

MASSACHUSETTS APPEALS COURT

Commonwealth v. Donahue

6 Mass. App. Ct. 971 (1979) · Decided January 17, 1979

SUMMARY

The Massachusetts Appeals Court affirmed the denial of the defendant’s fourth motion for a new trial following his conviction for receiving stolen property. The court held that the motion judge properly rejected an alleged recantation and that the defendant failed to establish that evidence concerning promises or inducements to the principal witness was newly discovered.

CASE DETAILS

COURT	Massachusetts Appeals Court
JURISDICTION	Massachusetts
DECIDED	January 17, 1979
DISPOSITION	affirmed
PROCEDURAL POSTURE	The defendant appealed from an order denying his fourth motion for a new trial following his conviction for receiving stolen property.
STANDARD OF REVIEW	The appellate court upheld the motion judge's factual determinations, including the credibility determination rejecting the witness's recantation and the choice to credit the prosecuting attorney's denial of promises. The defendant bore the burden of establishing that the supporting evidence was newly discovered.
PRECEDENTIAL VALUE	Published Massachusetts Appeals Court opinion
PARTIES	Defendant v. Commonwealth

TOPICS

- post-conviction relief
- criminal procedure
- evidence
- appellate procedure
- standard of review

PRACTICE AREAS

- criminal procedure
- post-conviction relief
- evidence
- appellate procedure

QUESTIONS PRESENTED

1. Whether the defendant was entitled to a new trial because the principal witness allegedly recanted his trial testimony.

2. Whether the defendant was entitled to a new trial based on alleged promises or inducements made to the principal witness by police officers or the prosecution.
3. Whether a new trial was required as a matter of law because the judge deciding the fourth motion was not the judge who presided over the trial.

HOLDINGS

1. The defendant was not entitled to a new trial based on Fernald's alleged recantation because the motion judge found that Fernald was not telling the truth, and that credibility determination removed the factual basis for the claim.
2. A new trial was not required merely because the judge deciding the motion was not the judge who presided over the trial, particularly where the motion judge had read the trial transcript and rejected the alleged recantation.
3. The defendant was not entitled to a new trial because he failed to meet his burden of showing that the evidence concerning alleged promises or inducements was newly discovered.

KEY QUOTATIONS

“The burden was on the defendant to show that the evidence in support of his motion was newly discovered; this burden was not met.” (972)

“But this request for “consideration” does not require an inference that it was made as a result of a promise to Fernald in exchange for his testimony.” (973)

FACTUAL BACKGROUND

The defendant had been convicted of receiving stolen property, principally on the testimony of Fernald. Fernald and others later submitted affidavits and testimony asserting that Fernald had lied at trial, but the motion judge rejected the alleged recantation as untruthful. The defendant also relied on evidence that police officers may have offered Fernald assistance or consideration, but the record showed that defense counsel knew of relevant information before trial or had an opportunity to pursue it earlier, and the motion judge credited the prosecuting attorney's denial of any promise.

PROCEDURAL HISTORY

The defendant's conviction had previously been affirmed, along with the denial of three earlier motions for a new trial. In his fourth motion, he asserted newly discovered evidence consisting of an alleged recantation by the principal witness and alleged promises or inducements made to that witness by members of the prosecution team. The motion judge rejected the recantation and found that the evidence concerning promises and inducements was not newly discovered; the Appeals Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Commonwealth v. Donahue, 369 Mass. 943 (1976), cert. denied, 429 U.S. 833 (1976)
- Commonwealth v. Bernier, 359 Mass. 13, 16 (1971)
- Commonwealth v. Scott, 2 Mass. App. Ct. 763, 764 (1975), S.C. 360 Mass. 695 (1971)
- Commonwealth v. Melanson, 3 Mass. App. Ct. 108, 111 (1975)
- Commonwealth v. Meuse, 3 Mass. App. Ct. 189, 192 (1975)
- Commonwealth v. Subilosky, ante 860 (1978), S.C. 352 Mass. 153 (1967)
- Commonwealth v. Ellison, 376 Mass. 1, 17 (1978)
- Commonwealth v. Richardson, 1 Mass. App. Ct. 348, 349 (1973)
- Commonwealth v. Hubbard, 371 Mass. 160, 175 (1976)
- Graci v. Damon, ante 160, 166 (1978), aff'd on another ground, 376 Mass. 931 (1978)

OPINION

PER CURIAM.

We affirm the order denying the defendant's fourth motion for a new trial in the case of Commonwealth v. Donahue, 369 Mass. 943, cert. denied, 429 U.S. 833 (1976), in which the defendant's conviction for receiving stolen property was affirmed on review of the judgment and three separate motions for a new trial.

The defendant's fourth motion for a new trial alleges newly discovered evidence in two respects.

