Circuit Court for Baltimore City

Case No. 114094007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2412

September Term, 2019

DAVID THORNTON

V.

STATE OF MARYLAND

Reed,
Shaw Geter,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: February 16, 2021

The appellant, David Thornton, was convicted in a jury trial, presided over by Judge Melissa Phinn, in the Circuit Court for Baltimore City of voluntary manslaughter and of carrying a dangerous weapon openly with the intent to injure another person.

For the manslaughter conviction, the appellant received a sentence of imprisonment for ten years. The appellant does not challenge his manslaughter conviction in any way. For his conviction for carrying a dangerous weapon, the appellant received a sentence of three years, to be served consecutively with the sentence for manslaughter. Both of the appellate contentions in this case relate exclusively to the dangerous weapon conviction. The contentions are:

1. That Judge Phinn committed plain error by failing to instruct the jury with respect to the so-called "penknife exception" to the offense of carrying a dangerous weapon openly; and

2. That the evidence was not legally sufficient to support the conviction for openly carrying a dangerous weapon.

Plain Error

At the very outset of his argument on this contention, the appellant frankly and openly acknowledges that he failed to make any timely objection to the jury instruction delivered by the court. Maryland Rule 4-325(e). In arguing that the Court should exercise "plain error" review in this case, the appellant repeats the almost universal mistake that most defense counsel make when arguing this issue. They belabor the frequently uncontroversial point that the alleged error qualifies for "plain error" review and that the appellate court, therefore, has the authority to exercise such review, should it be so inclined. In doing this, the advocate for "plain error" review ignores the fundamental nature of such

discretionary review. The critical issue is almost always not whether the appellate court has the authority to engage in "plain error" review. The real issue is that of why the court, with essentially unbridled discretion, would wish to engage in "plain error" review. The appellant here has totally ignored this issue.

As the Court of Appeals explained in Yates v. State, 429 Md. 112, 130-31, 55 A.3d 25 (2012), the "exercise of discretion to engage in plain error review is rare." The Court explained, *Id.* at 131, quoting Savoy v. State, 420 Md. 232, 243, 22 A.3d 845 (2011), "Plain error review is reserved for errors that are compelling, extraordinary, exceptional, or fundamental." (Emphasis supplied.) In this case, the alleged error in question dealt not with the primary conviction in the case but only with a secondary conviction. It dealt not with the lead sentence of ten years imprisonment but only with a subsidiary sentence. What the appellant has completely failed to do is not to persuade us that the alleged error was, indeed, error. What he has failed to do is to explain how the alleged error, even if conceded to be error, could qualify as "compelling, extraordinary, or exceptional." The omission in a jury instruction of the so-called "penknife exception" as it bears on a merely secondary conviction is, erroneous or not, hardly a "blockbuster." An ordinary error is, by definition, not extraordinary.

As this Court explained in Morris v. State, 153 Md. App. 480, 522, 837 A.2d 248 (2003), the common failure that occurs when plain error is promiscuously invoked "is the failure to realize the chasm of difference between due process and gratuitous process and the different mind sets that reviewing judges, in the exercise of that discretion, in all

likelihood bring to bear on those two very different phenomena." That difference was explained by us in Jeffries v. State, 113 Md. App. 322, 326, 688 A.2d 16 (1997):

> There is a vast philosophical, as well as legal, distinction between due process and gratuitous process. There are procedural requirements that must be satisfied before **process** literally becomes **due**. For a reviewing court to overlook a precondition for review or to interpret loosely a procedural requirement, on the other hand, is an indulgence in favor of a defendant that is purely gratuitous. Even those who are indisputably factually guilty are entitled to **due process**. By contrast, only instances of truly outraged innocence call for the act of grace of extending **gratuitous process**.

(Emphasis supplied.)

In the exercise of our discretion, we are not persuaded to undertake "plain error" review of the alleged but unpreserved error in this case.

Sufficiency Of The Evidence

Once again, we are dealing not with the manslaughter conviction but only with the subsidiary conviction for openly carrying a deadly weapon. With respect to the status of the weapon used by the appellant in this case as a "deadly weapon," the manslaughter victim died of a stabbing in his abdomen caused by what the appellant described as "my pocket knife." Its deadliness or dangerousness thereby speaks for itself. The appellant further described the "overall" length of his knife as "four or five" inches. The appellant himself, describing a confrontation between him and his mother, on the one hand, and three or four other persons, on the other hand, testified that "I was scared. I was in fear for me and my mother." To "make them back down," the appellant further testified, "I pulled out my pocket knife and showed it to them." As the appellant then engaged in hand-to-hand

combat with his ultimate victim, the appellant fought with his knife in his right hand. He acknowledged swinging the knife at his opponent "to get him off of me."

With respect to the definition of "weapon" as part of the crime of carrying a dangerous weapon, Criminal Law Article, §4-101, the appellant now contends that the State failed affirmatively to negate subsection 4-101(a)(ii)(2)'s penknife exception to the definition of "weapon."

At the motion for a judgment of acquittal, however, the appellant failed to raise the so-called penknife exception as having any bearing on the legal sufficiency of the State's case. The appellant frankly acknowledges that he failed to raise that issue in his motion for a judgment of acquittal. "Ordinarily, the appellate court will not decide any other issues unless it plainly appears by the record to have been raised in or decided by the trial court." Maryland Rule 8-131. We are, therefore, not even considering the so-called "penknife exception." As this Court held squarely in Whiting v. State, 160 Md. App. 285, 308, 863 A.2d 1017 (2004), aff'd 389 Md. 334, 885 A.2d 785 (2005):

> Maryland Rule 4-324(a) requires that as a prerequisite for appellate review of the sufficiency of the evidence, appellant move for a judgment of acquittal specifying the grounds for the motion…Review of a claim of insufficiency is available only for reasons given by appellant in his motion for judgment of acquittal.

(Emphasis supplied.)

The appellant did, however, preserve for appellate review his argument that the State's evidence was insufficient to establish that the weapon was carried openly. In that respect, however, the testimony of Deborah Wheeler adequately established this element of the offense. She testified that she saw the appellant and his mother "coming down the

street." She testified that, as they did so, the appellant was "swinging a knife." That is all the evidence that is required. Anything else was surplusage.

A Non-Contention: Inadequacy of Defense Counsel

With respect to the failure of the defense to have raised the "penknife exception" issue at the motion for a judgment of acquittal, the appellant makes the further claim that this failure ipso facto establishes the inadequacy of counsel. There are numerous reasons why an issue involving an inadequacy of counsel claim should be considered and resolved by way of post-conviction review rather than on direct appeal. On this occasion, however, we do not find it necessary to recite any of them. We decline even to consider the appellant's inadequacy of counsel claim for the simple reason that it is not properly a contention before us. The formal pleading on an appeal imposes a necessary limit on the substance that may be argued in support of that pleading. The contention formally raised by the appellant was clear:

> The evidence was insufficient to sustain Mr. Thornton's conviction for carrying a dangerous weapon openly with the intent to injure.

There is not a syllable in that pleading that remotely touches the subject of the adequacy or inadequacy of counsel. It behooves us periodically to remind defense counsel that the fundamental and independent question of the Sixth Amendment's right to the effective assistance of counsel is not an unexpressed but automatic contingent contention that is implicitly before the appellate court whenever the primary contention fails and that

failure, if further examined, might be blamed on the inadequacy of counsel. It is not in any sense an adequately pled contention in this case.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.