UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

November 14, 2018
CCO-013

No. 97-1101

UNITED STATES OF AMERICA

v.

TIMOTHY WALKER
Appellant

(E.D. Pa. No. 2-94-cr-00488-4)

Present: CHAGARES, RESTREPO and SCIRICA, Circuit Judges

1. Motion by Appellant to Review the Clerk's Determination.

Respectfully,
Clerk/tmm

ORDER

The foregoing motion is hereby denied.

By the Court,

s/Michael A. Chagares
Circuit Judge

Dated: December 20, 2019
SLC/cc: Robert R. Calo, Esq.
Stephen P. Patrizio, Esq.
Timothy Walker

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1101

UNITED STATES OF AMERICA

v.

TIMOTHY WALKER

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 94-cr-00488-4)
District Judge: Honorable Lowell A. Reed, Jr.

Submitted Under Third Circuit LAR 34.1(a)
January 26, 1998
Before: MANSMANN, COWEN and ALITO, Circuit Judges.

(Filed FEB 05 1998, 1998)

MEMORANDUM OPINION OF THE COURT

MANSMANN, Circuit Judge.

Timothy Walker appeals from a Judgment in a Criminal Case entered following his conviction on one count of conspiracy to possess with intent

to distribute cocaine and one count of attempted possession with intent to distribute cocaine in violation of 21 U.S.C. § 846. Walker alleges that there was insufficient evidence to sustain either conviction, and that the district court erred in: 1) allowing the government to present testimony concerning Walker's prior "bad acts;" 2) ruling that Walker's prior convictions could be used for impeachment purposes if he elected to testify; 3) considering Walker's prior conviction for robbery in determining that Walker should be deemed a career offender for purposes of sentencing; and 4) holding that Walker's relevant conduct included 50 kilograms of cocaine. Because we have not found merit in any of these allegations of error, we will affirm the Judgment in a Criminal Case.

I.

We assume that the facts underlying this appeal are well known to the parties and recount only the procedural history. On November 30, 1994, a federal grand jury in the Eastern District of Pennsylvania returned a four count indictment charging Walker and four others with drug-related offenses. Walker was charged with conspiracy to possess with intent to distribute cocaine, attempted possession with intent to distribute cocaine, and criminal forfeiture. The case was tried before a jury and Walker was convicted on the conspiracy and attempted possession counts. On January 28, 1997 Walker was sentenced

to a 480 month term of imprisonment to be followed by a ten year term of supervised release. This timely appeal followed.

II.

We consider Walker's allegations of error seriatim, turning first to the claim that there was insufficient evidence to sustain either conviction. Where a sufficiency of the evidence claim is properly preserved for consideration on appeal, we "evaluate the record to see if the government produced substantial evidence sufficient to prove [each] element of its case beyond a reasonable doubt." United States v. Barel, 939 F.2d 26, 37 (3d Cir. 1991). This is not such a case; Walker waived his sufficiency of the evidence claim when he failed to make a timely motion for judgment of acquittal.

Fed. R. Crim P. 29(c) requires that a motion for judgment of acquittal following a guilty verdict be made within seven days of the jury's discharge unless further time is granted during that period. Here, Walker first filed a motion for judgment of acquittal on November 13, 1996, one year and twelve days following the November 13, 1995 jury verdict. The district court refused to consider the merits of this motion because it was untimely: "No . . . time [beyond the seven day period specified in Rule 29] was requested or granted, and [Walker failed] to set forth any reason why the motion[] [was] not filed on time." United States v. Walker, No. 94-488-4, Order dated Jan. 28, 1997.

Where a defendant fails to file a timely motion for judgment of acquittal, "the alleged insufficiency of the evidence . . . must constitute plain error in order to warrant reversal." United States v. Anderson, 108 F.3d 478, 480 (3d Cir.), cert. denied, ___ U.S. ___, 118 S. Ct. 123 (1997). We have stated that we will find plain error in the case of an untimely motion only where the proof offered "was so defective that it amounted to a . . . miscarriage of justice." United States v. Barel, 939 F.2d at 37. Having reviewed the record before us, we are convinced that the proof presented was not defective. The evidence offered to establish Walker's guilt was substantial and we have no doubt that a reasonable juror, considering the totality of the evidence, could have found Walker guilty beyond a reasonable doubt.

III.

Walker next claims that the district court erred in permitting a co-defendant, Michael McDonald, to testify that he had supplied Walker with cocaine on occasions prior to the 50 kilogram delivery which formed the basis for the indictment. The district court allowed McDonald's testimony, reasoning that evidence of prior transactions was admissible "to show opportunity, motive, intent, a lack of accident and so forth" under Fed. R. Evid. 404(b).[1]

---

1. Rule 404(b) provides that:

transactions to those occurring during or after the fall of 1993[3], and minimized any prejudice to Walker related to the admission of this evidence through comprehensive limiting instructions both at the time of McDonald's testimony and at the close of the evidence. We are convinced that the district court's admission of McDonald's testimony was consistent with the sound exercise of judicial discretion.

IV.

We turn next to Walker's argument that he was "denied his right to testify at trial" when the district court ruled that the government "would be permitted to impeach [Walker's] testimony with his prior criminal convictions." This claim is not properly before us. It is by now well established that in order "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." Luce v. United States, 469 U.S. 38, 43 (1984). "Any possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative." Id. at 41.

---

3. The Indictment charged that "beginning on a date unknown to the Grand Jury and continuing to or about November 4, 1994 . . . defendants conspired to possession with intent to deliver cocaine."

The essence of Walker's defense was his claim that he knew nothing about the drug buy underlying the indictment and was present at the transaction only because he was asked by a friend to deliver a bag, the contents of which were unknown to him. Based upon the record before us, we agree with the government that:

> The prior relationship between McDonald and Walker and the details of their cocaine distribution scheme were relevant to show Walker's knowledge of the scheme to purchase 50 kilograms of cocaine from undercover officers. Such evidence also demonstrated his intent to make such a purchase. Furthermore, the evidence also demonstrated opportunity, preparation, planning, and motive for seeking a new supplier of cocaine. . . .

Govt. Br. at 16 (citations omitted).

The record reflects that the district court heard argument on the competing concerns of relevance and prejudice as outlined in Fed. R. Evid. 403[2] before finding the evidence admissible. The court limited the evidence of prior

---

> 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

2. Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. . . .

V.

Walker next contends that the district court erred in taking into consideration his prior conviction for robbery in applying the career offender provision set forth in U.S.S.G. § 4B1.1. This section provides that:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a . . . controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Section 4B1.2 defines a crime of violence as "any offense under federal or state law punishable by imprisonment for a term exceeding one year that -- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another...." For purposes of section 4B1.1, crimes of violence include robbery. See U.S.S.G. § 4B1.2, application note 2.

Walker contends that his 1986 conviction under Pennsylvania's robbery statute, 18 Pa. C.S.A. § 3701, was not for a crime of violence within the meaning of U.S.S.G. 4B1.1 because the conviction was for the physical "taking or removing property of another by force, however slight." 18 Pa. C.S.A. § 3701(a)(1)(v). According to Walker, the career offender provision of the Sentencing Guidelines was not intended to apply where the predicate crime involved de minimis use of force.

In United States v. McQuilken, 97 F.3d 723, 727 (3d Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 2413 (1997), we rejected a similar argument, holding that "[o]ur jurisprudence . . . does not permit us to examine the actual conduct underlying the offense." "[N]o inquiry into the facts of the predicate offense is permitted when a predicate conviction is enumerated as a 'crime of violence' in application note 2 to section 4B1.2. The fact of the conviction remains dispositive for such crimes." Id. at 728 (citation omitted). We decline to depart from this precedent.

VI.

We consider last Walker's contention that the district court erred in calculating his sentence by attributing to him 50 kilograms of cocaine. Walker contends that he brought a bag containing $79,848 to the scene of the drug transaction at issue and "should be subject [only] to the number of kilograms of cocaine that [could] be purchased with [this amount] at $25,000 per kilogram," or 3.1 kilograms. Because we have concluded that Walker was properly sentenced under the career offender provision of the Sentencing Guidelines, we need not address this argument. In light of Walker's status as a career offender, the alleged error in the amount of cocaine attributable to him would, in any event, be harmless. As the government points out, "[Walker's] sentencing range as a career offender equals or exceeds any sentence he would have received

regardless [of] whether the [district] court found [Walker] accountable for 50 kilograms of cocaine or [the 3.13 grams] urged by Walker." Section 4B1.1 of the Sentencing Guidelines directs that: "If the offense level for a career criminal . . . is greater than the offense level otherwise applicable, the offense level [for a career criminal] shall apply."

VII.

Because we conclude that each of the allegations of error raised in this appeal lacks merit, we will affirm the Judgment in a Criminal Case.

TO THE CLERK:

Please file the foregoing opinion.

Carl Lee Hansmann

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1101

UNITED STATES OF AMERICA

v.

TIMOTHY WALKER
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 94-cr-00488-4)
District Judge: Honorable Lowell A. Reed, Jr.

Before: MANSMANN, COWEN and ALITO, Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on January 26, 1998.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the district court entered on February 7, 1997, be and the same is hereby affirmed.

ATTEST:

Clerk

FEB 06 1998

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TIMOTHY WALKER

Defendant/Petitioner

vs.

UNITED STATES OF AMERICA

Plaintiff/Respondant

Appeal No. 97-1101
USDC No. 94-488

REQUEST TO RECALL APPEAL MANDATE

Timothy Walker, Pro Se
Reg. No. 48340-066
Butner LSCI
P.O. Box 999
Butner, NC 27509

JURISDICTION

The Court Of Appeals has inherent jurisdiction to recall its mandate. (See, Calderon v Thompson, 523 U.S. 538, 550, 140 L. Ed. 2d 728, 118 S.ct. 1489(1998)).

INTROCUCTION

Petitioner is requesting that the mandate in his direct appeal [Appeal No. 97-1101] be recalled because there was a fundamental defect in the manner his direct appeal was decided, and that fundamental defect resulted in an egregious miscarriage of justice. (Details explicated infra.) In addition, subsequent Third Circuit rulings have reinforced the viability of Petitioner's argument that his sentence is unjust.

