

Commonwealth v. Dieujuste

Appeals Court of Massachusetts

October 14, 2016, Entered

15-P-676.

Reporter

2016 Mass. App. Unpub. LEXIS 984 *; 90 Mass. App. Ct. 1110; 60 N.E.3d 1198; 2016 WL 5955968

COMMONWEALTH vs. PANOFSKY DIEUJUSTE.

Notice: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28 ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

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Subsequent History: Appeal denied by *Commonwealth v. Dieujuste*, 476 Mass. 1104, 2016 Mass. LEXIS 938, 65 N.E.3d 660 (Mass., Nov. 30, 2016)

Disposition: Judgments affirmed.

Judges: Cypher, Cohen & Green, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a District Court jury trial, the defendant, Panofsky Dieujuste, was convicted of possession with intent to distribute marijuana, a related school zone violation, and simple possession of cocaine (as a lesser included offense of the charged crime of possession with intent to distribute cocaine). On appeal, he contends that (1) his constitutional rights were violated when he was required to recite his pleas to the charges in the presence of the jury; and (2) the judge's instruction on reasonable doubt was defective. We affirm.

Background. On April 3, 2013, while the defendant was not at home, officers of the Everett police department executed a search warrant at the residence he shared with a housemate. In the course of the search, the police entered the defendant's attic room. Among the items found and seized from that location were: approximately eight ounces of marijuana, 1.8 grams of crack cocaine, a digital scale, a box of sandwich bags, some cash (less than \$100), and identification documents bearing the defendant's name and photograph. After returning home, the defendant [*2] called the police to report a break-in. When the police arrived, they told him about the search warrant and placed him under arrest. At the time of his arrest, the defendant was found to be in possession of a cellular telephone, about \$900 in cash, and seven clear bags containing, in total, less than one ounce of marijuana.

Discussion. At trial, the defendant did not object to the alleged errors he argues on appeal. We therefore review to determine if there was error, and, if so, whether the error created "a substantial risk of a miscarriage of justice." *Commonwealth v. Freeman*, 352 Mass. 556, 564, 227 N.E.2d 3 (1967). "Errors of this magnitude are extraordinary events and relief is seldom granted." *Commonwealth v. Randolph*, 438 Mass. 290, 297, 780 N.E.2d 58 (2002).

1. *Reciting pleas in the presence of the jury.* The defendant argues that his constitutional rights under the Fifth and Sixth Amendments to the United States Constitution and under Article 12 of the Massachusetts Declaration of Rights were violated when he was asked by the session clerk to state his pleas to each of the charges, and was compelled to respond "not guilty" four times. According to the defendant, his oral responses, as well as his tone and demeanor (neither of which may be ascertained from the record before us), constituted "testimony" that likely influenced the jury. We disagree.

Even if this procedure was irregular,¹ we discern no risk that it [*3] had a material effect on the verdict. The exchange occurred before the judge gave the jury preliminary instructions, and opening statements had yet to commence. The defendant was not under oath and did not speak from the witness stand. Immediately after the defendant responded with his pleas, the judge told the jury that the evidence had not yet begun. The judge then instructed the jury that in deciding the case they must consider only the evidence, i.e., the witness testimony and exhibits. In the final charge, she repeated this admonition and also emphasized that the defendant had not testified and had an absolute right not to do so.

"The jury are presumed to follow the judge's instructions." *Commonwealth v. Maynard*, 436 Mass. 558, 571, 767 N.E.2d 1 (2002). Where "[t]he judge's instructions were clear . . . we must presume the jury followed them." *Commonwealth v. Helfant*, 398 Mass. 214, 228, 496 N.E.2d 433 (1986). The jury would have understood from the instructions that neither the defendant's oral recitation of his [*4] pleas, nor any aspect of his tone of voice or demeanor, was evidence in the case. At most they would have viewed the exchange as ceremonial confirmation of the obvious fact that the defendant was contesting the charges. Whether or not there was error, there was no substantial risk of a miscarriage of justice.

2. *Reasonable doubt instruction.* In her instructions to the jury, the judge used the "modern syntax" version of the *Webster* charge on reasonable doubt. See Instruction 2.180 of the Criminal Model Jury Instructions for Use in the District Court (2009); *Commonwealth v. Webster*, 59 Mass. 295, 5 Cush. 295 (1850). About six months after the defendant's trial, the Supreme Judicial Court exercised its supervisory power to require that trial judges use a new version of this charge, which would provide "further clarification of the phrase 'moral certainty.'" *Commonwealth v. Russell*, 470 Mass. 464, 477, 23 N.E.3d 867 (2015). The objective was to use more modern language while preserving the "power, efficacy, and essence of the *Webster* charge." *Ibid.*

The defendant contends, in substance, that the concerns animating the revision demonstrate that the prior charge was constitutionally deficient. That is not the case. *Russell* was decided more than six months after the defendant's trial, and the new charge explicitly [*5] was established for prospective use. *Id.* at 477-478. Lest there be any misunderstanding, the court expressly disclaimed that the prior

¹ At oral argument the Commonwealth acknowledged that the procedure deviated from that prescribed by the then-current Instruction 1.100 of the Criminal Model Jury Instructions for Use in the District Court (2009), and informed the court that steps had been taken to insure that this would not occur again.

instruction was vulnerable to challenge, stating that the *Webster* charge "has been and continues to be a constitutionally sufficient source of [appropriate] context for the use of the term 'moral certainty.'" *Id.* at 476. There was no error, and hence no substantial risk of a miscarriage of justice.

Judgments affirmed.

By the Court (Cypher, Cohen & Green, JJ.²),

Entered: October 14, 2016.

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²The panelists are listed in order of seniority.