

Commonwealth v. Ernst

Appeals Court of Massachusetts

May 16, 2019, Entered

18-P-1395

Reporter

2019 Mass. App. Unpub. LEXIS 377 *; 95 Mass. App. Ct. 1113; 125 N.E.3d 800; 2019 WL 2152912

COMMONWEALTH vs. MICHAEL P. ERNST.

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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Disposition: Judgment reversed. Finding set aside. Judgment for the defendant.

Judges: Blake, Henry & McDonough, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a bench trial in the District Court, the defendant, Michael P. Ernst, was convicted of larceny over \$250 by single scheme pursuant to G. L. c. 266, § 30

(1). The defendant appeals, claiming that the evidence was insufficient and the sentence was illegal. We reverse.

Background. The defendant entered into a handwritten contract with Ashley Lynch (Ashley)¹ on September 4, 2015, which stated that Ashley "gave [the defendant] \$500 for a 1998 Saab Turbo Convertible Black. He payed [*sic*] \$700 and we're going to fix the car and split the profit when the car is sold." Thereafter, the defendant acquired the car and had it delivered to Ashley's mother's house, where Ashley also lived. The title was not transferred to either the defendant or Ashley, but stayed in the name of the prior owner. The title was physically held for safekeeping by Ashley's mother, Dorothy Lynch, at her home. At some point thereafter, new tires were put on the car.

Less than three months later, on November 23, 2015, Ashley filed an application for a criminal complaint, which issued. The complaint charged the defendant with larceny over \$250 by single scheme between September [*2] 4, 2015, and November 17, 2015.² At the arraignment on December 28, 2015, the defendant was released on personal recognizance and he was ordered to stay away from Ashley and to have no contact with her. After a jury-waived trial, the defendant was convicted and sentenced to two years in a house of correction.³ This appeal followed.

Standard of review. We review to determine whether, in the light most favorable to the Commonwealth, there was sufficient evidence to warrant the conviction. *Commonwealth v. Latimore*, 378 Mass. 671, 676-677, 393 N.E.2d 370 (1979). Where, as here, the defendant did not move for a required finding of not guilty at trial, he must demonstrate that his conviction created a substantial risk of a miscarriage of justice. *Commonwealth v. McGovern*, 397 Mass. 863, 867-868, 494 N.E.2d 1298 (1986). If "the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof." *Commonwealth v. Louis Constr. Co.*, 343 Mass. 600, 606, 180 N.E.2d 83 (1962), quoting *Commonwealth v. Carter*, 306 Mass. 141, 147, 27 N.E.2d 690 (1940).

¹ We use first names as two witnesses share a surname.

² The property is not specified in the complaint or in the application for criminal complaint. In his brief, the defendant argues that the alleged stolen property was the car. At oral argument, he stated that the property was the \$500 cash. The Commonwealth argues that the property was the cash, and its opening statement at trial suggests that it intended that the cash, not the car, constituted the stolen property.

³ Shortly before trial, Ashley had the car removed from her mother's property and sent to a junkyard. She testified that, after a fire at her mother's house, "the house inspector" required that the car be removed before an occupancy permit would be issued.

Larceny. As a preliminary matter, the parties agree that the larceny conviction was premised on that portion of the statute that addresses larceny by false pretenses. As such, the Commonwealth must prove beyond a reasonable doubt that the defendant "(1) knowingly ma[de] a false statement of fact; (2) with the intent that the person to whom the statement [*3] is made should rely on it as true; (3) [that there was] reliance by such person; and (4) as a result, the person parts with personal property or money worth more than \$250." *Commonwealth v. O'Connell*, 438 Mass. 658, 664 n.9, 783 N.E.2d 417 (2003).

The defendant first argues that the Commonwealth failed to demonstrate his intent to defraud Ashley, and that this is in essence a contract dispute that is a civil matter. In support of his argument, he cites *Commonwealth v. McCauliff*, 461 Mass. 635, 963 N.E.2d 719 (2012); *Louis Constr. Co.*, 343 Mass. 600, 180 N.E.2d 83; and *Commonwealth v. True*, 16 Mass. App. Ct. 709, 455 N.E.2d 453 (1983). In each of these cases, the defendant's larceny conviction was reversed where the court concluded that the defendant's mere nonperformance of a promise did not suffice to demonstrate deception. See *McCauliff*, *supra* at 640-643; *Louis Constr. Co.*, *supra* at 604-606; *True*, *supra* at 711-713. These cases stand for the proposition that "we must look to see what evidence, other than the defendant's failure to perform, was elicited to show that *he anticipated* that he would not perform his promise" (emphasis added), *True*, *supra* at 712, and that if such anticipation is not demonstrated, the matter is civil and not criminal. See *McCauliff*, *supra*; *Louis Constr. Co.*, *supra*.