BACKGROUND

At sentencing Petitioner was erroneously held to be a "career offender." Petitioner made arguments against his "career offender" status in the District Court at sentencing and in the Third Circuit Court of appeals on direct appeals. Neither Court, District nor Appellate, applied the proper precedent in considering Petitioner's argument. Had the correct controlling precedent been applied Petitioner would not be a "career offender" and his 480 month (40 year) sentence would be significantly shorter. In fact, in light of the more than twenty-three (23+) years Petitioner has already served but for the "career offender" sentencing enhancement incorrectly imposed upon him Petitioner would now be free. (Details explicated infra.)

PROCEDURAL

Petitioner seeks an Emergency Motion to Recall the Third Circuit's 1998 mandate denying his Direct Appeal.

The Supreme Court has recognized that Courts Of Appeals have inherent power to recall their mandates. Calderon v. Thompson, 523 u.S. 538, 118 S.Ct. 1489, 140 L. Ed.2d 278(1998). "Our authority to recall the mandate is clear." Nonetheless the Supreme Court has instructed that, "we may exercise that power only upon a showing of Extraordinary Circumstances." In the instant matter a recall of Petitioner's 1998 Direct Appeal mandate is justified under the Extraordinary Circumstances prong: 1) The District Court and this Court sidestepped their duty to apply the correct law at the time of Petitioner's sentence; Subsequent legal authority has clarified that this court was in error; 2) The blatant error in the prior decision results in a serious injustice, an injustice deserving of correction.

On November 30, 1994, Petitioner was indicted on Three(3) counts: Count (1) Conspiracy to poessess with intent to distribute 50 kilograms of cocaine under § 21 U.S.C. 846; Count (2) Attempted possession with the intent to distribute 50 kilograms of cocaine under § 21 U.S.C. 841; Count (3) Forfeiture under § 21U.S.C. 853. On November 13, 1995 Petitioner was found guilty on two counts, 841 and 846. On January 28, 1997, Petitioner was sentenced to 480 months, due in part to the District Court classifying Petitioner as a "career offender." Petitioner filed a notice of appeal on February 13,1997. On Direct Appeal Petitioner raised (4) grounds. Only ground (4) is perinent to this Emergency Recall of the Mandate Motion. (i.e. predicate 1986 Pennsylvania Robbery used to enhance

Petitioner to "career offender status").

On March 7, 1998 the Appeals Court mandate affirmed the District Court's ruling. Both the District Court and the Appellate Court made a serious omission, as will be explained below.

"Extraordinary Circumstances" sufficient to warrent recall of a mandate include: 1) Showing that controlling legal authority has changed significantly; 2) Presenting new evidence, not earlier obtainable by the exercise of due dilligence, that would deter a fact finder from finding quilt or imposing a particular sentence; or 3) Convincing a court that a blatant error in the prior decision will, if uncorrected, result in a serious injustice.

As is described in detail in Petitioner's "Substantive Argument," infra, missapplication of the law and legal procedure to the facts of Petitioner's case constituted a blatant error the consequences of which was an egregious miscarriage of justice. Put briefly, the court's (both District and Appellate) failure to apply the principles/mandates of U.S. Taylor, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed. 2d 607(1990), to Petitioner's claim that his prior Pennsylvania robbery conviction could not serve as a predicate offense to make him a "career offender" resulted in Petitioner being sentenced to a 480 month (40 year) term of incarceration; Petitioner has served more than twenty-three(23+) plus years of his sentence. When the mandate is recalled and the career offender designation is vacated Petitioner's recalculated advisory Guideline sentencing range will be 262

to 327 months.[FN] Resentenced anywhere in the range, even at its very top, in light of the many years he has already served, Petitioner will be immediately released.

Throughtout his incarceration Petitioner has diligently and steadfastly attacked his career offender sentence.[FN] Procedural obstacles have consistently blocked his path. The time is long past due that fairness be achieved, a "fairness" that can be accomplished by recalling the appellate mandate and proceeding to a determination of the merits of Petitioner's substantive argument. As the Honorable James L. Dennis, Circuit judge, U.S. Court Of Appeals for the Fifth Circuit wrote in U.S. v Emeary, 794 F.3e 526, 530 (5th Cir. 2015):

> [T]o ensure that rights are not foregone and that substantial legal and factual arguments are not inadvertently passed over...[there is a demand that courts will be] willing [] ... to correct plain errors that escaped notice, at least in some circumstances. ... A criminal defendant should not be unlawfully condemned to five excessive years in prison-a "drastic loss of liberty." Penson , 488 U.S. at 85.

Petitioner's case contains not just a "plain" error but a "blatant" error. Petitioner is serving not five (5) excessive years, descibed as a "drastic loss" by the Supreme Court in Penson; Petitioner's sentence is 13 to 18 years longer than it should be.

FN Without "career offender" status and applying the applicable guideline drug sentencing range[including the revised drug quantity offense levels that result from Amendment 782--"All drugs minus two"] Petitioner would face a guideline range of 262 to 327 months. In light of the time he has already served, petitioner would be immediately released.

FN From his direct appeal to his initial 2255 Motion to not less than eight (8) subsequent applications. Petitioner has diligently and consistently challenged his designation as a career offender. At every turn he has been proceedurally barred, thus he continues to serve the illegal sentence imposed upon him.

In light of the detailed substantive argument that follows, the direct appeal mandate in Petitioner's case should be recalled.

SUBSTANTIVE ARGUMENT

The " mandate" in Petitioner's direct appeal [March 2, 1998, DE# 224] should be recalled because there was/is a fundamental miscarriage of justice in the manner in which Petitioner's direct appeal was decided. On direct appeal Petitioner argued:

> The defendant is entitled to a remand for resentencing because the District Court improperly determined that the Defendant is [was] to be sentenced as a career offender

On direct appeal Petitioner argued that one of his prior convictions [Robbery under 18 Pa. C.S.A. [Sec.] 3701] could not serve as a violent predicate offense for the purpose of sentencing Petitioner as a "career offender" in Federal Court. Petitioner's argument rested on the Supreme Court decision in Taylor v. U.S. 495 U.S. 575, 109 L.Ed.2d 607, 110 S.Ct. 2143(1990).* In Taylor the Supreme Court proscribed the approach that courts should take "in the assessment of prior convictions which are enumerated offenses in relation to the career criminal enhancement of [sec.] 4B1.2." (Direct Appeal Brief, Docket No.97-1101, p.33)(hereinafter DAB.) The "approach" for assessing the validity of enumerated offenses proscribed by the Supreme Court in Taylor was and is the "categorical" approach. Ultimately while the categorical approach and its modified variant involve many moving parts, they retain one overarching purpose; they give a sentencing court a way to 'satisfy Taylor's

*See, Exh. D

demand for certainty" as to this underlying question: "[W]hat crime, with what elements, was defendant convicted of?"

Petitioner concedes that Robbery is an enumerated offense under U.S.S.G. 4B1.2 n1 or 2. However, the fact that Robbery is an enumerated offense does not automatically make his Pennsylvania common law Robbery for pickpocketing a crime of violence under 4B1.2. The District and the Appeals Court erred when they held that the enumeration of Robbery was alone sufficient to render Third Degree Robbery under Pennsylvania law a qualifying predicate for career offender. "Enumerated offenses" at the time of Petitioner's sentencing and Direct Appeal did not define Robbery in the guidelines or Commentary. The Courts back then should have defined the elements of his Robbery according to the "generic, contemporary meaning" of Robbery. Taylor v. U.S., 495 U.S. 575, 598, 110 S.Ct. 2143, 109 L. Ed.2d 607(1990). The Courts then were to compare the the elements of the crime of conviction to the generic form of the offense as defined by the States, learned treatises and the Model Penal code.

The District Court and the Third Circuit were supposed to disregard the label placed on Petitioner's State Robbery and look to whether the conduct under Pennsylvania law was an equivalent to the offense of Robbery as envisioned by the Guideline drafters. If Pennsylvania Robbery under 3701(v) followed the generic offense, the Court of Appeals could uphold the District Courts applications of the career offender enhancement. Taylor 495 U.S. At 599, 110 S.Ct. at 2158, If however, Pennsylvania's definition was broader

than generic Robbery, Petitioner's prior conviction could not serve as a predicate under the categorical approach for the career offender enhancement. Id. at 599-602, 110 S.Ct. at 2158 -60. Pennsylvania's Third Degree Robbery Statute involving force however slight cannot categorically be a crime of violence because it does not involve "violent force" as required by the Supreme Court's narrowing interpretation in Johnson v U.S. 599 133, 130 S.Ct. 1265 176 L.Ed.2d 1(2010(Curtis Johnson).

In U.S. v. Marrero, 743 F.3d 389, 2014, U.S. Appx. Lexis 2964 (3rd cir. 2014), this Circuit described the manner in which Taylor was to be applied. The Marrero Court quoted U.S. v. Walker, 595 F.3d 441, 443-44(2nd Cir. 2010), for the proposition that where a defendant's prior conviction is an "enumerated " offense "the trial court need find only that the state statute corresponds in substance to the generic meaning of [Robbery]." (Walker quoting Taylor, 495 U.S. at 599.) The Marrero Court went to write that:

> The District Court... erred when it held that the enumeration of [the Marrero case defendant's prior conviction of 'murder'] was alone sufficient to render third-degree murder under Pennsylvania law a crime of violence. ...[T]he [District] Court should have proceeded to apply the additional steps set forth by the Supreme Court in Taylor.
>
> In Taylor the [Supreme] Court concluded that Congress did not intend for offenses enumerated as crime of violence to take on whatever meaning state statutes ascribe to them; rather, Congress sought to use 'uniform, categorical definitions ... regardless of technical definitions and labels under state law.'Taylor, 495 U.S. at 590

Delving further into the matter the Marrero court wrote:

> The Taylor analysis must be applied in enumerated - offense cases [such as Petitioner's]. ...
>
> [First, a Court must distill a 'generic' definition of the predicate offense...[citations omitted]... Second,... a Court must determine whether the defendant's prior conviction constituted a conviction of the generic offense... by comparing the elements of the crime of conviction with the generic offense. (Emphasis in original.)...[I]f the [state] **statute sweeps more broadly than the generic crime, a conviction under that law cannot constitute a conviction of the generic offense.** (Emphasis added.)

(Marrero, 743 F.3d at 399-400.)

