

Commonwealth v. Fortune

Appeals Court of Massachusetts

April 2, 2019, Entered

18-P-204

Reporter

2019 Mass. App. Unpub. LEXIS 237 *; 95 Mass. App. Ct. 1106; 124 N.E.3d 705; 2019 WL 1467211

COMMONWEALTH vs. MICHAEL J. FORTUNE.

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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Judges: Maldonado, Massing & Neyman, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A jury convicted the defendant, Michael J. Fortune, of breaking and entering in the daytime with intent to commit a felony, G. L. c. 266, § 18, and larceny over \$250, G. L. c. 266, § 30 (1), as in effect prior to St. 2018, c. 69, § 136. On appeal, he contends that the Commonwealth did not introduce sufficient evidence that he was the individual who left a cigarette butt bearing his deoxyribonucleic acid (DNA) at

the victim's apartment during the commission of the crimes.¹ We agree; therefore, we reverse.

Discussion. We review sufficiency challenges to determine "whether the evidence, in its light most favorable to the Commonwealth, . . . is sufficient . . . to permit the jury to infer the existence of the essential elements of the crime charged' . . . 'beyond a reasonable doubt'" (citations omitted). *Commonwealth v. Latimore*, 378 Mass. 671, 676-677, 393 N.E.2d 370 (1979). In all prosecutions, the Commonwealth must prove identity, *Commonwealth v. Blackmer*, 77 Mass. App. Ct. 474, 483, 932 N.E.2d 301 (2010), but where, as here, the Commonwealth seeks to do so only with DNA evidence recovered from the scene of a crime, it must prove beyond a reasonable doubt that the defendant left his DNA at the scene during the commission of the offense. *Commonwealth v. Anitus*, 93 Mass. App. Ct. 104, 107-109, 97 N.E.3d 700 (2018). There must be evidence to reasonably exclude "the hypothesis that the [*2] [DNA] was left at some time other than when the crime was committed." *Commonwealth v. French*, 476 Mass. 1023, 1025, 68 N.E.3d 1191 (2017).

Here, the only evidence linking the defendant to the crime scene was DNA on a cigarette butt. However, DNA remains on surfaces long after its transfer. See *Anitus*, 93 Mass. App. Ct. at 108. And, much like the discarded electronic bank transfer (EBT) card that was insufficient to support a finding of identity in *Commonwealth v. Renaud*, 81 Mass. App. Ct. 261, 262-264, 961 N.E.2d 1102 (2012), cigarette butts are easily transportable and routinely discarded immediately after use. See *id.* (cut-up and taped EBT card with defendant's name found at scene of break-in insufficient to link defendant to crime as it is portable item and was apparently discarded). Accordingly, while the defendant's DNA on a cigarette butt suggests that the defendant possessed and smoked the cigarette at one time, it does not exclude the equally reasonable hypothesis that the cigarette was consumed at an earlier time and transported to the scene by someone else — either intentionally or accidentally. Compare *Commonwealth v. Wallis*, 440 Mass. 589, 595-596, 800 N.E.2d 699 (2003) (evidence insufficient to convict when it supports reasonable inference in favor of defendant and equally reasonable inference in favor of Commonwealth). For example, there was no evidence from which the jury could reasonably infer that the cigarette [*3] was consumed on scene, such as evidence of the lingering odor of cigarette smoke or the existence of ash remains. Nor was there evidence of the actual condition of the cigarette, so

¹ He also contends that the Commonwealth did not introduce sufficient evidence to prove that the item alleged to be stolen, a television, is worth over \$250. Because we conclude that the Commonwealth did not prove identity as to either offense, we do not address this issue.

as to exclude the possibility of it having been carried in on someone else's shoe. The Commonwealth did not present the cigarette butt itself, pictures of the cigarette butt, or testimony regarding what it looked like when found (i.e., whether it retained its round shape or appeared smashed and stepped on and left a tobacco imprint on the floor where it was discovered). In the absence of this or any other evidence linking the defendant to the scene, we cannot conclude that a jury could find beyond a reasonable doubt that the defendant, as opposed to any other individual, committed the crimes charged. Contrast *Commonwealth v. Fazzino*, 27 Mass. App. Ct. 485, 487, 539 N.E.2d 1060 (1989) (in addition to defendant former employee's fingerprints on file box in proprietor's ransacked office upstairs from burned-open safe, "there was evidence of knowledge of the premises, knowledge where money was kept, special knowledge about a point of entry that was not apparent, skill with a blowtorch, and that [defendant] harbored ill feelings against" proprietor).

Conclusion. The judgments are reversed, [*4] the verdicts are set aside, and judgments shall enter in favor of the defendant.

So ordered.

By the Court (Maldonado, Massing & Neyman, JJ.²),

Entered: April 2, 2019.

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² The panelists are listed in order of seniority.