

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-866-2011
vs. :
: CRIMINAL DIVISION
: SHAKOOR TRAPP,
: Appellant : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this court's Order dated September 7, 2012. The relevant facts follow.

On May 29, 2011, an individual entered 606 Maple Street and assaulted a 23-year old female in an upstairs bedroom by shooting, stabbing, and choking her. Fortunately, she survived the attack. Based on the information the police learned from the victim and other aspects of their investigation, the perpetrator was an African American male wearing a white or cream colored hoodie, who had been seen around the neighborhood.

Appellant Shakoor Trapp (“Trapp”) was an African American male whom a neighbor had previously seen wearing a white hoodie and possessing a silver handgun in the vicinity of 610 Maple Street. The police showed the victim an eight-photograph array, which contained Trapp's photograph. The victim selected Trapp’s photograph and identified him as her attacker.

On May 31, 2011, the police charged Trapp with attempted homicide, aggravated assault by causing or attempting to cause serious bodily injury, aggravated assault

by causing or attempting to cause bodily injury with a deadly weapon, burglary, criminal trespass, person not to possess a firearm, possessing instruments of crime, recklessly endangering another person, and simple assault. Upon motion of the defense, the person not to possess charge was severed for trial purposes.

A jury trial was held from June 5, 2012 to June 7, 2012 on all the charges, except the severed charge. Rather than having a completely separate trial on the person not to possess a firearm charge, the parties stipulated that Trapp would proceed to a non-jury trial on that charge.

After the parties completed their presentation of evidence and their arguments to the jury, Trapp formally waived his right to a jury trial on the persons not to possess a firearm charge. When the court was conducting the colloquy for that waiver, it expressly told Trapp that one of the differences between a jury trial and a non-jury trial is that a jury might be unable to reach a unanimous verdict and a mistrial could be declared, but that the court would reach a verdict one way or the other. Trapp indicated that he understood, and his attorneys did not object or in any way indicate that the alleged agreement between the parties was that the court would issue a decision based on the jury's verdict.¹ The parties then incorporated the evidence presented to the jury and presented additional evidence regarding Trapp's prior criminal conviction that precluded him from possessing a firearm.

Following lengthy deliberations, the jury deadlocked and a mistrial was declared on all of the offenses that had been presented to the jury. On June 14, 2012, in accordance with the rules of criminal procedure, the court issued an opinion, verdict and

¹ At the time the court decided Trapp's motion for arrested judgment, the court utilized and cited the page numbers of a draft of the transcript of the waiver colloquy. Those page numbers, however, are incorrect. The waiver colloquy is actually found in a separate transcript dated June 7, 2012 consisting of four pages, numbered

order finding Trapp guilty of the firearm charge.

On June 15, 2012, Trapp filed a “Motion for Arrested Judgment or Alternatively to Dismiss Remaining Charges Due to Double Jeopardy.” In this motion, Trapp alleged that he and his attorneys believed that the court would decide the severed count based upon the determination of the jury verdict with the additional prior conviction evidence. In the alternative, Trapp argued that a retrial on the remaining charges would violate the principles of double jeopardy and collateral estoppel. The court held an argument on this motion on July 30, 2012, and it denied the motion in an Opinion and Order entered September 7, 2012.

Trapp filed a timely notice of appeal. The sole issue asserted on appeal is that Trapp’s double jeopardy rights would be violated if he stood trial on the remaining counts, because, in finding Trapp guilty of person not to possess a firearm, the court specifically found that Trapp was the perpetrator of the attack that formed the basis of the remaining charges.

DISCUSSION

“The prohibition against double jeopardy protects against a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.” Commonwealth v. McCane, 517 Pa. 489, 539 A.2d 340, 345-46 (1988), citing North Carolina v. Pierce, 395 U.S. 711, 89 S.Ct. 2072 (1969). “Generally, mistrial because of the inability of the jury to reach a verdict does not fall within these protections and, therefore, is not a bar to reprosecution.” McCane, 539 A.2d at 346.

