIBLY INFER THAT THE DEFENDANT, AS A CONVICTED FELON, WOULD HAVE A CRIMINAL PROPENSITY TO COMMIT THE CHARGED OFFENSE, THEREBY DEPRIVING THE DEFENDANT OF A FAIR TRIAL.

Question Presented

Whether the Superior Court erred by instructing the jury that the Defendant had stipulated that he was a person prohibited from possessing a firearm which meant that he had previously convicted of a felony? The issue was preserved for review because the Defendant objected to the instruction which effectively informed the jury that he had been previously convicted of a felony, because he had already stipulated to his status as a person prohibited from possessing a firearm, and because the trial court declined to give a limiting instruction to the jury explaining any limited relevance of the Defendant's prior felony conviction to the effect that it was not to be used to infer a general criminal disposition. A12-13 (D.I. 25, 6/6/12, pp. 9-104).

Standard and Scope of Review

This Court reviews the Superior Court's admission of other crimes evidence for an abuse of discretion. See *Floudiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999).

Merits of Argument

Immediately before trial began, the Defendant advised the trial court that he intended to stipulate that he was a person prohibited. A7 (D.I. 26, 6/5/12, p. 13). The Defendant was charged by indictment alleging the offense that he was a person prohibited from possessing a firearm due to his prior aggravated menacing conviction. A5. The stipulation that he was a person prohibited from possessing a firearm was admitted into evidence before the jury. State Exhibit #1; A (D.I. 25, 6/6/12, p. 39).

Later, because the State was aware that the Defendant intended to testify, a discussion arose concerning the scope of the State's possible impeachment of the Defendant by prior conviction under D.R.E. 609,¹ which the Defendant opposed. The Defendant had two prior convictions for aggravated menacing and maintaining a vehicle for the possession of controlled substances. The State advised the trial court that it only sought to impeach based on the

¹ D.R.E 609(a) provides that: "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted but only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect or (2) involved dishonesty or false statement, regardless of the punishment."

prior aggravated menacing conviction, not the controlled substance offense. The trial court ruled that the State could use either of the two prior felony convictions for impeachment, but could only refer to prior felony convictions generically and not mention the specific, prior offenses. A9-10 (D.I. 25, 6/6/12, p. 43-45).

When the Defendant later testified, however, the State decided not to attempt to impeach him with a prior felony conviction under D.R.E. 609(a) because it could be a problem on appeal. The State also suggested a conforming amendment to the indictment before it went to the jury that would retain the language of the prior felony conviction disability but remove the indictment's specific reference to the prior aggravated menacing conviction. The Defendant objected on the ground that the prior felony conviction for the person prohibited charge in the indictment need not be mentioned at all because the Defendant had already stipulated that he was a person prohibited at the time of the offense. A12 (D.I. 25, 6/6/12, pp. 97-99). The trial court stated that it did not intend to remove the reference to the Defendant's prior felony conviction in the indictment or instructions to the jury unless it was shown legal authority that specifically required it. A12-13 (D.I. 25, 6/6/12, pp. 99-101). The Defendant then requested that, if the trial court intended to include the Defendant's prior

felony conviction in the indictment and instructions given to the jury, a limiting instruction be given to the jury concerning the Defendant's prior felony conviction so that the jury would not impermissibly infer a criminal propensity by the Defendant, but the Superior Court demurred. A limited admissibility instruction is permissible under this circumstance. D.R.E. 105.²

The State did not object to a limiting instruction. The Superior Court informed the parties, however, that unless legal authority was presented that prevented the trial court from informing the jury of the Defendant's prior felony conviction, it would be referenced in the jury instructions. The trial court then adjourned to the following morning. A13 (D.I. 25, 6/6/12, pp. 101-104).

The next morning, the Superior Court defined the offense of possession of a firearm by a person prohibited to the jury in pertinent part:

In order to find the defendant guilty of possession of a firearm by a person prohibited in Count II of the indictment, you must find that all of the following elements have been established beyond a reasonable doubt: ... two, the defendant was prohibited from purchasing, owning, possessing, or

² D.R.E. 105 provides: "When evidence which is admissible as to 1 party or for 1 purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

controlling a firearm because he had previously been convicted of a felony. The parties have stipulated or agreed that the defendant was a person that was prohibited from purchasing, owning or possessing, or controlling a firearm, and, therefore, this element, the parties agree, has been established.

A19 (D.I. 24, 6/7/12, p. 40). Through this instruction, the jury was effectively informed by the trial judge that the Defendant was a felon, having been previously convicted of a felony, without any attempt to provide further guidance to the jury through a limiting instruction concerning the relevance of his status of a convicted felon.

First, the Defendant's status as a previously convicted felony was unnecessary to prove any offense at trial because he had unequivocally stipulated that he was a person prohibited from possessing a firearm. *Old Chief v. United States*, 519 U.S. 172, 191 (1997) ("Proving status without telling exactly why that status was imposed leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence..."). That a jury knows that the defendant at trial is a previously convicted felon without instructional guidance as to the relevance of the defendant's prior felony conviction invite an unnecessary risk that the jury will convict the defendant of the charged offense based on a criminal propensity. *Getz v. State*, 538 A.2d 726 (Del. 1988). The jury

being informed that the Defendant was a previously convicted felon when the offense of possession of a firearm by a person prohibited, when he had already stipulated that he was legally prohibited from possessing a firearm, in the absence of a limiting instruction, could only "further the purpose of showing predisposition to commit the crime charged." *Deshields v. State*, 706 A.2d 502, 508 (Del. 1998) (quoting *Allen v. State*, 644 A.2d 982, 984-85 (Del. 1994)).

Second, the absence of a limiting instruction explaining any proper limited use of the Defendant's status as a convicted felon risked unconstrained prejudice if the jury could infer, as they reasonably could, that the Defendant had a propensity to commit felony offenses, and was therefore more likely to have possessed the firearm in question at trial. At a minimum, the jury should have been instructed as to the specific purpose, if there was one despite the Defendant's stipulation that he was a convicted felon, that the evidence of the Defendant's status as a convicted felon could be used for no other purpose. *Pope v. State*, 632 A.2d 73, 78 (Del. 1993); also *Cobb v. State*, 765 A.2d 1252, 1256 (Del. 2001); *Milligan v. State*, 761 A.2d 6, 10 (Del. 2000).

The circumstances of the jury being informed in the jury instructions of the Defendant's status as a convicted felon and the failure to provide a limiting instruction concerning that information was unfairly prejudicial to the Defendant's

right to a fair trial concerning the allegation that he had illegally possessed a firearm when he had already stipulated that he was a person prohibited from legally possessing a firearm.

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant submits that his conviction for possession of a firearm by a person prohibited should be reversed.

Respectfully submitted,

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