

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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|---------------------|---|--------------------------|
| COMMONWEALTH | : | No.: 902-2011 |
| | : | |
| v. | : | |
| | : | CRIMINAL DIVISION |
| JAMES LEMAR, | : | |
| Defendant | : | |

OPINION AND ORDER

The Defendant filed a Post-sentence Motion on May 15, 2012. Argument on Defendant's Motion was held on June 26, 2012. Defendant argues that the guilty verdict was against the weight of the evidence.

Background

On March 19, 2011, a black male entered the Jersey Shore Uni Mart on 101 Bridge Street, Jersey Shore. The individual requested a pack of Newport cigarettes and when he received them proceeded to exit the store without paying. Jaime Weaver, an employee working at the store, followed the individual outside and requested that he stop. The individual did stop and had a short conversation with Weaver, in which he indicated that he was not going to pay for the cigarettes. The individual then continued to leave the premises.

Weaver reported the incident and the Tiadaghton Valley Regional Police Department responded. Weaver identified the shoplifter as a black male, approximately 6 feet tall, and wearing a black hooded sweatshirt, gray pants, and a black cap. The police also watched video surveillance footage of the incident that was not very clear. Shortly thereafter the police identified a potential suspect that matched the description, James Lemar (Defendant). The police prepared a photo array with the Defendant and showed it to Weaver. Weaver positively

identified the Defendant as the shoplifter and he was charged with Retail Theft on March 31, 2011.

On May 15, 2012, Defendant was found guilty of Retail Theft following a non-jury trial. The Defendant was sentenced to twenty-four (24) months of probation consecutive to any current probation he may be serving. On May 15, 2012, the Defendant filed a timely Post Sentence Motion.

Discussion

Whether the Defendant's guilty verdict was against the weight of the evidence

The Defendant alleges that the verdict of guilty was against the weight of evidence. "The standard to apply in reviewing the sufficiency of the evidence is whether, viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find that every element of the crime has been proven beyond a reasonable doubt." Commonwealth v. Back, 389 A.2d 141 (Pa. Super. 1987). A defendant's request for a new trial based on the argument that the verdict was against the weight of the evidence will only be granted when the verdict is so contrary to the evidence as to make the award of a new trial imperative. Commonwealth v. Mason, 741 A.2d 708, 715 (Pa. 1999).

"It is well established that the finder of fact is free to believe all, part, or none of the evidence." Commonwealth v. Carter, 546 A.2d 1173, 1182 (Pa. Super. Ct. 1988). "It is [also] well settled that it is within the province of the trial judge, sitting without a jury, to judge credibility of the witnesses and weigh their testimony. Consequently, credibility determinations are generally not subject to review." *Id.*

The crime of Retail Theft, defined by 18 Pa.C.S. Section 3929(a)(1), has the following elements pertinent to this case:

A person is guilty of a retail theft if he: (1) takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof;

Here, this Court found the testimony of Weaver to be more credible than the testimony of the Defendant. Weaver not only saw the Defendant in the store but she also stopped the Defendant while he was leaving with the cigarettes. The police brought Weaver a photo array and she identified the Defendant. This Court found the photo array compelling because it had other photos very similar to the Defendant's. Moreover, Weaver identified the Defendant at the trial.

Apart from the identification of the Defendant, the Court found all of the remaining elements of the charge of Retail Theft were proven beyond a reasonable doubt. The cigarettes the Defendant carried away from the store were offered for sale. The Defendant left the store without paying for the cigarettes. Further, Weaver stopped the Defendant outside the store and he informed her that he was not paying. Therefore, the Defendant had the intention of depriving the merchant of possession of its merchandise and the verdict was not against the weight of evidence.

Conclusion

Based upon the foregoing, the Court finds no reason upon which to grant Defendant's Post-Sentence Motion. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4)(a), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of this Order to the Pennsylvania Superior Court; "(b) the right to assistance of counsel in the preparation of the appeal; (c) the rights, if the defendant is indigent, to appeal in forma pauperis and to proceed with assigned counsel as provided in Rule 122; and (d) the qualified right to bail under Rule 521(B)."

ORDER

AND NOW, this _____ day of July, 2012, based upon the foregoing Opinion, it is hereby ORDERED and DIRECTED that the Defendant's Post Sentence Motion is DENIED.

By the Court,

Nancy L. Butts, President Judge

xc: DA
PD