The Pennsylvania statute under which petitioner was convicted swept more broadly than the Federal generic definition of Robbery. Had the Third Circuit, at the time of Petitioner's direct appeal properly applied Taylor the "career offender" enhancement would have been set aside, and Petitioner would have been resentenced to significantly less than 480 months[40 years] of incarceration. In Taylor the court concluded that Congress did not intend for offenses enumerated as crimes of violence to take on whatever meaning state statutes ascribed to them; rather, Congress sought to use "uniform, categorical definitions ... regardless of technical definitions and labels under state law." Taylor 495 U.S. at 590. The Court reasoned that it was, "Implausible that Congress intended the meaning of Burglary for purposes of ACCA's §924(e) to depend on the definition adopted by the state conviction."

The Taylor analysis must be applied in enumerated offense cases like Petitioners. "Where, as here, the guidelines specifically designate a certain offense as a 'crime of violence,' we compare the elements of the crime of

conviction to the generic form of the offense as defined by the States, learned Treatise, and the Model Penal code." U.S. v. Watkins 54 F.3d 163, 166 (3rd. Cir. 1995)(comparing a Pennsylvania burglary statute to the "generic" definition of burglary announced in Taylor.)

18 Pa.C.S.A. 3701(a)(1) reads:

(a) offense defined-

(1) A person is guilty of robbery if, in the course of committing a theft, he:
(i) inflicts serious bodily injury upon another.
(ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury.
(iii) commits or threatens immediately to commit any felony of the first or second degree.
(iv) inflicts bodily injury upon another or threatens anther with or intentionally puts him in fear of immediate bodily injury, or
(v) physically takes or removes property from the person of another by force however slight.

(Emphasis added.)

As argued in his Appellate Brief:

> The Pennsylvania statute proscribing Robbery specifically delineates those **offenses** in which an individual threatens another with, or intentionally puts another in fear of bodily injury.

(DAB at p. 35)

18 Pa. C.S.A. 370(a)(1)(i) through (a)(1)(iv) make specific reference to "bodily injury" (i); "threats" (ii); "First or second degree felony" (iii); "inflicts bodily injury" (iv). Subpart (a)(1)(v) does not contain language that comports with "violence." It is clear from the face of the Pennsylvania statute that that statute sweeps more broadly than the generic definition of "violent robbery."

The crux of the "fundamental miscarriage of justice" that

occurred during Petitioner's direct appeal was the appellate court ignoring the command of Taylor and failing to establish a generic definition of violent Robbery and then comparing the language of the Pennsylvania Robbery statute to the generic statute. Instead, the appellate court wrote:

> [O]ur jurisprudence ... does not permit us to examine the actual conduct underlying the [predicate] offense. [N]o inquiry into the facts of the predicate offense is permitted when a predicate conviction is enumerated as a 'crime of violence ' in application note 2 to section 4B1.2. The fact of the conviction remains dispositive for such crimes.

There are several problems.

First, Petitioner never asked the appellate court to "examine the actual conduct underlying the offense."[FN]

Second, the essence of Taylor is an acknowledgment of uniformity, state-to-state and jurisdiction-to jurisdiction, in the definitions and elements of crimes. In petitioner's direct appeal decision the Third Circuit failed to properly apply the Taylor test to Petitioner' circumstances. Third Circuit precedent made clear that a Federal Court could, and should, examine state judicial precedent in determining the reach of a state statute

---

FN In the years following Taylor jurisprudence has developed that allows for a "modified categorical approach" and allows, in some circumstances, the court to examine evidence/materials relative to predicate offenses. See Descamps and Mathis. While the decision in Mathis v U.S. was decided almost two decades after Petitioner's appeal the language of the Mathis decision makes clear that Mathis ...reinforces long-established precedent, see Mathis 136 S. Ct. 2243 at 2247("For more than 25 years our decisions have held that the prior crime qualifies as a ACCA predicate if, but only if, its elements are the same as, or narrow than, those of the generic offense.") id. at 2251("Taylor set out the essential rule governing ACCA cases more than a quarter century ago... that simple point became

and whether or not conviction under the statute constitutes a "violent felony."

In U.S. v. Preston, 910 F.2d 81 (3rd Cir. 1990), the court was addressing the question of whether a defendant's prior Pennsylvania "criminal conspiracy" conviction was a "violent felony" within the meaning of [Sec.] 924(e)(2)(B). To resolve the question the Federal Court turned to Pennsylvania precedent writing:

> for criminal conspiracy conviction in Pennsylvania, the prosecution must show that a specific crime was the object of the conspiracy. See, e.g., Commonwealth v. Smith, 289 Pa. Super. 356, 433 A.2d 489, 494(1981)("the heart of the offense of conspiracy is an agreement to do an unlawful act.") Commonwealth v. Anderson, 265 Pa. Super, 494, 403 A.2d 546, 549 (1979)(essence of criminal conspiracy is a common understanding that a particular criminal objective be accomplished).

(Preston at p. 86.) The Preston Court concluded:

(continued from previous page) the mantra in our subsequent ACCA decisions." (citing Taylor v. U.S. 495 U.S. 575 1990)). Such holding also apply in the career offender context when the over-breadth of a state criminal statute is at issue. Even at the time of Petitioner's direct appeal Third Circuit case law held that in certain circumstances [such as those that obtained in Petitioner's case],"[W]hen the statutory definition of the prior offense is broad enough to permit conviction based on conduct that falls outside the scope of [Sec.] 924(e)(2)(B), it becomes necessary to look beyond the statute of conviction .... (courts may look to facts of the crime to determine if a conviction under an over-inclusive statute satisfies [Sec.] 924(e)(2)(B)." U.S. v. Watkins, 54 F.3d 163,166 (3rd Cir. 1995). The Watkins court also cited U.S. v. Potter, 895 F.2d 1231, 1237 (9th Cir.), cert. denied 497 U.S. 1008 (1990) for the concern regarding "the quantum of proof necessary to determine that a given prior conviction was for a 'violent felony' under [Sec.] 924(e)(1) where the statute of conviction had several subsections defining particular offenses, not all of which would constitute 'violent felonies'."

> Based on these authorities, [FN] we believe Pennsylvania law requires that the crime that was the object of the conspiracy be defined for the jury.

To determine whether Preston's prior Pennsylvania conviction was a "violent felony" the Federal Court turned to Pennsylvania jurisprudence. The same thing should have happened during the course of Petitioner's direct appeal.

Petitioner was convicted of robbery under 18 Pa. Stat. [Sec.] 3701(a)(1)(v). In Pennsylvania v. Smith, 333 Pa. Super. Lexis 6097 (1984), the Superior Court of Pennsylvania addressed the meaning of [Sec.] (a)(1)(v) which reads:

> [A] person is guilty of Robbery if, in the course of committing a theft, he...(v) physically takes or removes property from the person of another by **force however slight.**

(Emphasis added.)(Smith decision attached as Exhibit (A).) The appellant in Smith conceded the first two elements of (a)(1)(v) [(1) physically took or removed property and (2) from the person of another], but Appellant argued that the force used was only necessary to take the property; Appellant had not used force sufficient to perpetrate violence against a person or to put the victim in fear of her/his safety,[FN] The Superior Court concluded that "force however slight" used to take or remove property from another requires "proof of more than only the physical removal of an object from a person."(id. at 1354.) In Pennsylvania v. Windell, 365 Pa. Super.

FN The "authorities" being Pennsylvania decisional law.

FN Attached as Exhibit (B) the Court will find Petitioner's objection to the PSR Recommendation regarding the Pennsylvania prior. The Exhibit recites the details of the "theft."

392; 529 A.2d 1115; 1987 Pa. Super. Lexis 8803(1987), the Commonwealth Court addressed the Pennsylvania Robbery statue that was used as a predicate conviction to make Petitioner a career offender at his Federal Sentencing. Specifically, the Commonwealth Court considered the specific portion of the Robbery Statute [Sec.3701 (a)(1)(v)] under which Petitioner was convicted. The Windell Court cited its 1984 decision in Smith, supra, for the proposition that:

> [T]he force required for Robbery must be something more than the force needed to take and carry away another person's property.

As argued supra, Petitioner's Pennsylvania prior did not comprise the Federal generic offense of Robbery. Just as the Court determined in Windell ["In light of the evidence, we are constrained to hold that appellant's conviction for Robbery... must be vacated. There is ... adequate evidence, however to support the onviction of theft." (Id. at 398,)(Windell decision attached as Exhibit (c))], so too in Petitioner's case does the record demonstrate that had Taylor been applied during the course of Petitioner's direct appeal the inescapable conclusion would have been that Petitioner was, at worst, guilty of the non-violent crime of "pickpocketing/theft" and, therefore, did not have the requisite violent prior(s) to make him a career offender at his Federal sentencing in 1997.

Pennsylvania decisional law, admissible under Preston, supra. shows that Petitioner's Pennsylvania prior was not a crime of violence because it did not involve the use, threatened use, or fear of use of physical force against another.

Petitioner's arguments are supported by the recent decision of the Third Circuit in U.S. v. Peppers, NO. 17-1029, filed August 13, 2018. In Peppers the Court held that,**Pennsylvania's robbery statute does not categorically constitute a "violent felony."** (slip opinion at p. 35.)(Emphasis added.) The Peppers court also wrote:

> [P]eppers argues that we should use "the current state of the law" to determine whether his prior convictions qualify as violent felonies under either the elements clause or the enumerated offenses clause ... The government counters that we may only use ...case law as it existed at the time of sentencing. ... [w]e agree with Peppers.

(slip opinion at p. 27) The Peppers Court then references Mathis v. U.S., 136 S.Ct. 2243 (2016), Descamps v. U.S., 570 U.S. 254(2013), and Johnson v. U.S., 559 U.S. 133(2010)[FN] (Peppers at 27-28) In Petitioner's situation it matters not what case law is applied for the result must be the same. Taylor, which existed at the time of Petitioner's sentencing and direct appeal, required the application of the "categorical" approach. The failure of the District and Appellate courts to apply Taylor resulted in a fundamental defect, a miscarriage of justice. Application of the subsequent directives in Mathis, Descamps, and Johnson(2010) serve to further solidify the correctness of Petitioner's instant claim.

Finally this --in Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13(1994), the Supreme Court wrote:

FN Elsewhere, the Peppers Court references Shepard v. U.S, 544 U.S. 13 (2005). (Peppers at p. 37)

> A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.

