No. _____

In the Supreme Court of the United States

JOSHUA DAVOREN,

Applicant,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

Application for Extension of Time to File Petition for Writ of Certiorari

Pursuant to 28 U.S.C. § 2101(d) and Rule 13.5 of the Rules of this Court, applicant Joshua Davoren respectfully requests a 60-day extension of time, to and including Friday, February 11, 2022, within which to file a petition for a writ of certiorari.

On November 16, 2020, the Massachusetts Appeals Court issued a decision on the merits of the applicant's direct appeal from conviction. *Commonwealth v. Joshua Davoren*, 98 Mass. App. Ct. 1119, 158 N.E.3d 883 (2020)(unpublished). On February 22, 2021, the Supreme Judicial Court denied, without prejudice, discretionary appellate review and remanded Mr. Davoren's case to the Massachusetts Appeals Court for reconsideration. *Commonwealth v. Joshua Davoren*, 486 Mass. 1115 (2021). Following remand, on May 4, 2021, the Massachusetts Appeals Court issued a second decision on the

merits. *Commonwealth v. Joshua Davoren*, 99 Mass. App. Ct. 1123, 168 N.E.3d 376 (2021)(unpublished). On September 14, 2021, the Supreme Judicial Court denied discretionary appellate review. *Commonwealth v. Joshua Davoren,* 173 N.E.3d 1093 (September 14, 2021). Those opinions and orders are attached.

Unless extended, Petitioner's time to file a petition for a writ of certiorari will expire on December 13, 2021. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1257.

Issue to be Presented in Certiorari Petition

The petitioner's forthcoming certiorari petition presents the following question:

> In *Heller* and *McDonald*, this Court held that the core right protected by the Second Amendment is the right to possess arms in one's own home for self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767-768 (2010). The Defendant/Petitioner was convicted under Massachusetts General Laws Chapter 269, Section 10(h)(1) for possession of a shotgun in his home, a criminal offense that carries a sentence of up to two years. To prove this offense, the Commonwealth must prove only that the defendant knowingly possessed a firearm, rifle, shotgun, or ammunition. *Commonwealth v. Johnson*, 461 Mass. 44, 53, 958 N.E.2d 25, 33 (2011). Proof that the defendant lacks a license or is otherwise disqualified from exercising his core, Second Amendment right is not required. *Commonwealth v. Powell*, 459 Mass. 572, 582, 946 N.E.2d 1114 (2011), *cert. denied*, 565 U.S. 1262, 132 S.Ct. 1739, 182 L.Ed.2d 534 (2012). Consequently, the statute "totally bans [arms] possession in the home." *Heller*, 554 U.S. at 628. Is the statute facially invalid under the Second and Fourteenth Amendments, where it

renders the exercise of the core, Second Amendment right, even by law-abiding citizens, a crime?

Basis of Jurisdiction and Judgment Sought to be Reviewed

This Court has jurisdiction under § 1257(a) because the judgment appealed from was rendered by the Massachusetts Appeals Court, discretionary review was denied by the state's highest court, and the appeal concerns the validity of a state statute under the Constitution.

Good Cause for Extension

For the reasons listed below, undersigned counsel is not able to properly prepare the contemplated petition prior to December 13, 2021 and requires the requested extension.

Undersigned counsel is responsible for the following cases which have required her attention or will require her attention during the period for seeking certiorari:

1. *Commonwealth v. Tahatdil,* Massachusetts Appeals Court No. 2020-P-0756 (second degree murder). A reply brief is due November 30, 2021.
2. *Commonwealth v. Tillery*, Massachusetts Appeals Court No. 2020-P-0017, (Massachusetts Armed Career Criminal Act, M. G. L. c. 269, § 10G). A reply brief is due November 23, 2021.
3. *Commonwealth v. Rivera*, No. 1779CR00447 (Hampden Sup. Ct.)(armed assault with intent to murder). Substantial

investigation, research, and drafting as part of pretrial litigation and in anticipation of trial is ongoing.

4. *Commonwealth v. Harrigan,* No.1583CR00554 (Plymouth Sup. Ct.)(Massachusetts Armed Career Criminal Act, M. G. L. c. 269, § 10G). A response to the Commonwealth's Opposition to the defendant's motion for new trial is due on or about November 22, 2021. An evidentiary hearing has been requested.
5. *Commonwealth v. Akara,* Supreme Judicial Court No. 10229 (first degree murder, joint venture). Substantial investigation and research in anticipation of a post-conviction challenge to the imposition of a life sentence without parole upon a teenager is ongoing.
6. *Commonwealth v. Valle,* No. 1479CR00670 (Hampden Sup. Ct.); Massachusetts Appeals Court No. 2019-P-0525 (Home Invasion). A motion for resentencing and request for a sentencing hearing is pending, and undersigned counsel anticipates a federal habeas petition will be filed if the motion for resentencing is denied.
7. *Commonwealth v. Flannery,* No. 74-11352 (Hampshire Sup. Ct.) (rape). Counsel has undertaken significant investigation and research and is actively drafting a motion for new trial.