Both *Louis Constr. Co.* and *True* are distinguishable from this case. They involved transactions with professionals engaged in business practices wherein complainants had sought out the defendants' [*4] services, which the complainants then alleged were not properly rendered. See *Louis Constr. Co.*, *supra*; *True*, *supra*. Neither of those factors are present here.

However, the analysis in *McCauliff* is on point to this case. In *McCauliff*, the complainant loaned the defendant \$70,000, with the understanding that the defendant was using the money to "clean up" a property that he owned and was selling. *McCauliff*, 461 Mass. at 636. The complainant was under the impression that "the sale of the property was imminent, but the defendant did not give him a time frame for how long it would take to get the property in the shape necessary for sale." *Id.* After a number of months passed, the defendant had not sold the property or repaid any of the loan. *Id.* The complainant made efforts to collect payment but was unsuccessful. *Id.* In reversing the defendant's conviction, the Supreme Judicial Court held that the Commonwealth failed to prove that "the defendant made a false statement he knew to be false at the time [the

complainant] agreed to loan the money . . . and, arguably, at the time [the complainant] actually parted with the funds This is so because what must be shown is that the false statement caused [the complainant] [*5] to make the loan, or at least was material to his decision to do so. . . . The defendant's seemingly deceptive statements and evasive actions [after the loan transactions] arguably offer some support for an inference that he did not have an imminent sale of the property lined up when he gave that assurance to [the complainant] But without more, we cannot say that a contrary inference is not just as likely." *Id.* at 641-642. The court further stated that "there was little or no evidence from which to infer that the [defendant's] statements were false when made; the Commonwealth's repeated assertions that they were false does not make them so." *Id.* at 641. Contrast *Commonwealth v. Cheromcka*, 66 Mass. App. Ct. 771, 779-782, 850 N.E.2d 1088 (2006) (Commonwealth sufficiently proved deceptive intent at outset of transaction); *Commonwealth v. Lewis*, 48 Mass. App. Ct. 343, 350-352, 720 N.E.2d 818 (1999) (same); *Commonwealth v. Stovall*, 22 Mass. App. Ct. 737, 741-742, 498 N.E.2d 126 (1986) (same).

While the Commonwealth is correct that "[i]t is not necessary to have direct evidence that a representation was false" (quotation and citation omitted), *Commonwealth v. Reske*, 43 Mass. App. Ct. 522, 525, 684 N.E.2d 631 (1997), and that a false pretense "may be made by implication as well as by verbal declaration," *Louis Constr. Co.*, 343 Mass. at 604, here, the Commonwealth failed to prove that the defendant made a statement that he knew to be false at the time of the transaction. The totality of the Commonwealth's evidence on the issue of intent [*6] to defraud is its own assertion that the defendant took Ashley's money with no intention of repairing and reselling the car, or returning the cash. This does not suffice. Notably, the defendant started performing under the contract. The contract states that the defendant paid \$700; he also acquired the car, left it in Ashley's possession, and gave the title to Dorothy. At some point thereafter, new tires were put on the car, although there was no direct evidence that they were put on by the defendant. After his arraignment, the defendant was unable to continue to work on the car due to the no contact/stay away order that was a condition of his personal recognizance. Despite not having the keys to the car, Ashley exercised control over it when she disposed of the car prior to trial. At no time did Ashley ask the defendant for the keys, or for her money back. As the court stated in *McCauliff*, 461 Mass. at 641, just because the Commonwealth says the defendant's representations were false at the outset does not mean that the Commonwealth proved it beyond a reasonable doubt. Here, the Commonwealth's

evidence was insufficient, and accordingly the defendant's conviction must be reversed.⁴

Judgment reversed.

*Finding set [*7] aside.*

Judgment for the defendant.

By the Court (Blake, Henry & McDonough, JJ.⁵),

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⁴ In light of this ruling, we need not reach the remaining issue raised in the defendant's appeal.

⁵ The panelists are listed in order of seniority.