Judicial construction(s)" of Pennsylvania robbery statute 18 Pa. C.S.A. 3701(a)(1)[(v)] make inescapably clear that that statute is not "categorically" a crime of violence and conviction under subsection(v) of that statute ["Force however slight"] cannot be a crime of violence.

A grave miscarriage of justice occurred during the course of Petitioner's direct appeal. The appellate court misapplied the dictates of Taylor in considering the merits of Petitioner's argument concerning his career offender sentence. The appellate court failed to apply then existing Third Circuit precedent [Watkins and Preston] which, had they been applied, would have mitigated against application of the career offender designation. The miscarriage of justice was further compounded by the failure of Petitioner's attorney to seek rehearing or rehearing en banc in the Third Circuit and a petition for writ of certiorari in the Supreme Court.

RELIEF SOUGHT

Petitioner prays that this Honorable Court will; a) Recall the mandate in his direct appeal; b) determine that his Pennsylvania Robbery was not a qualifying predicate offense for the purpose of designating him to be a "career offender;" c) Remand Petitioner's case to the District Court with instructions to resentence him without the "career offender enhancement; d) instruct the District Court to resentence Petitioner within ninety (90) days of the remand ORDER, **FN** and e) provide any other relief to which he may be entitled.

Respectfully Submitted

Timothy Walker, Pro Se
Reg. No. 48340-066
Butner LSCI
P.O. Box 999
Butner, NC 27509

Dated: 10/17/18

FN(continued) As desribed in detail supra, in light of the 23+ years Petitioner has served rêsentenging would almost assuredly result in his immediate release.

CERTIFICATE OF SERVICE

I, TIMOTHY WALKER proceeding pro se, hereby certify that on 10/17/18, a true and correct copy of the foregoing motion was delivered to Prison Authorities for mailing to the parties below, by placing same in an envelope with first-class postage prepaid affixed thereto, and addressing to:

Clerk of Courts
For the Third Circuit
601 Market St
Phila PA 19106

AUSA
615 Chestnut St Suite 1250
Phila PA 19106

I hereby swear under penalty of perjury, 28 U.S.C. §1746, that the foregoing is true and correct.

Executed on 10/17/18 20.

Exhibit A [Decision]

Commonwealth v. Smith, 333 Pa. Super. 158, 481 A.2d 1352 (1984)

KEY CASE
But

COMMONWEALTH of Pennsylvania v. Anton SMITH, Appellant
Superior Court of Pennsylvania
333 Pa. Super. 155; 481 A.2d 1352; 1984 Pa. Super. LEXIS 6097
March 19, 1984, Submitted
September 21, 1984, Filed

Editorial Information: Prior History

NO. 3104 PHILA. 1982, Appeal from the Judgment of Sentence in the Court of Common Pleas of Philadelphia County, Criminal No. 81-10-3112

Counsel Elaine DeMasse, Assistant Public Defender, Philadelphia, for appellant.
Jane C. Greenspan, Assistant District Attorney, Philadelphia, for Commonwealth, appellee.

Judges: Spaeth, President Judge, and Rowley and Beck, JJ.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant sought review of a judgment of the Court of Common Pleas, Philadelphia County (Pennsylvania), convicting him for robbery under 18 Pa. Cons. Stat. § 3701(a)(1)(v). Appellant claimed that the evidence was insufficient to prove robbery, because there was no proof of "force however slight" as required in the statute.To give effect to the phrase "force however slight," it had to be construed as requiring proof of more than only the physical removal of an object from a person, and the distinction was the difference between robbery and theft.

OVERVIEW: Appellant criminal sought review of his conviction by the Commonwealth for robbery in violation of 18 Pa. Cons. Stat. § 3701(a)(1)(v). Appellant claimed that the evidence was insufficient to prove robbery, because it did not prove "force however slight" where he removed a partially protruding pack of cigarettes from the victim's pants, and there was no threat by appellant or struggle or physical resistance by the victim. The court found that the elements of robbery were that property was physically taken or removed from the person of another by use of "force however slight." The court held that to give effect to the phrase "force however slight," it had to construe it as requiring proof of more than only the physical removal of an object from a person, because the legislature clearly intended a distinction between robbery and theft. When a criminal statute was susceptible of two constructions, both reasonable, it was the construction that operated in favor of appellant's liberty that had to prevail, therefore, the court reversed the judgment of sentence for robbery and remanded for imposition of a sentence for theft.

OUTCOME: The judgment sentencing appellant for robbery was reversed, and the matter was remanded to impose a sentence for theft, because the phrase "force however slight" had to be construed as requiring proof of more than only the physical removal of an object from a person; the distinction was one intended by the legislature between robbery and theft.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence

In determining the sufficiency of evidence, the superior court must view the evidence, including all reasonable inferences from it, in the light most favorable to the Commonwealth.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > General Overview
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed Robbery > Elements

The elements of robbery as defined by 18 Pa. Cons. Stat. § 3701(a)(1)(v) are (1) that the defendant physically take or remove property, (2) from the person of another, (3) by use of force however slight.

Governments > Legislation > Interpretation

When a criminal statute is susceptible of two constructions, both reasonable, it is not the construction that is supported by the greater reason that is to prevail but the one that operates in favor of the defendant's liberty, and if there is doubt, the defendant must be given the benefit of the doubt.

Opinion

Opinion by: SPAETH

Opinion

{333 Pa. Super. 157} {481 A.2d 1353} This is an appeal from judgment of sentence for robbery. Appellant was tried by a judge sitting without a jury on charges of robbery, 1 theft, 2 and receiving stolen property, 3 and was found guilty of having violated Section 3701(a)(1)(v) of the Crimes Code, 18 Pa.C.S. § 3701(a)(1)(v), which provides that ". . . a person is guilty of robbery if, in the course of committing a theft, he . . . (v) physically takes or removes property from the person of another by force however slight." Appellant concedes that the evidence was sufficient to prove theft but argues that it was insufficient to prove robbery because it did not prove "force however slight." We agree and therefore reverse the judgment of sentence and remand for imposition of sentence for theft.

In determining the sufficiency of evidence, we must view the evidence, including all reasonable inferences from it, in the light most favorable to the Commonwealth. *Commonwealth v. Madison*, 263 Pa. Super. 206, 397 A.2d 818 (1979). So viewed, the evidence established the following.

On the evening of August 26, 1981, appellant approached Joseph Walker, a blind man, and asked him for a cigarette. Mr. Walker, who had known appellant for two years and recognized his voice, answered that he did not have a cigarette, and continued on his walk to a store. On Mr. Walker's return from the store, appellant reached into Mr. Walker's pants pocket, removed a partially protruding pack of cigarettes, and ran away. There was no threat by appellant or struggle or physical resistance by Mr. Walker.

In holding this evidence sufficient to sustain appellant's conviction of robbery, the trial judge stated:

> **{333 Pa. Super. 158}** The cigarettes, although not completely in the pocket, were sufficiently in the pocket for [appellant] to have to pull them out. In fact, there was no way [appellant] could have gotten the cigarettes out of the Complainant's pocket without using some force. There was not a lot of force used, but there was force. The statute specifically provides: "force *however*

slight." (emphasis added).Slip op. at 3.

The elements of robbery as defined by § 3701(a)(1)(v) are (1) that the defendant physically take or remove property, (2) from the person of another, (3) by use of force however slight. Here, as appellant concedes, the first two elements were proved. However, with respect to the third element, the only "use of force" that was proved was that appellant used just so much force as was necessary to "physically take or remove" (first element) the pack of cigarettes "from the person of" Mr. Walker (second element). The conclusion follows that the third element was not proved, and that the evidence was therefore insufficient. Plainly, the legislature intended to distinguish between evidence showing *only* a taking or removal from the person, and a taking or removal by force. To hold, as did the trial judge, that evidence proving *only* a taking or removal *also* proves a removal by force because "there was no way [appellant] could have gotten the cigarettes . . . without using some force" is equivalent to holding that the first and third elements are synonymous. Such a holding is proscribed, for its effect would be to make the third element redundant, or surplusage, and in construing a statute, we must assume that the legislature intended that every **{481 A.2d 1354}** word of the statute would have effect. *Habecker v. Nationwide Ins. Co.*, 299 Pa. Super. 463, 445 A.2d 1222 (1982); *Crusco v. Insurance Company of North America*, 292 Pa. Super. 293, 437 A.2d 52 (1981); 1 Pa.C.S. § 1922(2). To give effect to the phrase "force however slight", we must construe it as requiring proof of more than only the physical removal of an object from a person. *Cf. Commonwealth **{333 Pa. Super. 159}** v. Ostolaza*, 267 Pa. Super. 451, 406 A.2d 1128 (1979) (evidence proved "a brief tug of war over the wallet;" held that evidence was insufficient to prove robbery by putting the victim in fear of immediate serious bodily injury but would have been sufficient to prove robbery by removing property from victim by force however slight).

The Commonwealth argues that the phrase "force however slight" should be construed to include "any act directed to overcome the will of the victim." Brief for Commonwealth at 4. As applied here, the argument is that Mr. Walker did not want appellant to take his cigarettes; that appellant's act of removing the protruding pack of cigarettes from Mr. Walker's pocket therefore overcame Mr. Walker's will; and that this was "force however slight." We find this argument unpersuasive, for several reasons.

The legislature clearly intended a distinction between "robbery" and "theft." In defining "robbery," the legislature starts from the premise that the person is "in the course of committing a theft," and then goes on to define what *additional* act will result in that conduct becoming a robbery, as, for example, if the thief "inflicts serious bodily harm upon another," 18 Pa.C.S. § 3701(a)(1)(i), or, the provision pertinent to our consideration here, "physically takes or removes property from the person of another by force however slight", 18 Pa.C.S. § 3701(a)(1)(v). These two sorts of robbery are, respectively, a felony of the first degree and a felony of the third degree. 18 Pa.C.S. § 3701(b). In defining the punishment for "theft", the legislature provided that if the property in question was "taken from the person or by threat," the theft is to be punished as a misdemeanor of the first degree. 18 Pa.C.S. § 3903(b). If we were to accept the Commonwealth's definition of "force", the distinction between robbery by force however slight and theft would be eliminated. Mr. Walker's pack of cigarettes was "taken from [his] person". This taking no doubt was, in the words of the Commonwealth's argument, **{333 Pa. Super. 160}** an "act directed to overcome [his] will", but to say that it was therefore a taking "by force however slight" would be to say that there was no difference in meaning between § 3903(b) (property "taken from the person") and § 3701(a)(1)(v) ("physically take or remove property from the person of another by force however slight"). However, when the legislature used the same verb ("takes") in one section *without* qualifier ("taken from the person") and in another section *with* qualifier ("takes from the person . . . by force however slight"), the legislature must have intended the two sections to have a different meaning. 4

This conclusion finds further support in other principles of statutory construction. **{481 A.2d 1355}**

The Statutory Construction Act provides that "words and phrases shall be construed according to their common and approved usage . . ." 1 Pa.C.S. § 1903. Webster's Dictionary defines force as a "general term for the exercise of strength or power to overcome resistance." 5 Here, no doubt because of the stealth and quickness with which appellant acted, Mr. Walker offered no resistance. As a matter of common usage, therefore, **{333 Pa. Super. 161}** appellant's taking of the pack of cigarettes was without "force," slight or otherwise.