8. *Commonwealth v. Sicard,* No. HDCR1997-02264 (Hampden Sup. Ct.) Counsel has undertaken significant investigation and research and is actively drafting a motion for new trial.
9. *United States v. Williams,* First Circuit Court of Appeals No. 21-1493. The defendant's brief is due on January 11, 2022.

Undersigned counsel has exclusive parenting responsibilities for two children, including an elementary-school student who requires childcare, and childcare is or was unavailable on the following dates: November 2, 11, 24-26; December 8, 23-31; January 6, 17, 28.

Undersigned counsel will be on a previously-planned family vacation from January 8 to 17, 2021.

Conclusion

For all the foregoing reasons, the Court should grant Petitioner an extension of time to and including February 11, 2021, within which to file a petition for a writ of certiorari.

Respectfully submitted,

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NOVEMBER 18, 2021

98 Mass.App.Ct. 1119
Unpublished Disposition

Appeals Court of Massachusetts.

COMMONWEALTH

v.

Joshua DAVOREN.

19-P-19
|
Entered: November 16, 2020.

By the Court (Meade, Sullivan & Sacks, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** After a jury trial, the defendant was convicted of possession of a firearm without a firearms identification card (FID), and possession of ammunition without an FID card. In a separate jury trial, the defendant was convicted of being a felon in possession of a firearm after having been previously convicted of a violent crime. On appeal, he makes a variety of claims that are without merit; we affirm his convictions.

1. Constitutional challenges. The defendant claims for the first time on appeal that G. L. c. 269, § 10 (h) (1) is both facially invalid and invalid as applied to him. We disagree. Putting aside the standard of review, the Supreme Judicial Court has already determined that the statute is not facially invalid. See Commonwealth v. Loadholt, 460 Mass. 723, 724-727 (2011) (facial challenge to licensing scheme). In any event, the defendant has failed to "establish that no set of circumstances exist[ ] under which the [statute] would be valid" (quotation and citation omitted). Chief of Police of Worcester v. Holden, 470 Mass. 845, 860 (2015).[2] Nothing has changed since Loadholt to breathe new life into this claim.[3]

The defendant's as-applied challenge is similarly without merit because there is no evidence that the defendant applied for an FID card and was rejected. "[T]hose who do not apply for a Massachusetts firearm license are not entitled to assert as-applied challenges to the licensing laws because they cannot demonstrate that they sought, and were denied, a Massachusetts firearm license." Commonwealth v. Harris, 481 Mass. 767, 771 n.5 (2019). In any event, based on his criminal record, which includes several felony convictions, the defendant is statutorily prohibited from obtaining an FID card. See G. L. c. 140, § 129B (1) (i).

The defendant's final constitutional challenge to his convictions under G. L. c. 269, §§ 10 (h) and 10G, raised for the first time on appeal, involves claims that the sentencing structure set forth by the Legislature for graduated mandatory minimum sentences under the armed career criminal act (ACCA) violated the Second, Eighth and Fourteenth Amendments to the United States Constitution. The defendant claims that because G. L. c. 269, § 10 (h), is a misdemeanor, with a maximum sentence of two years to the house of correction, his sentence under G. L. c. 269, § 10G, to more than two years constitutes cruel and unusual punishment and denies him due process. We disagree.

***2** The defendant's claim is based on a misunderstanding of the statutory scheme. Although G. L. c. 269, § 10G, does not create a freestanding crime, it enhances the punishment sentence for the underlying crime. Commonwealth v. Richardson, 469 Mass. 248, 252 (2014). The defendant's prior convictions of having committed a violent offense

did not automatically enhance his sentence. Rather, the defendant had a separate jury trial on the ACCA enhancement charges, and the Commonwealth was required to prove beyond a reasonable doubt that the previous crimes of which the defendant was convicted were violent crimes. See Commonwealth v. Wentworth, 482 Mass. 664, 675-676 (2019). The Legislature's choice to criminalize habitually violent offenders with enhanced sentences, with the benefit of a trial with the full panoply of constitutional protections, is not cruel and unusual punishment that "shocks the conscience and offends fundamental notions of human dignity" (citation omitted). Commonwealth v. Dunn, 43 Mass. App. Ct. 58, 63 (1997).[4]

2. The sentence enhancement trial. The defendant also claims that G. L. c. 269, § 10G, was vague as applied in his case because he did not know what facts establish a violation, the evidence was insufficient, and that the trial was unfair because constitutional and evidentiary rules were not observed. We find no merit to these claims.

"The ACCA provides a staircase of mandatory minimum and maximum enhanced punishments for certain weapons-related offenses if a defendant has been previously convicted of a 'violent crime' or a serious drug offense." Wentworth, 482 Mass at 670. Pursuant to the ACCA, the Commonwealth was required to prove that the defendant "having been previously convicted of two violent crimes ... arising from separate incidences, violate[d] the provisions of" G. L. c. 269, § 10 (h). G. L. c. 269, § 10G (b). Pursuant to G. L. c. 140, § 121, a "violent crime" is defined, as relevant here, as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another." G. L. c. 140, § 121. See G. L. c. 269, § 10G.