1. The allegedly newly discovered evidence that the principal witness, Fernald, had (as put in the defendant's brief) "lied during the *972trial," was presented on affidavits (submitted with the motion) by counsel for Fernald and by Fernald and on Fernald's subsequent oral testimony.

They cannot avail the defendant, since the motion judge in his "Order Denying Motion for New Trial" refused to "accept the 'recantation' " and found that Fernald "was not telling the truth." This determination must stand. Commonwealth v. Bernier, 359 Mass. 13, 16 (1971). It removed any basis for the motion in this respect and left unimpaired Fernald's trial testimony as a basis, together with the other evidence, for the jury's verdict of guilty.

Accordingly, we reject the defendant's argument that a new trial is required as a matter of law because the motion judge was not also the trial judge. Compare Commonwealth v. Scott, 2 Mass. App. Ct. 763, 764 (1975), S.C. 360 Mass. 695 (1971); Commonwealth v. Melanson, 3 Mass. App. Ct. 108, 111 (1975); Commonwealth v. Meuse, 3 Mass. App. Ct. 189, 192 (1975); Commonwealth v. Subilosky, ante 860 (1978), S.C.

352 Mass. 153 (1967) —cases in which the motion judge was not the trial judge. Contrast Commonwealth v. Ellison, 376 Mass. 1, 17 (1978); Commonwealth v. Richardson, 1 Mass. App. Ct. 348, 349 (1973). In Commonwealth v. Melanson, 3 Mass. App. Ct. at 111, the court pointed

out that the motion judge could have utilized the trial transcript; we note that the motion judge in this case stated that he had read the transcript.

See generally *Commonwealth v. Hubbard*, 371 Mass. 160, 175 (1976). 2. The motion judge was not required to grant a new trial on the basis of the defendant's claim of newly discovered evidence of promises and inducements allegedly made to Fernald by various members of the "prosecution team." Their testimony is contained in the transcript (received by the motion judge) of a hearing in the United States District Court for the District of Massachusetts on a petition for habeas corpus brought by the defendant, denied in part, and dismissed in part for failure to exhaust State court remedies, (a) Officer Rafferty, a detective in the Canton police department, testified that he "told [Fernald] I would given him some assistance if he assisted us in the investigation of the crime" when Fernald, on May 21, 1974, while being interrogated on a different charge, mentioned that the defendant was involved in criminal activity with him.

But Stoughton police Detective Hunnewell testified that he was present at the interrogation and told both the defendant and his attorney "about these promises" "within a week" after the interrogation — at least six months before trial. Further, it can be inferred from the transcript of the trial (and of the hearings on the prior motions) that the defendant during trial had Officer Rafferty's report which stated that Fernald had agreed to talk to the district attorney's office "as long as I came with him and got him out on the Street as I promised." The burden was on the defendant to show that the evidence in support of his motion was newly discovered; this burden was not met.

See *Graci v. Damon*, ante 160, 166 (1978), affid on another ground, 376 Mass. 931 (1978). Officer Rafferty's further testimony that the prosecuting attorney was privy to promises made to Fernald was flatly denied by the prosecuting attorney, who testified that neither he nor anyone in his presence had ever made any such promise.

We see no reason to supplant the motion judge's apparent choice to accept the prosecuting attorney's testimony. *Commonwealth v. Bernier*, 359 Mass. at 16. (b) Lieutenant Bergin of the State Police testified that he was present on May 22, 1974, when a written statement was first taken from Fernald and that neither then nor at any other time did he make any promise or offer an *973 inducement to Fernald in exchange for his testimony.

The defendant points to the testimony of Arthur O'Connell, a Boston police officer, who testified that he arrested Fernald in Roxbury on January 8, 1975, and that Fernald made a telephone call to a person who talked to Officer O'Connell and identified himself as Lieutenant Bergin. Officer O'Connell testified that Lieutenant Bergin told him that Fernald "was doing something big for him and he asked if any consideration could be given to [Fernald] he would appreciate it." But this request for "consideration" does not require an inference that it was made as a result of a promise to Fernald in exchange for his testimony.

Fernald's statement incriminating the defendant had been taken long before, and he had already been granted immunity. Compare *Commonwealth v. Donahue*, 369 Mass. at 952, part 6. Here again the defendant has not met his burden of showing that Lieutenant Bergin's request was newly discovered. Indeed, the transcript indicates that defense counsel knew of the telephone call (see *Donahue* case, *supra* at 951, part 5) and had an opportunity to pursue the matter when Lieutenant Bergin was called as a witness.

Willie J. Davis (Melvin S. Louison & Jerry E. Benezra with him) for the defendant. Charles J. Hely, Assistant District Attorney, for the Commonwealth. Order denying motion for new trial affirmed.