

SUPERIOR COURT OF PENNSYLVANIA

Commonwealth v. Ball

357 Pa. Super. 32 (Pa. Super. Ct. 1986) · Decided August 8, 1986

SUMMARY

The Pennsylvania Superior Court affirmed Robert J. Ball’s judgment of sentence for burglary, terroristic threats, and intimidation of witnesses or victims. The court held that the proffered after-discovered evidence was offered solely for impeachment and therefore could not support a new trial. It also rejected claims of ineffective assistance based on counsel’s failure to call or investigate witnesses and declined to consider an unpreserved witness allegation raised only in the appellate brief.

CASE DETAILS

COURT	Superior Court of Pennsylvania
WRITING FOR THE COURT	Johnson; Watkins; Wickersham
JURISDICTION	Pennsylvania
DECIDED	August 8, 1986
DISPOSITION	affirmed
PROCEDURAL POSTURE	Direct appeal from a judgment of sentence following a jury conviction for burglary, terroristic threats, and intimidation of witnesses or victims. The appellant challenged the denial of post-verdict motions and sought a new trial based on alleged after-discovered evidence and ineffective assistance of trial counsel.
STANDARD OF REVIEW	The court applied the established four-part test for a new trial based on after-discovered evidence and examined whether the proposed evidence was solely impeachment evidence. For ineffective assistance, the court required arguable merit, the absence of a reasonable strategic basis, and prejudice. The court also applied the rule that appellate courts consider only issues properly preserved and facts appearing in the trial-court record.
PRECEDENTIAL VALUE	Published precedential opinion of the Superior Court of Pennsylvania
PARTIES	Robert J. Ball v. Commonwealth of Pennsylvania

TOPICS

- criminal procedure
- evidence
- ineffective assistance
- preservation of error
- appellate procedure

PRACTICE AREAS

Pennsylvania criminal law

criminal procedure

appellate practice

evidence

QUESTIONS PRESENTED

1. Whether Ball was entitled to a new trial based on alleged after-discovered evidence concerning the prior condition of the residence's doors.
2. Whether trial counsel was ineffective for failing to discover or subpoena Albert Smolensky as a witness.
3. Whether the appellate court could consider the alleged testimony of Tom Gill when that witness and proposed testimony were mentioned only in Ball's appellate brief and were not presented to the trial court.

HOLDINGS

1. A new trial was not warranted because the proposed evidence concerning the prior condition of the doors would be used solely to impeach the Commonwealth's witnesses, failing the after-discovered-evidence requirement that the evidence not be used solely for impeachment.
2. Trial counsel was not ineffective because Smolensky's proposed testimony lacked arguable merit: the prior condition of the outside door was irrelevant to the burglary charge and, even if relevant, was inadmissible without evidence that the door's condition had not changed before the burglary.
3. The court would not consider the alleged facts concerning Tom Gill because the issue was not preserved in the trial court and the appellate record contained no reference to the witness or proposed testimony.

KEY QUOTATIONS

“A new trial will be awarded on the basis of after-discovered evidence only if the evidence in question:” (34)

“In this prosecution for burglary, we fail to see how the condition of the outside door leading into the kitchen is either relevant or admissible.” (36)

“We will not consider information located only in a party’s brief.” (38)

FACTUAL BACKGROUND

Ball was discovered inside a private residence with another man, unloading meat from the complainant's freezer into a plastic garbage bag. The complainant testified that he had left the residence approximately thirty minutes earlier with the lock in good condition and returned to find the door pushed in and the two men inside. Ball sought to introduce testimony from Albert Smolensky, who had observed damage to the doors more than a month before the burglary, and from Tom Gill, who allegedly would testify that the complainant held a grudge against Ball.

PROCEDURAL HISTORY

A jury found Ball guilty of burglary, terroristic threats, and intimidation of witnesses or victims. The trial court denied post-verdict motions and sentenced Ball to three and one-half to ten years' imprisonment for burglary and

five years' consecutive probation for intimidation. Ball filed a pro se direct appeal, and appellate counsel was appointed. The Superior Court rejected both appellate issues and affirmed the judgment of sentence.

DISPOSITION

affirmed

CASES CITED

- Commonwealth v. Myer, 340 Pa. Super. 176, 489 A.2d 900 (1985)
- Commonwealth v. Valderrama, 479 Pa. 500, 388 A.2d 1042 (1978)
- Commonwealth v. Walker, 348 Pa. Super. 207, 501 A.2d 1143 (1985)
- Topelski v. Universal South Side Autos, Inc., 407 Pa. 339, 180 A.2d 414 (1962)
- Rubinstein v. J.E. Kunkle Co., 244 Pa. Super. 474, 368 A.2d 819 (1976)
- Reilly by Reilly v. Southeastern Pennsylvania Transportation Authority, 507 Pa. 204, 489 A.2d 1291 (1985)
- McFarlane v. Hickman, 342 Pa. Super. 240, 492 A.2d 740 (1985)