At trial, the defendant urged the trial judge to adopt the "categorical approach" set out in Mathis v. United States, 136 S. Ct. 2243, 2248 (2016), which looks merely at the elements of the offense and not the underlying conduct, to determine if the predicate offense qualified as a violent crime. In the circumstances of this case, the judge properly rejected this and applied a "modified categorical approach" from Commonwealth v. Eberhart, 461 Mass. 809, 817 (2012). See Wentworth, 482 Mass. at 671-676 (rejecting Mathis categorical approach). Under this approach, the jury at an ACCA enhancement trial were permitted to consider additional evidence to determine whether a predicate conviction is a "violent crime" under the "force" clause. Id. at 672. Ultimately, the question for the jury to resolve is not whether the defendant is guilty of the predicate offenses, but rather is whether the previous crime for which the defendant was convicted was a "violent" crime under the ACCA.

***3** The defendant's predicate offenses in this case were assault by means of a dangerous weapon (ADW) and assault and battery (A&B). The defendant claims the statute does not apply to him because when he violated G. L. c. 269, § 10 (h), he had not been "previously convicted" of two crimes that had, as an element, the use of physical force. This, he claims, is because ADW and A&B may be committed without the use of violent force.[5] See Eberhart, 461 Mass. at 818-820 (A&B may be committed without proof of physical force). However, this is just a restatement of the defendant's request at trial for the judge to employ a categorical approach, which is without merit. See Commonwealth v. Mora, 477 Mass. 399, 406-408 (2017) (where predicate offense may be committed without use of violence, Commonwealth must prove conviction and surrounding circumstances of offense).

Furthermore, contrary to the defendant's claim, it was not premature to conclude the predicate offenses were violent crimes because the jury in this case had not yet so determined. But this is exactly what the jury in the ACCA trial had to determine, i.e., whether the prior conviction "has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another." G. L. c. 140, § 121. If the defendant was correct, no crime that did not have a physical force component as an element could ever serve as a predicate offense. But again, despite the defendant's protest, there is more to the analysis than a review of the elements. As the Supreme Judicial Court has clarified the operation of this statute in Eberhart, Mora, and Wentworth, the defendant's vagueness challenge is without merit. See Commonwealth v. Crawford, 430 Mass. 683, 689 (2000).

Applying the "modified categorical approach," the judge conducted a trial that provided the jury an opportunity to evaluate the circumstances underlying the convictions to determine if they qualified as violent. A review of the evidence lays to rest the defendant's claim that the parties did not understand what the Commonwealth had to prove, or for that matter, whether the Commonwealth carried its burden.

When evaluating sufficiency, the evidence must be viewed in the light most favorable to the Commonwealth with specific reference to the substantive elements of the offense. See Jackson v. Virginia, 443 U.S. 307, 324 n.16 (1979); Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979). In this case, under the "force" clause of G. L. c. 140, § 121, the Commonwealth was required to prove that the defendant's convictions involved the attempted, threatened, or actual use of physical force or a deadly weapon.

Under the modified categorical approach, the evidence was more than sufficient to demonstrate that his conviction for ADW was a violent one under the force clause. The defendant, after an argument, revved his engine and attempted or threatened to run over the victim with a motor vehicle. The defendant's action required the victim to jump out of the way to avoid being struck. That evidence alone provided the jury with sufficient proof to show the use of force constituting a violent crime. While the defendant objected on hearsay grounds to the content of victim's conversation with the police, the sufficiency of the evidence under Latimore, 378 Mass. at 677-678, "is to be measured upon that which was admitted in evidence without regard to the propriety of the admission." Commonwealth v. Sepheus, 468 Mass. 160, 164 (2014), quoting Commonwealth v. Farnsworth, 76 Mass. App. Ct. 87, 98 (2010).

***4** Relative to the defendant's conviction for A&B on his mother, the evidence in the light most favorable to the Commonwealth was sufficient to establish that it was one of violence under the force clause.[6] During an argument with his mother, the defendant put his hands on her, attempted to grab her by her throat, forced her to the ground, and "grabbed" her phone out of her hand when she tried to call 911. The jury were entitled to conclude that the defendant used, attempted to use, or threatened to use physical force against his mother. See G. L. c. 140, § 121. See also G. L. c. 269, § 10G. In these circumstances, the defendant's A&B conviction constituted a violent crime. See Eberhart, 461 Mass. at 818-820.[7]

Finally, the defendant claims that his sentence enhancement trial was unfair because constitutional and evidentiary rules were not observed. In particular, the defendant claims that the witnesses did not testify from personal knowledge, hearsay was improperly admitted, the defendant's right to confrontation was denied, and the defendant's "involuntary statements" were improperly admitted. Putting aside whether these claims were properly preserved, they lack merit.

Although the "trial judge may admit any evidence that would have been admissible at the original trial of the alleged predicate offense" at the sentence enhancement trial, the Supreme Judicial Court has emphasized that, "the Commonwealth need not retry the prior conviction." See Eberhart, 461 Mass. at 816, quoting Commonwealth v. Colon, 81 Mass. App. Ct. 8, 16 n.8 (2011).

