

[J-137-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 25 EAP 2003
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court, No. 0569 EDA 2001 dated
	:	February 15, 2002 affirming the judgment
v.	:	of the Court of Common Pleas of
	:	Philadelphia County at 9905-0311
	:	
CHRISTOPHER YOUNG,	:	
	:	
Appellant	:	ARGUED: October 22, 2003
	:	
	:	
	:	
	:	

OPINION

MR. CHIEF JUSTICE CAPPY

DECIDED: May 27, 2004

This court granted allowance of appeal to consider whether a mistrial was warranted after a police officer testified that a police photo was acquired from “contact with the police” and later referred to the police photo number. The trial court refused to grant a mistrial and the Superior Court affirmed. For the reasons discussed herein, we now affirm the orders of the courts below.

The facts set forth by the Superior Court establish that the police arrested Appellant, Christopher Young, following a shooting during which two persons were injured and one person murdered. Appellant and his co-defendant were tried before a jury. During trial, Detective Charles Brown, of the Philadelphia police department, related that an eyewitness to the shooting came into the police station and was shown photographs in a “photo imager.”

Detective Brown then explained that the photo imager can bring up photographs of individuals “who have had contact with the police” based on certain variables, descriptions, ages, and locations in different areas of the city. N.T., 11/7/2000, p. 64. Defense counsel immediately objected and requested a mistrial. Id. at 64-65. Following a sidebar discussion, the trial court denied counsel’s request for a mistrial and offered to give a curative instruction. Id. at 65-69. Counsel declined the curative instruction since he “didn’t want to highlight” the statement. Id. at 67, 69.

Thereafter, the questioning of Detective Brown resumed and the prosecutor asked whether the eyewitness identified Appellant. Detective Brown replied, “Yes, he did. He also identified a photograph of Christopher Young, Police Photo Number 775 --.” Id. at 71. The Commonwealth then asked, “Did he say anything -- did he specifically say anything at all when he observed the photograph of Christopher Young?” Id. Defense counsel immediately requested a sidebar. The court sustained counsel’s objection and the prosecution moved on with the examination of the witness.

Following trial, the jury convicted Appellant of first degree murder, two counts of attempted murder, criminal conspiracy, and possession of an instrument of crime. The jury sentenced Appellant to life imprisonment for first degree murder. The trial court imposed a concurrent term of ten to twenty years of imprisonment on each count of attempted murder, a consecutive term of ten to twenty years for criminal conspiracy and a concurrent term of one to two years for possession of an instrument of crime. On appeal, the Superior Court affirmed the judgment of sentence.

Appellant filed a Petition for Allowance of Appeal to this court raising one issue. This court granted the petition to consider whether the trial court erred in denying a mistrial where a police witness allegedly referred to Appellant’s prior criminal activity.¹

¹ In reviewing a question of whether a trial court erred in denying a motion for a mistrial, an appellate court considers whether the lower court abused its discretion. Commonwealth v. (continued...)

The parties agree that our decision in Commonwealth v. Allen, 292 A.2d 373 (Pa. 1973) guides the analysis in this case. Appellant argues that pursuant to Allen the statements made by Detective Brown created a reasonable inference of prior criminal conduct in the minds of the jury and denied Appellant a fair trial. Accordingly, Appellant concludes that a mistrial was warranted.

The Commonwealth responds that in this case, the detective stated that the photos were obtained from “prior police contact.” Under the standard set forth in Allen, mere references to an accused’s past contact with the police do not imply that the accused committed prior crimes. Accordingly, a mistrial was not warranted.²

In Allen, this court considered whether reversible error occurred when the trial court “permitted several of the Commonwealth’s witnesses to make references to the fact that the police had shown photographs of the appellant to the alleged eyewitnesses” over defense counsel’s objections. Allen, 292 A.2d at 374. In reviewing appellant’s challenge, this court specifically rejected an “inflexible” rule that any reference to a photograph at trial requires reversal. Instead, the court held that the important question is

whether or not a juror could reasonably infer from the facts presented that the accused had engage in prior criminal activity. A mere passing reference to photographs from which a reasonable inference of prior criminal activity cannot

(...continued)

Savage, 602 A.2d 309, 312 (Pa. 1992); see also Harman ex rel. Harman v. Borah, 756 A.2d 1116 (Pa. 2000).

² The Commonwealth also asserts that any possible prejudice could have been cured by an instruction. In this case, the trial court offered to instruct the jury that the detective’s testimony did not in any way indicate that defendant was previously arrested or engaged in prior criminal conduct. Defense counsel chose not to have cautionary instructions read to the jury; and thus, he cannot complain that the trial court erred by denying his request for a mistrial. We need not reach the Commonwealth’s alternative argument because, as discussed *infra*, we conclude that the admission of the references by Detective Brown did not require a mistrial.

properly be drawn does not invalidate the proceedings since there has been no prejudice as a result of the reference; so too, where it appears on the face of the record that there is an explanation of the police possession of the photograph unrelated to any inference of prior criminal activity.

Id. at 375.