When considering whether two crimes constitute the same offense for double jeopardy purposes, the court must look at the elements of each offense to determine whether each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy principles would preclude additional punishment or successive prosecutions. United States v. Dixon, 509 U.S. 688, 696 (1993); Commonwealth v. Buffington, 574 Pa. 29, 828 A.2d 1024, 1029 (2003).

To obtain a conviction on the person not to possess a firearm charge in this case, the Commonwealth had to prove that Trapp possessed a firearm and he had a prior conviction for unlawful restraint, an enumerated offense. See 18 Pa.C.S. §6105; Commonwealth v. Dixon, 997 A.2d 368, 381-382 (Pa. Super. 2010). None of the other offenses required the Commonwealth to prove that Trapp had a prior conviction, which was the whole reason why the person not to possess a firearm charge was severed from the other offenses. Possession of a firearm also was not an element of many of those other offenses.

For those offenses which arguably contained possession of a firearm as an element, i.e., aggravated assault with a deadly weapon, and possession of an instrument of crime, each contained an element that the firearm charge did not.² The possession of an instrument of crime charge required the Commonwealth to prove that Trapp intended to employ the weapon criminally, and the aggravated assault charge required the Commonwealth to establish that Trapp caused or attempted to cause bodily injury to the victim. 18 Pa.C.S. §§ 907, 2702.

Since Trapp has not satisfied the same elements test, a retrial of the remaining

² The court also notes that a firearm was not the only weapon which formed a basis of these charges. Since the perpetrator not only shot the victim, but also stabbed and choked her, the Commonwealth also asserted that the weapon for these charges was a firearm, a knife or both.

charges would not be barred by traditional double jeopardy principles. This, however, does not end the inquiry.

With respect to the criminal defendant, collateral estoppel is treated as a subpart or enhancement of the traditional double jeopardy protection. Commonwealth v. States, 595 Pa. 453, 938 A.2d 1016, 1020 (2007). Trapp alleged that collateral estoppel (or issue preclusion) prevented the Commonwealth from proceeding to a retrial on the other charges because the court, in finding Trapp guilty of the firearm offense, determined that he was the individual who shot the victim. Trapp relied heavily on States, supra, and Commonwealth v. Wallace, 411 Pa. Super. 576, 602 A.2d 345 (1992). The court found Trapp's reliance on these cases was misplaced.

In Wallace, the defendant was charged with numerous offenses including firearm offenses. The firearm offenses were severed for trial purposes. After a jury trial on the other charges, the defendant was acquitted. Following the acquittal, the defendant filed a motion to dismiss the firearm charges based on collateral estoppel. The trial court denied the motion.

On appeal, the defendant asserted that the jury's verdict in the first case precluded trial on the remaining charges because the verdict of the jury represented a factual finding that defeated the viability of the remaining charges. In reversing the trial court, the Superior Court noted that because the jury determined that the defendant either did not have a gun or that they were not convinced beyond a reasonable doubt that he had a gun, it would be offensive to collateral estoppel principles and in fact "a severe injustice to allow the Commonwealth another chance to convict appellant in a second trial simply because that charge was severed to ensure an unprejudiced jury." 602 A.2d at 349.

In States, the issue was whether a mistrial on some of the charges due to a hung jury, coupled with an acquittal in the bench trial, implicated double jeopardy or collateral estoppel principles such that a retrial could not occur. Before trial, States sought severance of an accidents involving death or personal injury charge while not properly licensed charge from the charges of homicide by vehicle and homicide by vehicle while driving under the influence of alcohol, due to the potential jury prejudice based on the fact that he did not hold a valid driver's license. The trial court agreed and granted severance, but suggested a simultaneous jury/bench trial, with the court determining guilt on the accidents involving death charge and the jury deciding the remaining charges. The parties agreed to this procedure and the simultaneous jury/bench trial commenced. The jury hopelessly deadlocked on the charges before it, and the trial court declared a mistrial. The trial court, however, acquitted the defendant of the accidents involving death charge, and explicitly stated that it was not convinced beyond a reasonable doubt that States was the driver of the vehicle. States then filed a motion to dismiss the remaining charges based on double jeopardy principles. The trial court denied the motion, but the appellate courts reversed.