During the sentence enhancement trial, the Commonwealth introduced evidence of the defendant's convictions for ADW and A&B through certified conviction documents, the testimony of the arresting officers, and the testimony of the guilty plea prosecutors. The defendant objected on hearsay (not constitutional) grounds to the testimony of both the officers and the prosecutors, as to the facts underlying the offenses, to which the defendant pleaded guilty after a full colloquy, during which he heard a recitation of the facts of the charges. While neither the arresting officers nor the prosecutors were eyewitnesses to the offenses, they all had personal knowledge of the defendant to establish his identity. Moreover, the prosecutors had personal knowledge of the facts presented in court when the defendant pleaded guilty to A&B and ADW. This recitation of the Commonwealth's evidence provided the factual basis for the defendant's guilty pleas and his resulting convictions. The jury were entitled to credit that evidence.

***5** In addition, pursuant to Mass. G. Evid. § 803(22) (C) and (D) (2019), a guilty plea is admissible

where "the evidence is admitted to prove any fact essential to the judgment;" and where it constitutes a prior judgment "against the defendant." Id. See Commonwealth v. Palermo, 482 Mass. 620, 625 (2019) (guilty plea of codefendant was not admissible substantively against defendant). The Commonwealth was required to establish that the defendant was previously convicted of a violent offense, but it was not required to prove the facts of the underlying conviction beyond a reasonable doubt to the sentence enhancement jury. Colon, 81 Mass. App. Ct. at 16 n.8. The jury were only required to consider whether the defendant was previously convicted, and whether those convictions constituted "violent crimes" under the statute. See Eberhart, 461 Mass. at 816-817, citing United States v. Harris, 964 F.2d 1234, 1236 (1st Cir. 1992), overruled on other grounds, Shepard v. United States, 544 U.S. 13 (2005). Also, the defendant cross-examined each Commonwealth witness and testified himself. Therefore, he was not denied the right to confrontation.

The defendant also claims, for the first time on appeal, that his admission to the facts at his guilty pleas was involuntary and should not have been admitted. Relying on Descamps v. United States, 570 U.S. 254, 270 (2013), the defendant claims his statements made during the plea colloquy were knowing and voluntary only as to the elements of the offenses. In particular, he claims he had little incentive to contest facts that did not constitute elements of the crimes. We disagree.

For some of the same reasons that Mathis, 136 S.Ct. at 2251, does not control the operation of our ACCA statute, see Wentworth, 482 Mass. at 671-676, Descamps, 570 U.S. at 270, does not control the instant circumstances either. Of primary concern to the Supreme Court in Descamps was that constitutionally inappropriate judicial fact finding was required when reviewing the circumstances underlying a guilty plea. Id. at 269-270. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Here, there was no judicial fact finding as the defendant had the benefit of a jury trial on the issues related to sentence enhancement. See Wentworth, supra at 675.

Furthermore, before a guilty plea or an admission to sufficient facts is accepted, a judge must conduct a colloquy with the defendant to determine whether the plea is voluntary and intelligent. See Boykin v. Alabama, 395 U.S. 238, 242-243 (1969); Commonwealth v. Foster, 368 Mass. 100, 105-107 (1975); Commonwealth v. Haskell, 76 Mass. App. Ct. 284, 289 (2010). If a defendant received a constitutionally inadequate plea colloquy, he would be entitled to withdraw that plea. The record before us reveals no such request has been made. Consequently, there has been no judicial determination that the defendant's guilty pleas to A&B or ADW were in any way infirm.

Moreover, a defendant's guilty plea is more than a mere admission. See Brady v. United States, 397 U.S. 742, 748 (1970). See also Boykin, 395 U.S. at 242 n.4 ("A plea of guilty is more than a voluntary confession made in open court. It also serves as a stipulation that no proof by the prosecution need be advanced .... It supplies both evidence and verdict, ending controversy" [citation omitted]). Here, even if Descamps applied, the conduct underlying the defendant's pleas, described by the witnesses, was necessary for the admission to meet the elements of the crimes, see Commonwealth v. Hart, 467 Mass. 322, 325 (2014), but it also provided the factual basis necessary for the modified categorical approach.

Finally, and also for the first time on appeal, the defendant claims errors in the judge's jury instructions. First, the defendant challenges the instruction on ADW where the judge instructed the jury that, due to the use of a dangerous weapon in the commission of the assault, the crime, by its nature, involved the use, attempted use or threatened use of physical force with a dangerous weapon against the person of another.[8] This was a correct statement of the law. In Commonwealth v. Rezendes, 88 Mass. App. Ct. 369, 372 (2015), we held that assault and battery by means of a dangerous weapon committed by an adult, due to the employment of the dangerous weapon, is a "violent crime" under G. L. c. 140, § 121. ADW is a lesser included offense, but still requires the use of a dangerous weapon, which also makes it a violent crime. There was no error, and thus, no risk that justice miscarried.