The court explained that it was a fundamental precept of common law that the prosecution may not introduce evidence of the defendant's prior criminal conduct, since admission of such evidence acts to "predispose the minds of the jurors to believe the accused guilty, and thus effectually to strip him of the presumption of innocence." Id.; see also Commonwealth v. Spruill, 391 A.2d 1048, 1049-50 (Pa. 1978). Thus, the court held that where the jury could have reasonably inferred from the photographic evidence presented at trial that a defendant was involved in prior criminal activity, reversible error occurred. Allen, 292 A.2d at 375.

This court has rendered a number of decisions since Allen, which apply this test and clarify the scope of the inquiry.³ In Commonwealth v. Riggins, 386 A.2d 520 (Pa. 1978), this court reviewed a police detective's statement before the jury that the officer knew where the appellant lived. The appellant asserted that the statement implied the appellant had engaged in prior criminal activity. Id. at 524. The court held that a reversal was unwarranted since "to conclude that appellant had committed prior crimes from a detective's single statement that he knew where appellant lived, the jury would have to indulge in gross speculation." Id.; see also Commonwealth v. Carpenter, 515 A.2d 531, 534-35 (Pa. 1986) (fact that jury was informed that witness was a parole officer who knew the appellant did not convey to the jury any prior criminal involvement).

³ In addition to the cases discussed, this court decided Commonwealth v. Brown, 512 A.2d 596 (Pa. 1986) and Commonwealth v. Shawley, 563 A.2d 1175 (Pa. 1989), which also applied the Allen test. Both cases, however, were plurality decisions. Thus, the reasoning set forth in those cases is not pertinent to the discussion of the instant case. See, e.g., Commonwealth v. Bethea, 828 A.2d 1066, 1073 (Pa. 2003).

Similarly, in Commonwealth v. Carlos, 341 A.2d 71, 72 (Pa. 1975), the court explained that a mere passing reference that a witness identified the defendant from a number of photos displayed by a police detective was not reversible error. Carlos, 341 A.2d at 72; see also Commonwealth v. Reiss, 468 A.2d 451 (Pa. 1983); Commonwealth v. Smith, 314 A.2d 224, 226 (Pa. 1974). “In other words, aside from the fact that a police officer displayed the photograph, there was nothing else linking it to the police. It is highly unlikely that a juror would conclude from this alone that Carlos had engaged in prior criminal conduct.” Id. at 73.

In Commonwealth v. Nichols, 400 A.2d 1281 (Pa. 1979), the court addressed a situation where a police witness testified regarding the defendant’s “obstreperous” conduct during a police lineup conducted in an unrelated criminal case. Nichols, 400 A.2d at 1282. Although the jury was never informed that the lineup was unrelated to the instant criminal action, the jury was told that that only one witness viewed the lineup and that witness was a woman. Id. at 1283. All the witnesses involved in Nichols, however, were men and there was no indication that a woman even witnessed the crime. Id. Moreover, the jury was also informed that the Commonwealth’s key witness attempted to identify the alleged perpetrator through photographs and not a lineup. Id. Accordingly, the court concluded that the “jury could reasonably have inferred Nichols was involved in other unrelated crimes from the evidence relating to the ... lineup, prejudice resulted, and a new trial must be granted.” Id.

Finally, in Commonwealth v. Turner, 311 A.2d 899 (Pa. 1973), the court addressed a situation involving a photographic reference by a police officer. During testimony, the police officer explained that in compiling the photo display for the victim, “[he] took eighteen photographs in the Robbery Section, we have files of medium, tall and short robbery suspects and defendants...” Turner, 311 A.2d at 900. After acknowledging the generally accepted rule as stated in Allen, the court applied those principles to the instant situation and concluded that the reference that the photographs were of “robbery suspects and defendants” amounted to prejudicial error.

A review of these cases clarifies that in applying the Allen test to the facts of a particular matter, a mere passing reference to photographs does not amount to prejudicial error. Carlos. Further, they explain that references to prior police contact do not amount to reversible error. Riggins. Instead, it is only those references that expressly or by reasonable implication also indicate some involvement in prior criminal activity that rise to the level of prejudicial error. Nichols; Turner. With these principles in mind, we turn to the facts of this case.

Detective Brown made two statements that Appellant complains of and each will be discussed separately. The first statement explained how a photo imager worked and that the imager compiled photographs of those persons matching the description “who have had contact with the police.” The circumstances of this case is akin to the situation this court confronted in Carlos, when a Commonwealth eyewitness referred to the identification process in which he selected the defendant’s photograph after the police displayed the photographs for him to view. We therefore find that the explanation of how the photo imager compiled photographs and the statement regarding “contact with the police” focused only on prior contact with the police and did not reasonably imply prior criminal conduct. The prior contact with the police could have occurred under a variety of circumstances that were not criminal in nature including involvement in a motor vehicle accident or violation, as a witness to a crime, or as a victim of a crime.

In the second statement that Appellant asks us to review, Detective Brown made a reference to “Police Photo Number 775 --.” This was a mere passing reference to the photograph. There was no indication that Appellant’s photo was in the possession of the police due to prior criminal activity. We reiterate that references to prior police contact, which do not imply prior criminal conduct, do not constitute reversible error.

For the reasons stated herein, we affirm the order of the Superior Court.

Former Justice Lamb did not participate in the decision of this case.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Nigro files a dissenting opinion.