Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Jul 01 2009, 9:12 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

MATTHEW D. ANGLEMEYER
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JOBY JERRELLS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SCOTT WALLACE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0812-CR-1066
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0806-FB-156877

July 1, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Scott Wallace ("Wallace") appeals his convictions of two counts of Robbery, each as Class B felonies,[1] Burglary, as a Class B felony,[2] Resisting Law Enforcement, as a Class A misdemeanor,[3] and Unlawful Possession of a Firearm by a Serious Violent Felon, a Class B felony,[4] as well as the finding that he was a Habitual Offender.[5] We affirm.

Issues

Wallace raises two issues, which we restate as:

I. Whether his conviction of Unlawful Possession of a Firearm by a Serious Violent Felon ("PSVF") violated the Fourteenth Amendment Due Process Clause; and

II. Whether the trial court abused its discretion in declining to give a jury instruction tendered by Wallace.

Facts and Procedural History

Wallace was previously convicted in Indiana of two separate felonies: Robbery in 1999 and PSVF in 2003. One night in 2008, Nicholas Johnson ("Johnson") and Rick Davis were in Johnson's house, when three men entered and held them at gunpoint. The intruders were looking for money and drugs. Ultimately, they took cash, marijuana, and other items that had been in the house.

---

[1] Ind. Code § 35-42-5-1.

[2] Ind. Code § 35-43-2-1.

[3] Ind. Code § 35-44-3-3.

[4] Ind. Code § 35-47-4-5.

[5] Ind. Code § 35-50-2-8.

The State charged Wallace with two counts of Robbery, Burglary, Resisting Law Enforcement, and PSVF, among other charges. It later alleged that Wallace was a Habitual Offender because he had previously been convicted of two unrelated felonies.

After a two-day trial, the jury found Wallace guilty of two counts of Robbery, Burglary, and Resisting Law Enforcement. Pursuant to a plea agreement, Wallace admitted that he was a Habitual Offender. As he waived his right to trial by jury regarding the PSVF count, the matter was tried to the bench. The trial court took the PSVF count under advisement, accepted legal briefs on the issue, and ultimately found Wallace guilty of PSVF.

He now appeals.

Discussion and Decision

I. Possession by a Serious Violent Felon Count

Wallace argues that his conviction of the PSVF count violated the Fourteenth Amendment Due Process Clause. Because the statute does not specify the mens rea for an element of the offense – being a serious violent felon – he asserts that the statute is void-for-vagueness and fails to give fair notice of what conduct is prohibited.

"A serious violent felon who knowingly or intentionally possesses a firearm" commits Unlawful Possession of a Firearm by a Serious Violent Felon. Ind. Code § 35-47-4-5(c). A person is a "serious violent felon" if he has previously been convicted in Indiana of, among other things, Robbery. I.C. § 35-47-4-5(a) and -(b)(12).

A criminal statute must define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage

arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). Ignorance of the law, however, does not excuse criminal conduct. U.S. v. Dimitrov, 546 F.3d 409, 414 (7th Cir. 2008), cert. denied, 129 S. Ct. 1372 (2009). The United States Supreme Court "has recognized repeatedly that a legislature constitutionally may prohibit a convicted felon from engaging in activities far more fundamental than the possession of a firearm." Lewis v. U.S., 445 U.S. 55, 66 (1980) (citing, as examples, disenfranchisement, prohibition from the practice of medicine, and prohibition from holding office in labor organization).

In U.S. v. Dimitrov, the Seventh Circuit analyzed a 1992 federal statute that prohibited knowingly operating an illegal money transmitting business. The 2001 Patriot Act removed the mens rea designation, thereby prohibiting the operation of an illegal money transmitting business, regardless of whether the operator knew the conduct to be illegal under state or federal law. In Dimitrov, the Seventh Circuit held that the statute did not violate the Due Process Clause, concluding that it was "enough that the statute requires a defendant to know the facts that make his conduct illegal." Id.

Meanwhile, in U.S. v. Pfeifer, the Eighth Circuit held that the defendant's actual knowledge of the relevant statute foreclosed his vagueness/fair notice argument. U.S. v. Pfeifer, 371 F.3d 430, 438 (8th Cir. 2004).

> Pfeifer's due process claim is precluded by the overwhelming evidence in the record showing that he had actual notice of the law prohibiting his possession of firearms. In 1996, Pfeifer forfeited custody of his firearms after having a protective order obtained against him in the course of his divorce. At the expiration of the protective order three years later, Pfeifer attempted to regain possession of his firearms from the Sheriff. The Sheriff informed Pfeifer that the new federal law prevented him from legally possessing firearms, and therefore refused to return them.

Id.

Here, Wallace was sentenced in 2003 for PSVF, the very offense of which he now claims to have had inadequate notice. Ex. 55. We conclude that Wallace's fully-executed, six-year term of imprisonment with the Department of Correction constituted actual notice of the PSVF statute.

In his argument, Wallace cites eight federal cases that stand for broad Due Process doctrines – vagueness, fair notice, and the rule of lenity. None of the cases, however, provides support for his argument that the Due Process Clause requires proof that he had previously been convicted of an offense that he knew to be defined as a "serious violent felony" in the PSVF statute.