***6** The defendant also challenges so much of the instruction as defining a "violent crime" as one that is "capable of causing pain or injury," rather than instructing the jury that the crime must be "likely

to cause harm." However, the defendant himself requested the "capable of causing" language, which the trial judge agreed to give to the jury. This is the exact language defining the element of physical force required for an offense to be "violent" as set out in Colon, 81 Mass. App. Ct. at 19. There was no error, and thus, no risk that justice miscarried.[9]

3. The motions to suppress, to disclose the informant's identity, and for a Franks hearing. The defendant also makes a variety of claims related the validity of the search warrant, that the confidential informant's (CI's) identity should have been disclosed, and that the affidavit supporting the search warrant contained material misrepresentations, which necessitated a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978).

A. The motion to suppress. The defendant claims that the judge should have allowed the motion to suppress because the search warrant was not supported by probable cause. In particular, he claims that the police failed to properly supervise the controlled buys conducted by the CI, and thereby invalidated the buys as information supporting probable cause. We disagree.

In general, any deficiency in the Aguilar-Spinelli[10] requirements of basis of knowledge and veracity can be remedied by a "controlled buy." That "buy" supplements or supplies the information required by either or both prongs of the test. See Commonwealth v. Warren, 418 Mass. 86, 89 (1994); Commonwealth v. Luna, 410 Mass. 131, 134 (1991). To provide that relief, the controlled buy must be properly supervised. See Commonwealth v. Desper, 419 Mass. 163, 166-168 (1994).[11]

The defendant is correct that the affidavit does not delineate the Desper components for all the controlled buys. However, the affidavit did satisfy these requirements in at least one of the controlled purchases. Although the affidavit did not repeat every step taken before, during, and after the remaining three controlled purchases, it was reasonable to infer, from the entire affidavit, that the affiant described the entire "controlled buy" procedure in detail relative to the first purchase in paragraph 18, and then used the shorthand "controlled purchase" to describe the steps taken in the subsequent purchases. The affidavit did not contain any evidence that the controlled purchase deviated from the steps described in paragraph 18. The inference that each controlled purchase satisfied the Desper requirements, and was thus reliable, was a reasonable one. See Commonwealth v. Cavitt, 460 Mass. 617, 626 (2011).

***7** Even if the affidavit was lacking in detail relative to three of the purchases, the first purchase on March 6, 2015, explicitly satisfied Desper, and evidence of one controlled purchase at the location, in addition to the other information provided by the CI, was more than adequate to establish probable cause to believe that the defendant sold narcotics from 21 Hamlet Street, and that evidence of that crime could be found there.

Here, the CI's basis of knowledge was apparent from the affidavit. The CI had recently purchased narcotics (over thirty times in the two months preceding the search warrant application) from the defendant at the defendant's home. This direct receipt of information satisfies the basis of knowledge test. See Commonwealth v. Allen, 406 Mass. 575, 578 (1990), citing Commonwealth v. Parapar, 404 Mass. 319, 322 (1989). "First-hand receipt of information through personal observation satisfies the basis of knowledge prong of Aguilar-Spinelli." Allen, supra.[12]

The CI's tip also satisfied the veracity requirement. The affiant's past experiences with the CI demonstrated that the CI had provided reliable and accurate information in the past leading to narcotics indictments. This fairly implies that the CI's information led to the seizure of narcotics, which establishes the CI's veracity. See Commonwealth v. Mendes, 463 Mass. 353, 365-366 (2012); Commonwealth v. Perez-Baez, 410 Mass. 43, 45-56 (1991).[13] To the extent there are any weaknesses, the explicitly supervised controlled buy made up for any deficiencies. Warren, 418 Mass. at 89. The motion to suppress was properly denied.

B. Informant's identity. The defendant claims that he was entitled to the disclosure of the CI's identity because all the charges depended on the validity of the warrant, which depended on the existence and veracity of the CI. We disagree.

The informant's privilege has long been recognized in the Commonwealth. See Commonwealth v. Madigan, 449 Mass. 702, 705-706 (2007); Commonwealth v. Amral, 407 Mass. 511, 516 (1990). "In order to obtain the identity of a confidential informant, the burden is on a defendant to demonstrate that an exception to the privilege ought apply, that is, that the disclosure would provide him with 'material evidence needed ... for a fair presentation of his case to the jury.' " Commonwealth v. Shaughessy, 455 Mass. 346, 353-354 (2009), quoting Commonwealth v. Lugo, 406 Mass. 565, 574 (1990).

In this case, the CI did not participate in or witness the events underlying the firearms charges against the defendant, but merely provided evidence to support the issuance of the search warrant. In that posture, the defendant has not made any showing tipping the balance in favor of disclosure. See Commonwealth v. Figueroa, 74 Mass. App. Ct. 784, 791 (2009) (disclosure not required where government's case did not depend "on proof that the defendant was involved in any particular transactions, including the controlled purchases; CI was patently not a percipient witness to the incidents" [quotation omitted]). The motion to disclose the CI's identity was properly denied.

***8** C. The Franks hearing. The defendant claims the judge erred in denying him a Franks hearing based on his allegation that the affiant fabricated the CI out of whole cloth, and thus intentionally or recklessly made false statements in the search warrant affidavit material to the determination of probable cause such that, without the misrepresentations, probable cause was lacking. We disagree.