Similarly, the Crimes Code states that its provisions "shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purpose of [the Crimes Code] and the special purposes of the particular provision involved." 18 Pa.C.S. § 105. One general purpose of the Crimes Code is to differentiate on reasonable grounds between serious and minor offenses. 18 Pa.C.S. § 103(5). Construing the phrase "force however slight" to exclude a taking by stealth alone is consistent with this purpose because a taking by stealth alone is not as likely to result in injury to the victim as a taking by "force"; for "however slight" the force may be, the victim may be prompted by it to resist, and injury may ensue. In recognition of this possibility, § 3701(a)(1)(v) has as its special purpose that greater punishment should be inflicted on those who use "force however slight" than on those who by resort to stealth void the use of force.

Finally, since § 3701(a)(1)(v) is a penal provision it must be strictly construed. 1 Pa.C.S. § 1928(b)(1). When a criminal statute is susceptible of two constructions, both reasonable, it is not the construction that is supported by the greater reason that is to prevail but the one that operates in favor of the defendant's liberty, *Commonwealth v. Glover*, 397 Pa. 543, 546, 156 A.2d 114 (1959); and if there is doubt, the defendant must be given the benefit of the doubt, *Commonwealth v. Teada*, 235 Pa. Super. 438, 344 A.2d 682 (1975). In this case, even if we could find the definition of force advocated by the Commonwealth reasonable, instead of precluded because producing surplusage, still we should have to accept appellant's position because it is at least equally reasonable.

The judgment of sentence for robbery is reversed and the case is remanded for imposition of sentence for theft. Jurisdiction is relinquished.

Footnotes

1

18 Pa.C.S. § 3701.

2

18 Pa.C.S. § 3921.

3

18 Pa.C.S. § 3925.

4

The Commonwealth cites cases from other jurisdictions holding that where the taking is from the immediate presence of the victim and not from the victim's person, still a "theft" may occur. These cases are irrelevant. The issue before us is not whether a theft occurred -- undeniably one did -- but whether a robbery occurred.

The Commonwealth also argues that by enacting § 3701(a)(1)(v) as an amendment to the Crimes Code, *see* Act of June 24, 1976, P.L. 425, No. 102 § 1, "the legislature intended to change the statutory scheme by treating what had been only theft as robbery." Brief for Commonwealth at 4 n. 1.

This argument has no merit. "Whenever a section or a part of a statute is amended . . . the remainder of the original statute and the amendment shall be read together as one statute passed at one time . . ." 1 Pa.C.S. § 1953; *Appeal of Neshaminy Auto Villa Ltd.*, 25 Pa. Commw. 129, 358 A.2d 433 (1976). We therefore must construe the Crimes Code so as to give effect to all its provisions, which is to say, so as to preserve, not eliminate, the distinction between robbery and theft. No doubt the legislature could have decided that mere removal of property from the person, "[which] had been [defined as] only theft", should be redefined as "robbery", but then it would have redefined "theft". For the same conduct (mere removal) cannot be both "robbery" and "theft".
5

Webster's Third New International Dictionary 887 (1965).

Exhibit B

Objection to PSR Chellenging
Use of Pennsylvania Prior as a
Predicate Offense for the Purpose
of Imposing a Career Offender
Sentence

APPENDIX

1. The term "violent felony" is defined as :
....any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that....

   (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
   (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;....

2. The Pennsylvania robbery statute provides:
   (a) Offense defined -
      (1) A person guilty of robbery if, in the course of committing a theft, he:
         (i) inflicts serious bodily injury upon another;
         (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
         (iii) commits or threatens immediately to commit any felony of the first or second degree;
         (iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; or
         (v) physically takes or removes property from the person of another by force however slight.
   (b) Grading - Robbery under subsection (a)(1)(iv) is a felony of the second degree; robbery under subsection (a)(1)(v) is a felony of the third degree; otherwise, it is a felony of the first degree.

3. Philadelphia Court of Common Pleas, December term,1985, Bill No.2797.

4. The PSI Report, at paragraph 34 reports that defendant pled guilty. Defendant waived his right to a jury trial, and plead guilty to an F-3 robbery before the honorable Esther Sylvester. As he was charged with an F-1 robbery, it becomes obvious that the trier of facts did not accept all of the allegations, or the plea would have been refused, and defendant would have been tried in public court for an F-1 robbery. Defendant therefore objects to allegation in paragraph 28 that states he committed a robbery of the F-1 or F-2 type, constituting a violent crime.

EXHIBIT "B"

A BRIEF SUMMARY OF THE CHARGES BEING USED AGAINST ME FOR ENHANCEMENT UNDER U.S.S.G. 4B1.1 AND 4B1.2.

In case CP 8512-2797 I was charged with robbery and aggravated assault for a crime which by no means was a robbery under the normally ascribed circumstances which would comprise a robbery, and there was no aggravated assault, but it was one of the charges the police automatically adjoin when charging someone with a robbery. It was a pocket picking and not a robbery. However, I will include a brief synopsis of events which led to my being charged with "robbery" and aggravated assault.

On December 15, 1985, I was in the Gallery Mall in Center City, Philadelphia (PA). I was in a store known as Spain's Gift Shop. It was crowded and, as I walked down one of the store's aisles I noticed a woman with her pocketbook open. I reached in, removed her wallet, and quickly exited the store. As I was heading for a Mall exit, a man ran up behind me, tackled me, and began to call for the police. The man held me to the floor until the police arrived. The man then released me and explained to the police that he had seen me remove the wallet from the woman's purse. The police escorted me back to the store where the lady was still shopping. She was asked to check her purse to see if her wallet was missing. She saw that it was missing. The police were able to recover her red wallet which still contained approximately $100.00 in cash and change. The police then placed me under arrest.

Please note that at no time did I assault the woman or do anything that could be construed as an aggravated assault. The woman herself acknowledged a mere "bump" from my encounter with her which was so slight that she gave it no thought. She, in fact, attached no significance to my brief contact with her and continued to shop. She was so unaffected by my actions that she remained unaware of the loss of her wallet until she was asked to check her purse. With these facts in mind, it is difficult , even with the broadest interpretation, to arbitrarily confer the term "act of violence" to this type of encounter. Neither can this encounter be termed an actually robbery under the intentions and guidelines of U.S.S.G. 4B1.1 and 4B1.2.

Additionally, CP 8512-2763 was consolidated with the above case for purposes of sentencing. Although this case wasn't used as an enhancement case under U.S.S.G. 4B1.1 and 4B1.2, it was used to add weight to my Offender Category score. The facts of this second case are described in the following paragraph.

I was riding the El, on an east-bound train in Philadelphia (PA), on December 31, 1985. I was accompanied by a friend who attempted to pick the pocket of a nearby man. The man felt the attempted removal of his wallet and began to call for help. The man continued to shout for help until we reached the 13th. and Market Streets station where undercover police responded by apprehending my friend and myself. The charges, however, were made against me only.

Both of the aforementioned situations are clear cases of pocket picking and neither contain any hint of violence. At no time was there even any intent or threat of harm beyond the non-violent harm generated by the financial loss experienced through the loss of their wallets. Neither did anyone express the thought that they feared harm in any form. With this in mind, it becomes equally clear that the my score, enhancement, and subsequent sentencing was weighted by an inaccurate assessment of previous cases.

Based on the foregoing information, I respectfully request the Court to review my sentence status and to make the necessary adjustments in my sentence that would more accurately reflect the facts. It is my hope that Career Offender Enhancement be removed from the PSI and that my Offender Category be amended from Class VI to Class III.

I wish to thank you in advance for your consideration.

Respectfully Submitted

Timothy Walker

Timothy Walker, Defendant

Exhibit C [Decision]

Commonwealth v. Windell, 365 Pa. Super. 392; 529 A.2d 1115 (1987)

COMMONWEALTH of Pennsylvania v. Robert WINDELL, Appellant
Superior Court of Pennsylvania
365 Pa. Super. 392; 529 A.2d 1115; 1987 Pa. Super. LEXIS 8803
No. 2146 Philadelphia, 1985
April 27, 1987, Submitted
August 14, 1987, Filed

Editorial Information: Prior History

Appeal from Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Philadelphia County, Nos. 85-03-2575, 2576, 2577.

Counsel Augustine J. Rieffel, Philadelphia, for appellant.
Donna G. Zucker, Assistant District Attorney, Philadelphia, for Com., appellee.

Judges: Wieand, Olszewski and Hoffman, JJ.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant pickpocket challenged a robbery conviction of the Court of Common Pleas, Philadelphia County (Pennsylvania) where the complainant was jostled during the theft of her purse and wallet on a crowded bus.Conviction of appellant pickpocket for robbery of complainant's purse on a crowded bus was improper; the evidence did not establish that appellant pushed complainant during the theft, or that the pushing was connected to the theft.

OVERVIEW: Appellant pickpocket was observed by a department store security guard dropping a wallet belonging to complainant after informants told the guard that they observed two men picking pockets on a local bus. At appellant's robbery trial, the complainant testified that she remembered being jostled forcefully as her bus stopped near the department store. While she remembered a tall man standing beside her after the jostling incident, she could not identify appellant as the man. The trial court convicted appellant of robbery, theft by unlawful taking, theft by receiving stolen property, and criminal conspiracy. Separate sentences were not imposed for the theft offenses as the trial court determined that they merged with robbery. On appeal, the court reversed the robbery conviction, and remanded for the trial court to impose a theft sentence. The court held that appellant's robbery conviction could be sustained only by conjecture, since the evidence did not establish, directly or by inference, that the pushing of complainant was in any way connected with the theft of her purse, or that it was done by appellant or a co-conspirator.