Finally, this Court has once held and repeatedly recognized that, for purposes of the PSVF statute, proof of scienter is required only as to the element of possessing a firearm. In Rhone v. State, Rhone argued that the trial court should have instructed the jury that the PSVF statute required proof that the defendant knew he was a serious violent felon. This Court rejected Rhone's argument, concluding that "the statute merely requires that a person knowingly or intentionally possess a firearm after having been convicted of a serious violent felony." Rhone v. State, 825 N.E.2d 1277, 1286-87 (Ind. Ct. App. 2005), trans. denied. "[N]either Indiana Code Section 35-47-4-5 nor case law requires the State to prove that a person knew his status as a serious violent felon as an element of unlawful possession of a firearm by a serious violent felon." Id. at 1287. See also Dugan v. State, 860 N.E.2d 1288,

1291 (Ind. Ct. App. 2007) ("the State must prove that Dugan knowingly or intentionally possessed a firearm while, at the same time, having a qualifying prior felony conviction"), trans. denied; and Causey v. State, 808 N.E.2d 139, 143 (Ind. Ct. App. 2004) ("the State had to prove that Causey had been convicted of robbery and, thereafter, knowingly or intentionally possessed a firearm").

Wallace's PSVF conviction did not violate the Due Process Clause.

II. Jury Instruction regarding Benefit to State's Witness

Wallace also argues that the trial court abused its discretion in refusing to give a jury instruction that he tendered. Johnson was an eyewitness to the offenses and was the State's first witness to testify at trial. Wallace asserted that Johnson received favorable treatment from the State in return for his testimony and that the jury should have been instructed to examine "with greater caution" Johnson's testimony because of the favorable treatment. App. at 119.

The manner of instructing a jury lies largely within the sound discretion of the trial court, and we review the trial court's decision only for an abuse of that discretion. Powell v. State, 769 N.E.2d 1128, 1132 (Ind. 2002).

> The test for reviewing the trial court's decision to refuse a tendered instruction is: (1) whether the instruction correctly states the law; (2) whether there was evidence in the record to support the giving of the instruction; and (3) whether the substance of the instruction is covered by other instructions given by the court.

Id.

In its preliminary instructions, the trial court listed six factors the jury could consider

"in determining the value to give to a witness's testimony," including "any interest, bias or prejudice the witness may have" and "your knowledge, common sense and life experiences." App. at 147. "You should not disregard the testimony of any witness without a reason and without careful consideration." Id.

On direct examination, Johnson acknowledged that he had in the house "[j]ust one little bag of marijuana, which was, like, real little. I don't know how much was in there." Tr. at 49. On cross-examination, Johnson testified that a prosecutor had advised him that he would not be prosecuted for Possession of Marijuana. Wallace's attorney then questioned Johnson whether he had avoided prosecution for Possession of Marijuana in consideration for his testimony against Wallace.

> Q: And what happens if you didn't come in here and testify?
>
> A: Nothing that – I don't know. Nobody said anything to me. . . . I don't know what happens if I don't testify.

Tr. at 96. The State then elicited on redirect Johnson's confirmation that no promises had been made to acquire his testimony. Wallace's attorney responded as follows on recross:

> Q: No promises except that if you came in and testified to a robbery, you would not be charged with possession of marijuana.
>
> A: No.
>
> . . .
>
> Q: Is that correct?
>
> A: No, it's not correct.

Tr. at 101.

Upon conclusion of the trial, Wallace asked the trial court to give the following instruction:

> YOU HAVE HEARD TESTIMONY THAT [WITNESS], A WITNESS, HAS RECEIVED [BENEFITS, COMPENSATION, FAVORED TREATMENT, ETC.] FROM THE GOVERNMENT IN CONNECTION WITH THIS CASE. YOU SHOULD EXAMINE [WITNESS'] TESTIMONY WITH GREATER CAUTION THAN THAT OF OTHER WITNESSES. IN EVALUATING THAT TESTIMONY, YOU SHOULD CONSIDER THE EXTENT TO WHICH IT MAY HAVE BEEN INFLUENCED BY THE RECEIPT OF [E.G., BENEFITS] FROM THE GOVERNMENT.

App. at 119 (brackets in original).

This is a correct statement of the law. See Jarrett v. State, 498 N.E.2d 967, 968 (Ind. 1986) (concluding that it "would be obviously relevant and proper for a jury to consider the quantity of benefit to accusing witnesses" and "whether they are thereby avoiding imprisonment of ten days, ten weeks, or ten years"). Nonetheless, the preliminary instruction regarding a witness' bias or interest, quoted above, had addressed the same idea. The trial court's first final instruction reminded the jury that it had already been instructed as to witness credibility and that the preliminary and final instructions should be considered collectively in the jury's deliberations.

As to the remaining consideration, whether there was evidence in the record to support the giving of the instruction, the trial court clearly found that such was not the case. After argument regarding Wallace's tendered instruction, the trial court commented as follows:

> [T]he reason I allowed the questioning of the witness with respect to this issue is because I think what the witness thinks about his testimony in this trial relates to his bias, interest or motive. Therefore, it relates to his credibility as a witness, and credibility is always at issue when you're testifying in front of a jury.

> And for that reason, I think it's sufficiently covered by the credibility instruction that the court has already given.
>
> Had I heard any inkling of evidence that the State did make any type of promise, whether it was in writing in the form of a plea agreement, or off the cuff in a conversation, then I – then I might consider giving this. But I don't believe that that's even the case.
>
> So what I feel is that the evidence, as it has come in, is sufficiently covered by the credibility instruction.

Tr. at 363-64 (emphases added). After additional argument, the trial court took the tendered instruction under advisement and ultimately declined to give it.

Although Wallace's tendered instruction was a correct statement of the law, another instruction addressed the same issue. Moreover, the trial court determined there was no evidence to support the giving of Wallace's instruction. Therefore, the trial court did not abuse its discretion in declining to give the jury instruction tendered by Wallace.

Conclusion

Wallace's conviction of the PSVF count did not violate the Fourteenth Amendment Due Process Clause. The trial court did not abuse its discretion in declining to give one of Wallace's tendered jury instructions.

Affirmed.

DARDEN, J., and ROBB, J., concur.