A defendant is entitled to a Franks hearing only if he makes two "substantial preliminary showing[s]." Commonwealth v. Long, 454 Mass. 542, 552 (2009), S.C., 476 Mass. 526 (2017), quoting Franks, 438 U.S. at 155. First, the defendant must demonstrate that the affiant included "a false statement knowingly and intentionally, or with reckless disregard for the truth," or intentionally or recklessly omitted material in the search warrant affidavit. Franks, supra at 155-156. Second, the defendant must show that "the allegedly false statement is necessary to the finding of probable cause," id. at 156, or that the inclusion of the omitted information would have negated the magistrate's probable cause finding. See Commonwealth v. Corriveau, 396 Mass. 319, 334-335 (1985).

A negligent misrepresentation by the affiant would not warrant a Franks hearing. See Commonwealth v. Nine Hundred & Ninety-Two Dollars, 383 Mass. 764, 767 (1981). Thus, a defendant is not entitled to relief simply because a police officer made a mistake about some of the facts set forth in an affidavit, but must demonstrate, by a preponderance of the evidence, that the statement was intentionally or recklessly false. Corriveau, 396 Mass. at 334. See Commonwealth v. Alvarez, 422 Mass. 198, 208 (1996).

Here, the motion judge afforded the defendant the benefit of an Amral-type preliminary hearing as to numerous perceived inconsistencies in the affidavit. See Amral, 407 Mass. at 522-523. In light of that hearing, the judge determined the defendant was not entitled to a Franks hearing because he did not establish the requisite "substantial preliminary showing that the affiant made a false statement knowingly and intentionally or with reckless disregard for the truth." Commonwealth v. Douzanis, 384 Mass. 434, 437 (1981).

The defendant challenged several discrepancies between the search warrant affidavit and police reports, and asserted the narcotics recovered following the controlled purchases did not, in fact, exist. The motion judge viewed the narcotics in camera, and satisfied himself that the narcotics existed, which dispensed with the defendant's allegation that the CI, and thus the controlled purchases described in the affidavit, were wholly fictional. Also, at the hearing, the police officer adequately explained each discrepancy the defendant claimed.[14] Accordingly, the motion judge implicitly rejected the defendant's claim that the controlled purchases, and thus the CI, were fabricated due to the omissions in repeating the descriptions of the steps taken in conducting the purchase. The motion judge's denial of the Franks hearing was not an abuse of discretion.

Judgments affirmed.

158 N.E.3d 883

All Citations

98 Mass.App.Ct. 1119, 158 N.E.3d 883 (Table), 2020
WL 6703188

Footnotes

1 The panelists are listed in order of seniority.

2 Because compliance with the requirement to obtain an FID card allows possession of a shotgun inside one's home, so long as the individual is not statutorily precluded from obtaining a license and is otherwise suitable, see G. L. c. 140, § 129B, a set of circumstances clearly does exist that allows the exercise of the right to bear arms under the Second Amendment to the United States Constitution. See G. L. c. 140, § 129C.

3 The Supreme Judicial Court has also rejected the defendant's claim that it is unconstitutional to place the burden on the defendant to present an FID card, rather than on the Commonwealth to prove its absence. Commonwealth v. Powell, 459 Mass. 572, 582 (2011), cert. denied, 565 U.S. 1262 (2012).

4 The defendant also erroneously claims that the failure to inform him at the plea hearings for what later became his predicate offenses here, that those convictions could enhance his sentence should he commit a future crime as he did here, renders G. L. c. 269, § 10G, vague as applied here. See Commonwealth v. Shindell, 63 Mass. App. Ct. 503, 504-506 (2005) (absent requirement by statute or rule, judge not required to advise defendant of collateral consequences of guilty plea). Also, the defendant, in conclusory fashion, claims that because G. L. c. 269, § 10G, "punishes" Second Amendment activity, it must be narrowly tailored. However, enhancing the punishment for felons who have a record of committing violent offenses, who choose to commit additional firearms offenses, furthers a compelling and legitimate government interest of promoting the health, safety, and welfare of the law-abiding public.

5 As far as being violent by category, ADW and A&B do not stand on the same footing. While A&B may not be categorically violent, ADW involves the use of a dangerous weapon. "It is undisputed that, if committed by an adult, an assault and battery by means of a dangerous weapon would be punishable by imprisonment for a term exceeding one year and thus would constitute a violent crime under the Massachusetts ACCA." Commonwealth v. Rezendes, 88 Mass. App. Ct. 369, 372 (2015). It follows that if assault and battery by means of a dangerous weapon constitutes a violent crime due to the use of dangerous weapon, the same holds true for ADW. See Commonwealth v. Widener, 91 Mass. App. Ct. 696, 703 (2017). To the extent there remains any doubt, that doubt was resolved through the application of the modified categorical approach.

6 At trial, the prosecutor requested that the jury be provided with a special verdict slip to indicate which predicate it had relied on if they chose to convict the defendant of only one prior violent crime. Defense counsel claimed it was not necessary, and the judge did not provide one. Because the evidence was sufficient as to both predicate offenses, the general verdict was proper. See Commonwealth v. Plunkett, 422 Mass. 634, 639 (1996).