OUTCOME: The court reversed appellant pickpocket's robbery conviction where the evidence did not establish that appellant took complainant's purse by force on a crowded bus; the evidence did not establish that the pushing of complainant was connected to the theft, or that appellant committed it.

LexisNexis Headnotes

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > General Overview
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed

Robbery > Elements

A person is guilty of robbery if, in the course of committing a theft, he physically takes or removes property from the person of another by force however slight.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > General Overview
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed Robbery > Elements

Any amount of force applied to a person while committing a theft brings that act within the scope of robbery under 18 Pa. Crim. Stat. § 3701(1)(a)(v); whether actual or constructive force, and actual force is applied to the body while constructive force is the use of threatening words or gestures, and operates on the mind.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > General Overview

The degree of actual force is immaterial, so long as it is sufficient to separate the victim from his property in, on or about his body; any injury to the victim, or any struggle to obtain the property, or any resistance on his part which requires a greater counter attack to effect the taking is sufficient.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > General Overview
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > Unarmed Robbery > Elements

The force required for robbery must be something more than the force needed to take and carry away another person's property.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > General Overview

The element of force however slight must be directed to the exercise of strength or power to overcome resistance.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > General Overview

A conviction must be based upon something more than mere suspicion or conjecture.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Robbery > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence

A conviction which is based solely on inference, suspicion, and conjecture cannot stand.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

It is axiomatic that a defendant has no standing to contest the search or seizure of items which he has voluntarily abandoned.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

The issue is not abandonment in the strict property-right sense, but whether appellant voluntarily discarded, left behind, or otherwise relinquished his interest in the property so that he could no longer retain a reasonable expectation of privacy with regard to it.

Opinion

Opinion by: WIEAND

Opinion

{365 Pa. Super. 394} {529 A.2d 1115} The issue in this appeal is whether a thief, who surreptitiously and without the knowledge of the owner removes a coin purse and wallet from a pocketbook being carried by a passenger on a bus, is guilty of robbery. We conclude that because the element of force is missing, the pickpocket is guilty of theft and not robbery.

On February 21, 1985, at or about 9:45 a.m., Kenny Welsh, a Sears security guard, received information from a customer that two males, whom the customer pointed out, had been picking pockets on a Route K SEPTA bus. Welsh and Thomas Strobeck, another guard, approached the men and asked them if they had been on the Route K bus. When one of them, Herbert Edmunds, responded in the affirmative, Welsh asked the men if they knew anything about pickpocketting a passenger on the bus. Edmunds answered, "no," but immediately walked to a clothing rack, where he dropped a red wallet. Welsh and Strobeck thereupon apprehended Edmunds and Robert Windell and took them to the store's security office. En route, Strobeck observed Windell drop to the floor a small, brown, coin purse. When Strobeck retrieved the purse, he found a beige wallet lying next to the purse. The purse contained a cross, a key, and coins in the total amount of $ 1.11. The beige wallet divulged a prescription containing the name of the prescribing physician, his telephone number, and the name "C. Taylor." A call to the physician led to Frances Taylor, a seventy-nine year old woman. Although she was able to identify the coin purse and **{529 A.2d 1116}** wallet, she had not been aware previously that they had been stolen.

Frances Taylor testified at trial that she had been a passenger on the Route K bus between 9:25 and 9:50 a.m. on the morning of February 21, 1985. The bus had been crowded, she said, and she had found it necessary to stand in the aisle. Although there had been a fair amount of jostling, she remembered being shoved forcefully just before **{365 Pa. Super. 395}** the bus arrived at the Sears store. When she turned around to see who had pushed her, she observed a tall man standing beside her, but she did not know who he was and could not identify him as either Edmunds or Windell. She did not become aware that her purse and wallet were missing until after she arrived home and learned that they were in the possession of the police.

The trial court, which heard the evidence without a jury, found Robert Windell guilty of robbery, 1 theft by unlawful taking, 2 theft by receiving stolen property, 3 and criminal conspiracy. 4 Post-verdict motions were denied, and Windell was sentenced on the robbery conviction to serve a term of imprisonment for not less than 11 1/2 months nor more than 2 years minus one day, to be followed by probation for a consecutive period of five years. He was sentenced to an additional term of probation for criminal conspiracy. Windell appealed. He contends, inter alia, that the evidence was insufficient to sustain a conviction for robbery.

A person is guilty of robbery if, in the course of committing a theft, he physically takes or removes property from the person of another by force however slight. 18 Pa.C.S. § 3701(a)(1)(v). The issue in this case is whether the removal of property from a person, without any force other than that needed to take the property and carry it away, constitutes robbery. If so, all unlawful taking of property from the person of another will constitute robbery and not merely theft.

In *Commonwealth v. Brown*, 506 Pa. 169, 484 A.2d 738 (1984), the Supreme Court held that the element of "force however slight," required by 18 Pa.C.S. § 3701(a)(1)(v), can be satisifed by evidence of any amount of force applied to a victim in the course of a theft. The court said:

> **{365 Pa. Super. 396}** *It is clear to us that any amount of force applied to a person while committing a theft brings that act within the scope of robbery* under § 3701(1)(a)(v). This force, of course, may be either actual or constructive. Actual force is applied to the body; constructive force is the use of threatening words or gestures, and operates on the mind. *Commonwealth v. Snelling*, [4 Binn. 379, 383 (1812)].The degree of actual force is immaterial, so long as it is sufficient to separate the victim from his property in, on or about his body. Any injury to the victim, or any struggle to obtain the property, or any resistance on his part which requires a greater counter attack to effect the taking is sufficient. The same is true if the force used, although insufficient to frighten the victim, surprises him into yielding his property. *Id.*, 506 Pa. at 176, 484 A.2d at 741 (emphasis added).

In *Commonwealth v. Smith*, 333 Pa. Super. 155, 481 A.2d 1352 (1984), defendant was found guilty of robbery because he had taken a pack of cigarettes from a blind man. There had been no threats made by defendant, and there had been no struggle or resistance by the victim. In reversing defendant's conviction, this Court stated:

> The elements of robbery as defined by § 3701(a)(1)(v) are (1) that the defendant physically take or remove property, (2) from the person of another, (3) by use of force however slight. Here, as appellant concedes, the first two elements were proved. However, with respect to the third element, the only "use of force" that was proved was that appellant used just so much force as was necessary to **{529 A.2d 1117}** "physically take or remove" (first element) the pack of cigarettes "from the person of" Mr. Walker (second element). The conclusion follows that the third element was not proved, and that the evidence was therefore insufficient. Plainly, the legislature intended to distinguish between evidence showing only a taking or removal from the person, and a taking or removal by **{365 Pa. Super. 397}** force. To hold, as did the trial judge, that evidence proving only a taking or removal also proves a removal by force because "there was no way [appellant] could have gotten the cigarettes . . . without using some force" is equivalent to holding that the first and third elements are synonymous. Such a holding is proscribed, for its effect would be to make the third element redundant, or surplusage, and in construing a statute, we must assume that the legislature intended that every word of the statute would have effect. To give effect to the phrase "force however slight", we must construe it as requiring proof of more than only the physical removal of an object from a person. *Id.*, 333 Pa. Superior Ct. at 158, 481 A.2d at 1353-1354 (1984) (citations omitted) (emphasis in original).

The decision in *Commonwealth v. Smith, supra*, holds that the force required for robbery must be something more than the force needed to take and carry away another person's property. The element of "force however slight" must be directed to the exercise of strength or power to overcome resistance. *Id.*, 333 Pa. Superior Ct. at 160, 481 A.2d at 1355.

The Commonwealth argues that the element of force was established by the victim's testimony that

she was pushed or shoved shortly before the bus stopped at the Sears store. We would readily agree with this argument by the Commonwealth if there were evidence that Windell or his co-conspirator had applied such force. In fact, however, the evidence does not establish, directly or by inference, that the pushing was in any way connected with the theft of the victim's purse and wallet or that it was done by appellant or his co-conspirator. Although the evidence was sufficient to permit an inference that appellant was on the bus and took the victim's purse and wallet, there was no evidence to connect him or the theft with the pushing which the victim experienced. The bus was crowded, as she conceded, and at the time of the pushing she was standing next to a tall man **{365 Pa. Super. 398}** whom she could not identify. She also did not know when her coin purse and wallet were taken.

A conviction must be based upon something more than mere suspicion or conjecture. *Commonwealth v. Roscioli*, 454 Pa. 59, 309 A.2d 396 (1973); *Commonwealth v. Stanley*, 453 Pa. 467, 309 A.2d 408 (1973). A conviction which is based solely on inference, suspicion, and conjecture cannot stand. *Commonwealth v. Simpson*, 436 Pa. 459, 464, 260 A.2d 751, 754 (1970); *Commonwealth v. Frey*, 264 Pa. Super. 212, 215, 399 A.2d 742, 743 (1979). In light of the evidence, we are constrained to hold that appellant's conviction for robbery can be sustained only by conjecture. Consequently, it must be vacated. There is more than adequate evidence, however, to support the convictions of theft and conspiracy.

Appellant contends that he is entitled to a new trial because the trial court erred when it denied his pre-trial motion to suppress the brown purse and beige wallet which were retrieved by Sears personnel after defendant and his companion had been detained. We disagree. It is axiomatic that a defendant has no standing to contest the search or seizure of items which he has voluntarily abandoned. *Commonwealth v. Shoatz*, 469 Pa. 545, 553, 366 A.2d 1216, 1220 (1976).

> The issue is not abandonment in the strict property-right sense, but whether appellant voluntarily discarded, left behind, or otherwise relinquished his interest in the property so that he could no longer retain a reasonable expectation of privacy with regard to it. *Commonwealth v. Williams*, 269 Pa. Super. 544, 547, 410 A.2d 835, 836 (1979). In the instant case, appellant intentionally and voluntarily discarded the purse and wallet when he was apprehended by Sears personnel. **{529 A.2d 1118}** Police had not arrived on the scene before this occurred. Thus, the abandonment of the purse and wallet could not have been caused by illegal police activity. Even if the security guards had detained appellant without probable cause, the **{365 Pa. Super. 399}** exclusionary rule argued by appellant did not prevent the use of the evidence. The rule has no application to a private or citizen's arrest. *Commonwealth v. Corley*, 507 Pa. 540, 551, 491 A.2d 829, 834 (1985).