The focal premise upon which these appellate decisions were reached was the fact that there was a final judgment in the defendant's favor on an issue or element that the Commonwealth would be required to prove in a subsequent trial. Accordingly, the defendant's double jeopardy rights would have been implicated on the retrial.

States and Wallace are clearly distinguishable from the facts of this case. Indeed, unlike the scenarios in those cases, Trapp was found guilty, not acquitted, of the charge. In order to proceed on retrial, the Commonwealth will not have to present evidence on an issue that has already been decided in Trapp's favor. To the contrary, the issue has

been decided against Trapp. If anything, utilizing collateral estoppel principles would preclude Trapp from contesting the fact that he possessed a firearm on the date in question and perhaps preclude him from presenting evidence that he was not the individual who shot the victim because a court of competent jurisdiction has already decided such ultimate facts. Such an outcome, though, would result in a denial of Trapp's right to a trial by jury and his due process rights, as well as strip him of the presumption of innocence. It is for reasons such as these that, in the criminal context, the use of the doctrine of collateral estoppel is considerably restricted, especially where the Commonwealth seeks to use it against a criminal defendant. Commonwealth v. States, 595 Pa. 453, 938 A.2d 1016, 1020 (2007); see also United States v. Dixon, 509 U.S. 688, 710 n.15 (1993) (“Under Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970), an acquittal in the first prosecution might well bar litigation of certain facts essential to the second one – though a conviction in the first prosecution would not excuse the Government from proving the same facts the second time.”).

Rather than being controlled by Wallace or States, this case is governed by cases such as Commonwealth v. Buffington, 574 Pa. 29, 828 A.2d 1024 (2003) and McCane, supra.

In Buffington, the jury acquitted the defendant of rape and involuntary deviate sexual intercourse, but deadlocked on the charge of sexual assault. The defendant claimed retrial on the sexual assault charge was barred by double jeopardy or collateral estoppel. In rejecting defendant's claims, the Pennsylvania Supreme Court stated: “The party seeking to invoke preclusion principles, however, bears the burden of establishing that the issue he seeks to foreclose from consideration in a subsequent prosecution **was necessarily resolved**

in his favor in the prior proceeding.” 828 A.2d at 1032-33 (emphasis added). The Court then found that the jury’s verdict did not establish or necessarily imply that the Commonwealth failed to establish an essential element of sexual assault because the jurors could have found that the defendant engaged in non-consensual sexual intercourse with the victim, albeit without forcible compulsion and at a time during which the victim was conscious and aware.

In McCane, the jury convicted the defendant of driving under the influence, but was unable to reach a verdict on the charge of homicide by vehicle while driving under the influence. The issue was whether a retrial was barred on the latter charge. The Pennsylvania Supreme Court held that retrial was permissible. “Double jeopardy presupposes a termination of the original jeopardy.” 539 A.2d at 346 n.6. The jury’s failure to reach a verdict was not an event that terminated jeopardy; therefore, a retrial would not constitute a “successive prosecution” in violation of double jeopardy.

Neither the court nor the jury decided any material fact or any element of any crime in Trapp’s favor. Therefore, this case is more akin to McCane and Buffington than States or Wallace.

In conclusion, a retrial on the remaining charges in this case is not barred by double jeopardy or collateral estoppel principles, because a mistrial due to the inability of the jury to reach a verdict did not terminate the original jeopardy on those offenses and there was no element or material fact that was resolved in Trapp’s favor. If Trapp had entered a stipulation with the Commonwealth regarding his ineligibility to possess a firearm such that all of the charges could have been tried before the jury without his prior conviction being introduced into evidence and the jury had returned a guilty verdict on the firearm charged but

deadlocked on the other charges, the Commonwealth clearly would not be precluded from proceeding to a retrial on the remaining charges. See McCane, supra. The result should not be any different when the finding of guilt on the firearm charge is made by the court, instead of a jury.

DATE: _____

By The Court,

Marc F. Lovecchio, Judge

cc: A. Melissa Kalas, Esquire (ADA)
Nicole Ippolito, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)