7 For the first time at a posttrial hearing on the defendant's motion filed pursuant to Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995), the defendant claimed that the Commonwealth failed to present evidence that either of the predicate crimes were "punishable by imprisonment for a term exceeding one year." G. L. c. 140, § 121. However, how a crime is punishable is a question of law upon which the jury could have been instructed, and not a question of fact for the jury to decide. See G. L. c. 233, § 70 (court may take judicial notice of statutes). Had the defendant raised this issue at the appropriate time, the judge would have instructed the jury that, as a matter of law, which the jurors were bound to accept, both A&B and ADW are punishable by imprisonment of a term exceeding one year. See G. L. c. 265, §§ 13A and 15B. The absence of this added instruction did not create a substantial risk of a miscarriage of justice.

8 The defendant claims that he objected to this instruction at the charge conference, by stating he did not believe it was a correct statement of the law. However, after the judge finished his instructions, the defendant stated that he was satisfied with the judge's instructions. To the extent the defendant did not agree with how the judge answered a later jury question on the matter, that did not preserve the issue. See Commonwealth v. Coutu, 88 Mass. App. Ct. 686, 692 (2015) ("We have a contemporaneous objection rule, not a retroactive objection rule"). At bottom, the standard of review does not affect the outcome here.

9 Prior to trial, the Commonwealth moved in limine to admit certified records from the Department of Criminal Justice Information Systems as a business record to show that the defendant did not possess an FID card. The defendant claims the judge abused his discretion by admitting the records. We need not address this claim because even if the judge abused his discretion in admitting the records, there would be no prejudice to the defendant because the Commonwealth did not have a burden to prove the absence of an FID card. Rather, possession of an FID card is an affirmative defense. See Powell, 459 Mass. at 582.

10 See Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

11 In Desper, 419 Mass. at 168, the Supreme Judicial Court set forth the minimum essential components of a controlled buy: "(1) a police officer meets the informant at a location other than the location where [it is] suspected that criminal activity is occurring; (2) the officer searches the informant to ensure the informant has no drugs on his person and (usually) furnishes the informant with money to purchase drugs; (3) the officer escorts or follows the informant to the premises where it is alleged illegal activity is occurring, and watches the informant enter and leave those premises; and (4) the informant turns over to the officer the substance the informant has purchased from the residents of the premises under surveillance."

12 The CI also provided the name, description, and cellular telephone number of the homeowner at 21 Hamlet Street. This information was sufficient, even without corroboration, to further establish the CI's basis of knowledge. See Commonwealth v. Alfonso A., 438 Mass. 372, 374 (2003).

13 The CI was also known to the affiant for seven years, which weighs in favor of the CI's reliability. See Alfonso A., 438 Mass. at 375.

14 This included explanations as to who conducted the field tests on the narcotics that resulted from the controlled purchases, and the confusion as to why the narcotics recovered after the controlled purchases appeared to be "out of order," as to when they were logged into evidence.

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486 Mass. 1115
(This disposition is referenced
in the North Eastern Reporter.)
Supreme Judicial Court of Massachusetts.

COMMONWEALTH

v.

Joshua B. DAVOREN

February 22, 2021

Reported below: 98 Mass. App. Ct. 1119 (2020).

Opinion

***1** The defendant's application is denied without prejudice. The case is remanded to the Appeals Court for reconsideration of the defendant's conviction under G. L. c. 269, § 10G, in light of our recent decision in Commonwealth v. Ashford, 486 Mass. 450 (2020). Either side may apply for further appellate review after the Appeals Court's reconsideration.

Appellate review denied.

All Citations

Slip Copy, 486 Mass. 1115, 2021 WL 786368 (Table)

End of Document

99 Mass.App.Ct. 1123
Unpublished Disposition

Appeals Court of Massachusetts.

COMMONWEALTH

v.

Joshua DAVOREN.

19-P-19
|
Entered: May 4, 2021.

By the Court (Meade, Sullivan & Sacks, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** On November 16, 2020, a panel of this court affirmed the defendant's conviction pursuant to G. L. c. 269, § 10G, of being a felon in possession of a firearm after having been previously convicted of two violent crimes. The defendant filed for further appellate review, which was denied without prejudice, but the case was remanded to this court for reconsideration of the defendant's conviction, in light of the Supreme Judicial Court's recent decision in Commonwealth v. Ashford, 486 Mass. 450 (2020). For the reasons set forth below, we affirm.

1. Prior violent crimes. The defendant claims that given the Supreme Judicial Court's holding in Ashford, his prior offenses of assault by means of a dangerous weapon (ADW) and assault and battery (A&B) do not constitute "violent crimes" for the purposes of G. L. c. 269, § 10G. We disagree.