Appellant also complains that Edmunds's affirmative response to questioning in which he said that he and appellant had been on the Route K bus was improperly received in evidence against appellant. Because appellant did not preserve this issue in his post-verdict motions, however, it has been waived. *Commonwealth v. Gamble*, 485 Pa. 418, 402 A.2d 1032 (1979); *Commonwealth v. Pyatt*, 477 Pa. 162, 383 A.2d 873 (1978). Moreover and in any event, the statement of Edmunds was admissible because it was a statement made by a co-conspirator during the continuation of the conspiracy. See: *Commonwealth v. Coccioletti*, 493 Pa. 103, 425 A.2d 387 (1981) (statement made by one co-conspirator in course of concealing evidence and evading capture admissible against other); *Commonwealth v. Bolden*, 268 Pa. Super. 431, 408 A.2d 864 (1979) (conspiracy extends to concealing and destruction of evidence).

For purposes of imposing sentence, the trial court determined that the theft offenses had merged with the crime of robbery. Therefore, the court imposed no separate sentence for theft. In view of our decision to reverse the conviction for robbery, we will remand to permit the trial court to impose an appropriate sentence for theft. We will also vacate the sentence imposed for criminal conspiracy and

remand for resentencing in light of this Court's determination that the Commonwealth failed to prove a robbery.

The judgment of sentence for robbery is reversed and with respect thereto appellant is discharged. The judgment of sentence for criminal conspiracy is vacated, and with respect thereto the matter is remanded for resentencing. The matter is also remanded for sentencing on the verdict finding appellant guilty of theft.

Footnotes

1

18 Pa.C.S. § 3701(a)(1)(v).

2

18 Pa.C.S. § 3921.

3

18 Pa.C.S. § 3925.

4

18 Pa.C.S. § 903.

Exhibit D

Petitioner's Direct Appeal Argument

IV. THE DEFENDANT IS ENTITLED TO A REMAND FOR RESENTENCING BECAUSE THE DISTRICT COURT IMPROPERLY DETERMINED THAT THE DEFENDANT IS TO BE SENTENCED AS A CAREER OFFENDER AND SUBJECTED HIM TO SENTENCING LIABILITY FOR 50 KILOGRAMS OF COCAINE

The defendant requests the Court to remand this matter to the District Court for resentencing.

The defendant was sentenced under U.S.S.G. §4B1.1 as a career offender for the purpose of sentencing enhancement. Paragraph 28 of the presentence investigation report, Part B (Criminal History), states that the defendant has been convicted of a drug offense and an offense involving violence. It states that the defendant is therefore subject to an enhanced sentence under U.S.S.G. §4B1.1, as a result of the defendant's prior convictions. Accordingly, the report applies a base level of 38 pursuant to U.S.S.G. §4B1.1, instead of the base level of 24. Applying a criminal history category of VI, the report arrives at a sentencing guideline range of 360 months to life.

The defendant objects to the application of a career criminal enhancement which effectively raises the base level from 24 to 38. Contrary to the conclusion of the report, the defendant does not have a prior conviction for a violent felony.

The one violent conviction cited in the report is for a violation of Pennsylvania's robbery statute, 18 Pa.C.S.A. §3701. The conviction for robbery on April 22, 1986, is graded as a felony of the third degree.

Thus, the defendant was convicted in that instance of physically taking or removing property of another by force, however slight, 18 Pa.C.S.A. §3701(a)(1)(v). For the following reasons, the conviction on April 22, 1986, is not a violent felony, and therefore, the violent career criminal enhancement was not applicable. The correct base offense level should be 24, pursuant to U.S.S.G. §2D1.1, and the correct guideline range if 63 to 77 months.

The United States Supreme Court has adopted a categorical approach in the assessment of prior convictions in relation to the career criminal enhancement of §4B1.2. Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143 (1990). In Taylor, the Court considered whether second degree burglary under Missouri law was sufficient to qualify as a violent felony. Burglary is specifically enumerated as a violent felony under §4B1.2. The Court, however, determined that Congress intended a common, uniform definition of "burglary," not what the state in which the prior conviction occurred chose to call "burglary." The statute, thus interpreted, incorporates the Federal concept of "burglary." Thus, the Court held that an offense constitutes "burglary" for the purposes of §4B1.2 enhancement if either its statutory definition substantially corresponds to "generic" burglary, or the charging paper and jury instructions actually required the jury to find all the elements of "generic" burglary in order to convict the defendant.

In the instant matter, the question presented is whether the defendant's 1986 robbery conviction qualifies as a predicate offense for the imposition of the §4B1.2 enhancement. A physical taking "by force however slight" does not fit within the definition of a "violent felony" as set forth in §4B1.1, as was intended by Congress. It is evident from the definition of a "violent felony" in §4B1.2 that Congress created two subcategories of prior criminal conduct: felonies against the person that have as an element, the use or threat of physical force, and felonies against property such as burglary, arson, etc., that present a serious potential risk of physical injury. See United States v. Mathis, 963 F.2d 399 (D.C. Cir.1992). The defendant's 1986 robbery conviction must be examined against the former subcategory of felonies against the person, i.e., felonies that have as an element the use, attempted use, or threatened use of physical force against the person of another, §4B1.2.

In Mathis, the Court examined the legislative history for the original enhancement provision enacted in 1984 and the current version amended in 1986. The Court reached the conclusion that when Congress amended the enhancement provision to cover all violent felonies that have "as an element the use, attempted use, or threatened use of physical force against the person of another," it did not include felonies in which the use of force was de minimis or which did not pose special dangers of violence, and thus, are more appropriately dealt with as theft. (citation omitted)."

In Mathis, applying this conclusion to the District of Columbia's "stealthy seizure" provision of the robbery statute of which the defendant was convicted, the Court held that the "force" required by the statute did not correspond to the meaning of that term which Congress drafted in §4B1.1. The Court thus found that "stealthy seizure" under the District of Columbia statute was not a violent felony within the meaning of §4B1.1 because the proof required to satisfy the element of force in the local statute fell below that which Congress intended in enacting §4B1.1.

The Pennsylvania statute proscribing robbery specifically delineates those offenses in which an individual threatens another with, or intentionally puts another in fear of bodily injury, 18 Pa.C.S.A. §3701(a)(1)(iv). It was by this provision that Pennsylvania intended to proscribe that conduct which places the citizenry at substantial risk of bodily injury during the commission of a theft. In the defendant's 1986 robbery conviction, he was charged with this offense, but pled guilty to a lesser offense, that of "taking by force, however slight," for what amounted to a pickpocket.

The defendant's offense is decidedly of an even less violent nature than that defined in the District of Columbia "stealthy seizure" provision, which requires undiluted force or violence. A pickpocket does not carry a substantial risk of bodily injury as does the District of Columbia provision. The defendant 1986 robbery conviction is therefore

not a violent felony as defined in §4B1.1, and the enhancement provision should not apply.

The defendant has only one prior conviction for a controlled substance felony pursuant to §4B1.1. His 1986 robbery conviction is not a predicate offense for application of the career criminal offender enhancement. The correct sentencing guidelines should be based on an offense level of 24, and a criminal history category of III. Therefore, the appropriate sentencing range is 63 to 77 months.

The defendant also submits that the District Court erred when it sentenced him by holding him liable for the entire 50 kilograms of cocaine, the amount which was allegedly the subject of the conspiracy. The defendant should be held accountable for 3.1 kilograms of cocaine. This would place the defendant's quantity of drugs to fall under §2D1.1(c)(6), lower his offense level below 38.

The defendant never denied that he knew Michael McDonald and Derrick Way. The only involvement that the defendant had was to deliver a bag to Way in the hotel parking lot. The Government did not prove that the defendant had knowledge of the contents of the bag or the use to which the contents were to be put.

While McDonald testified at trial that he provided the defendant with five kilograms of cocaine the night before drug transaction to sell for him, he also indicated that he never told the defendant what he intended to do on November 4, 1994. McDonald was

APPENDIX C

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

October 29, 2018

Mr. Timothy Walker
#48340-066
LSCI Butner
P.O. Box 999
Butner, NC 27509

RE: Undocketed in the Court of Appeals

Dear Mr. Walker:

This office received your Motion to Recall the Mandate on October 22, 2018. In your previous appeal, docketed at No. 97-1101, the Court affirmed the judgment of the District Court in an opinion issued February 5, 2018. The mandate issued in that case on February 27, 2018. Since that time, you have raised all of the arguments you raise in your Motion to Recall the Mandate in multiple filings with the Court. Accordingly, no action will be taken on the Motion to Recall the Mandate.

Very truly yours,

s/ Patricia S. Dodszuweit
Clerk

PSD/kmc

APPENDIX D

Letter Motion for Reconsideration

November 5, 2018

Timothy Walker
Reg. No. 48340-066
Butner LSCI
P.O. Box 999
Butner, NC 27509

Patricia S. Dodszuweit
Clerk
United States Court of Appeals
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Recall the Mandate
"Undocketed in the Court of Appeals"
Appellate No. 97-1101
USDC No. 94-488

Clerk Dodszuweit:

In a letter dated October 29, 2018, copy enclosed, you wrote:

> [Y]ou have raised all of the arguments you raise in your Motion to Recall the Mandate in multiple filings with the Court. Accordingly, no action will be taken on the Motion to Recall the Mandate.

With all due respect, that is incorrect! While it is true that I have made multiple requests of various courts to set aside my "career offender" designation,[FN1] the issue raised in my Motion to Recall the Mandate has never been previously raised in any court. In my Motion to Recall the Mandate (MRM), I variously wrote that the Mandate should be recalled because:

> [T]here was **a fundamental defect in the manner [my] direct appeal was decided,** and that fundamental defect resulted in an egregious miscarriage of justice.
> (MRM at p.2.)

> In the instant matter **a recall of [my] 1998 [FN2] direct appeal mandate** is justified under the Extraordinary Circumstances prong. (Id. at p.3.)

FN1 Every such request has been "procedurally" dismissed without the substantive merits of my claim being addressed.