"The ACCA provides a staircase of mandatory minimum and maximum enhanced punishments for certain weapons-related offenses if a defendant has been previously convicted of a 'violent crime' or a serious drug offense." Commonwealth v. Wentworth, 482 Mass. 664, 670 (2019). A defendant who commits such a weapon-related offense, while having two prior convictions for a "violent crime" or serious drug offense, is subject to a mandatory sentence of ten to fifteen years in state prison. See G. L. c. 269, § 10G (b). Under the ACCA, a "violent crime" includes "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another." G. L. c. 140, § 121. In determining whether a prior offense constitutes a violent crime for the purposes of G. L. c. 269, § 10G, we use a "modified categorical approach," where we look at additional evidence beyond the mere elements of the offense, to determine if the offense constitutes a "violent crime." Wentworth, 482 Mass. at 672.

However, in Ashford, the Supreme Judicial Court held that where the relevant predicate crime was A&B or ADW, the Commonwealth must prove that the defendant used intentional physical force, not mere recklessness, in order for the predicate offense to constitute a violent crime. See Ashford, 486 Mass. at 451, 467. Therefore, for the defendant's conviction under G. L. c. 269, § 10G, to stand, his predicate offenses for ADW and A&B must have involved the intentional use of physical force. See Ashford, supra.

We previously concluded that the evidence from the defendant's conviction for ADW, when viewed in the light most favorable to the Commonwealth, was sufficient for the offense to constitute a "violent crime" under the modified categorical approach.[2] See G. L. c.

140, § 121. The defendant, after an argument, revved his engine and attempted or threatened to run over the victim with a motor vehicle. The defendant's action required the victim to jump out of the way to avoid being struck. The defendant also admitted that he intended to scare the victim. Such an attempt or threat to run over another with a motor vehicle under these circumstances undoubtedly demonstrates an intent, not mere recklessness, to threaten the use of physical force against another. Cf. Ashford, 486 Mass. at 466, citing Leocal v. Ashcroft, 543 U.S. 1, 9-11 (2004) (act of driving under influence of alcohol carries substantial risk of bodily injury to another, but lacks intent for "use" of physical force against another). At bottom, such evidence demonstrates not only that the defendant acted with the required attempted and threatened use of physical force with a dangerous weapon (a motor vehicle) against another person, but also that when viewed in the light most favorable to the Commonwealth, such use of force was intentional. See Ashford, supra at 468. Indeed, he admitted as much.

***2** Furthermore, the evidence surrounding the defendant's conviction for A&B, when viewed in the light most favorable to the Commonwealth, was sufficient to establish that the predicate offense was one of violence under the force clause of the ACCA. During an argument with his mother, the defendant put his hands on her, attempted to grab her by her throat, forced her to the ground, and "grabbed" her phone out of her hand when she tried to call 911. The defendant's act of attempting to grab his mother's throat to force her to the ground demonstrates the defendant's intent to use force, or attempt to use force, to prevent his mother from calling 911. Cf. Ashford, 486 Mass. at 466, citing Voisine v. United States, 136 S. Ct. 2272, 2279 (2016) (husband recklessly hurling plate in anger against wall near his wife constitutes use of force, even if husband does not know or have "as an object," but only recognizes substantial risk, that shard from plate would ricochet and injure his wife). When viewed in the light most favorable to the Commonwealth, such evidence demonstrates that, like his conviction for ADW, the defendant's prior offense of A&B was for intentional conduct, rather than mere recklessness. See Ashford, supra.

Therefore, even when viewed with the benefit of the Supreme Judicial Court's further guidance in Ashford, the Commonwealth provided sufficient evidence that the defendant's prior offenses for ADW and A&B both constitute violent crimes for the purposes of G. L. c. 269, § 10G.

2. Jury instructions. For the first time in a post-remand supplemental memorandum, the defendant claims that a new trial is warranted, given the judge's failure to instruct the jury that the defendant's prior offenses for ADW and A&B required the intentional use of violent force against another person, rather than mere reckless conduct.

This new claim falls outside the scope of the Supreme Judicial Court's remand order to this panel. In that order, the court requested that we reconsider the defendant's convictions in light of Ashford, which does not discuss or hold anything related to jury instructions. Because such a jury instruction claim requires a careful evaluation of the trial evidence, and an opportunity for the Commonwealth to respond, this claim would be more appropriately resolved in a motion for new trial pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001).

Judgment affirmed.

All Citations

99 Mass.App.Ct. 1123, 168 N.E.3d 376 (Table), 2021 WL 1750142

Footnotes

1 The panelists are listed in order of seniority.

2 When evaluating the sufficiency of evidence, the evidence must be viewed in the light most favorable to the Commonwealth with specific reference to the substantive elements of the offense. See Commonwealth v. Latimore, 378 Mass. 671, 676-678 (1979). Here, the Commonwealth must prove that the defendant's conviction "has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another." G. L. c. 140, § 121.

168 N.E.3d 376

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173 N.E.3d 1093 (Table)
(This disposition is referenced
in the North Eastern Reporter.)
Supreme Judicial Court of Massachusetts.

COMMONWEALTH

v.

Joshua B. DAVOREN

September 14, 2021

Reported below: 99 Mass. App. Ct. 1123 (2021).

Opinion

Appellate review denied.

All Citations

173 N.E.3d 1093 (Table)

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