FN2 The October 29, 2018, letter is inaccurate regarding the Mandate in my direct appeal. The mandate was issued in 1998, not 2018.

> The time is long past due that fairness be achieved, a "fairness" that can be accomplished [only] **by recalling the appellate mandate.** (Id. at p. 5)

I quoted Judge Dennis, U.S. v. Emeary, 794 F. 3d 526, 530 (5th Cir. 2015), thusly:

> [T]o ensure that rights are not foregone and that substantial legal and factual arguments are not inadvertently passed over...[there is a demand that courts will be] willing []... **to correct plain errors that escaped notice,** at least in some circumstances. ...A criminal defendant should not be unlawfully condemned to five excessive years in prison - a "drastic loss of liberty." Penson, 488 U.S. at 85.

(Id.)

> The "**mandate**" in [my] direct appeal [March 2, 1998, DE #224] **should be recalled.** (Id. at p. 6.)
>
> **The crux of the "fundamental miscarriage of justice" that occurred during [my] direct appeal was the appellate court ignoring the command of Taylor.** (Id. at p. 11.) (emphasis in original.)
>
> The **failure of** the District and **Appellate courts** to apply Taylor resulted in a fundamental defect, a miscarriage of justice. (Id. at p. 15.)
>
> The **appellate court misapplied** the dictates of Taylor. (Id. at p. 16.)
>
> Petitioner prays that this Honorable Court will: (a) **Recall the Mandate** in his direct appeal. (Id. at p. 16.)

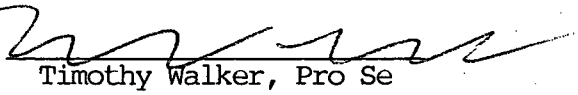
The issue in my Motion to Recall the Mandate is the failure of the appellate court to **properly** address the claim regarding my sentence. That **issue has not** been "raised... in multiple filings with the court."

In fact, until submission of my Motion to Recall the Mandate, **the issue** in the instant pleading has never been raised in any submission I have made to any court.

Please reconsider the conclusion contained in your October 29, 2018, letter. Please enter my MRM onto the docket and forward it into the process of consideration on the merits.

Thank you for your timely action on my request. I hope to hear from you at your earliest convenience.

Sincerely Yours,



Timothy Walker, Pro Se

CC: Chief Judge Smith

APPENDIX E

General Docket
Third Circuit Court of Appeals

Court of Appeals Docket #: 97-1101 **Docketed:** 02/13/1997

USA v. Walker **Termed:** 02/05/1998

Appeal From: United States District Court for the Eastern District of Pennsylvania

Fee Status: CJA

Case Type Information:
1) criminal
2) Sen & Cnv appeal
3) null

Originating Court Information:
District: 0313-2 : 2-94-cr-00488-004
Court Reporter: Michael Hearn
District Judge: Lowell A. Reed, U.S. District Judge
Date Filed: 11/30/1994

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:
02/07/1997	02/07/1997	02/07/1997

Current Cases:

	Lead	Member	Start	End
Related	97-1101	97-1163	03/07/1997	

UNITED STATES OF AMERICA Plaintiff - Appellee	Robert R. Calo, Esq. [COR NTC Federal government] unknown unknown
v.	
TIMOTHY WALKER (#48340-066) Defendant - Appellant	Stephen P. Patrizio, Esq. Direct: 215-569-2121 Email: SPatrizio@Dpesq.com Fax: 215-569-2042 [COR NTC CJA cont from DC] Suite 1205 1500 John F. Kennedy Boulevard Two Penn Center Plaza Philadelphia, PA 19102

UNITED STATES OF AMERICA

v.

TIMOTHY WALKER
Appellant

02/13/1997	Criminal Case Docketed. Notice filed by Timothy Walker. (TE) [Entered: 02/13/1997 11:02 AM]
02/13/1997	ORDER appointing, Stephen P. Patrizio, Esq. as CJA counsel to continue to represent Appellant, filed. (TE) [Entered: 02/14/1997 09:50 AM]
02/27/1997	APPEARANCE from Attorney Stephen P. Patrizio on behalf of Appellant Timothy Walker, filed. (TE) [Entered: 03/03/1997 01:34 PM]
02/27/1997	INFORMATION STATEMENT on behalf of Appellant Timothy Walker, received. (TE) [Entered: 03/03/1997 01:36 PM]
02/27/1997	TRANSCRIPT PURCHASE ORDER (Part I), ordering a transcript of the proceedings, filed. (TE) [Entered: 03/03/1997 01:50 PM]
03/03/1997	FOLLOW UP LETTER to Robert R. Calo requesting the following documents: **Appearance Form (TE) [Entered: 03/03/1997 01:58 PM]
03/10/1997	APPEARANCE from Attorney Robert R. Calo on behalf of Appellee USA, filed. (TE) [Entered: 03/11/1997 03:34 PM]
03/21/1997	See 3/20/97 docket note. (GB) [Entered: 03/21/1997 12:11 PM]
03/21/1997	ORDER to Michael Hearn directing transcript, ordered on 3/21/97, to be filed by 4/23/97, filed. (GB) [Entered: 03/21/1997 12:12 PM]
05/01/1997	TRANSCRIPT PURCHASE ORDER (Part III) notifying transcript by Michael Hearn in 97-1101 filed in D.C., 4/23/97, filed. (TE) [Entered: 05/02/1997 01:49 PM]
05/02/1997	CERTIFIED LIST filed. (TE) [Entered: 05/02/1997 01:54 PM]
05/02/1997	BRIEFING NOTICE ISSUED. Appellant brief and appendix due 6/2/97. (TE) [Entered: 05/02/1997 01:57 PM]
05/30/1997	MOTION filed by Appellant Timothy Walker in 97-1101 for extension of time to file brief and appendix until 8/1/97 . Answer due 6/10/97. Certificate of Service dated 5/30/97. (TE) [Entered: 06/03/1997 09:52 AM]
06/03/1997	ORDER (Clerk) denying motion to extend time to file brief and appendix as presented. Appellant's brief and appendix shall be filed and served on or before 7/2/97, filed. (TE) [Entered: 06/03/1997 01:14 PM]
07/02/1997	BRIEF on behalf of Appellant Timothy Walker in 97-1101, Pages: 40, Copies: 10, Delivered by mail, filed. Certificate of service date 7/1/97. (TE) [Entered: 07/03/1997 11:26 AM]

07/02/1997	APPENDIX on behalf of Appellant Timothy Walker in 97-1101, Copies: 4, Volumes: 1, Delivered by mail, filed. Certificate of service date 7/1/97. (TE) [Entered: 07/03/1997 11:28 AM]
07/02/1997	PRESENTENCE REPORT (4 ccs) filed [UNDER SEAL] SEND TO MERITS PANEL (TE) [Entered: 07/03/1997 11:28 AM]
07/18/1997	MOTION filed by Appellee USA in 97-1101 for extension of time to file brief until 8/11/97 . Answer due 7/28/97. Certificate of Service dated 7/18/97. (TE) [Entered: 07/21/1997 08:35 AM]
07/22/1997	ORDER (Clerk) granting motion for extension of time to file brief by Appellee USA. Appellee Brief shall be filed and served on or before 8/11/97, filed. (TE) [Entered: 07/22/1997 02:57 PM]
08/05/1997	MOTION by Appellee USA for extension of time to file brief until 8/21/97, filed. Answer due 8/15/97. Certificate of Service dated 8/5/97. (GB) [Entered: 08/06/1997 12:33 PM]
08/08/1997	ORDER (Clerk) considering motion by Appellee USA for extension of time to file brief. Appellee's brief shall be filed and served on or before 8/21/97. No further extensions shall be granted, filed. (GB) [Entered: 08/08/1997 11:31 AM]
08/22/1997	BRIEF on behalf of Appellee USA in 97-1101 , Pages: 27, Copies: 10, Delivered by mail , filed. Certificate of Service date 8/21/97. (TE) [Entered: 08/22/1997 03:36 PM]
08/22/1997	SUPPLEMENTAL APPENDIX on behalf of USA in 97-1101. Copies: 5 Volumes: 1 (TE) [Entered: 08/22/1997 03:38 PM]
08/22/1997	Notice of telephone request, to Robert Calo, US attorney requesting proof of service of suppl appendix on appellant. Response due in 3 days. (TE) [Entered: 08/22/1997 03:42 PM]
08/25/1997	COMPLIANCE RECEIVED Certificate of service for appendix, USA made service by mail on 8/21/97 on the appellant. (TE) [Entered: 08/26/1997 08:41 AM]
11/20/1997	CALENDARED for Monday, January 26, 1998. (TE) [Entered: 11/20/1997 02:51 PM]
01/26/1998	SUBMITTED 1/26/98 Coram: Mansmann, Cowen and Alito, Circuit Judges. (AGB) [Entered: 01/28/1998 03:49 PM]
02/05/1998	MEMORANDUM OPINION (Mansmann, Authoring Judge, Cowen, Alito, Circuit Judges), filed. Total MO Pages: 9. (AWI) [Entered: 02/05/1998 11:50 AM]
02/05/1998	JUDGMENT, Affirmed, filed. (AWI) [Entered: 02/05/1998 11:52 AM]
02/27/1998	MANDATE ISSUED, filed. (AWI) [Entered: 02/27/1998 08:07 AM]
02/27/1998	RECORD released. (AWI) [Entered: 02/27/1998 08:09 AM]
03/03/1998	RECEIPT FOR ISSUANCE OF MANDATE AND rel of Record received from Dist Ct, filed. (AWI) [Entered: 03/09/1998 08:45 AM]

11/08/2018		MOTION filed by Appellant Timothy Walker to Review the Clerk's Determination to Motions Panel. Certificate of Service dated 11/05/2018. Service made by US mail. (TMM) [Entered: 11/14/2018 02:26 PM]
01/22/2019		LETTER dated 01/14/2019 filed pursuant to Rule 28(j) from Appellant Timothy Walker. (TMM) [Entered: 01/23/2019 04:39 PM]
12/20/2019		ORDER (CHAGARES, RESTREPO and SCIRICA, Circuit Judges) denying motion to review filed by Appellant Timothy Walker. Panel No.: CCO-113. Chagares, Authoring Judge. --[Edited 12/20/2019 by AWI] (SLC) [Entered: 12/20/2019 01:30 PM]

APPENDIX F