

## DISTRICT OF COLUMBIA COURT OF APPEALS

### Alazajuan M. Gray and Clifton Smith v. United States

147 A.3d 791 (D.C. 2016) · No. 13-CF-854 & 13-CM-109; 13-CM-1039 · Decided October 20, 2016

#### SUMMARY

The District of Columbia Court of Appeals held that the trial court should have severed charges arising from two separate Metro robbery incidents because evidence from the first robbery was not sufficiently distinctive or necessary to establish identity or context for the second and created unfair prejudice. The court vacated the appellants' convictions for the September 28 unarmed robbery and Clifton Smith's related receiving-stolen-property conviction, while affirming the September 21 armed-robbery convictions. The court also directed correction of other judgments, including vacating Alazajuan Gray's offense-during-release conviction and enhancing certain sentences.

#### CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                         |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | District of Columbia Court of Appeals                                                                                                                                                                                                                                                   |
| WRITING FOR THE COURT | John Fisher; Corinne Beckwith; Stephen G. Newman                                                                                                                                                                                                                                        |
| JURISDICTION          | District of Columbia                                                                                                                                                                                                                                                                    |
| DECIDED               | October 20, 2016                                                                                                                                                                                                                                                                        |
| DOCKET                | 13-CF-854 & 13-CM-109; 13-CM-1039                                                                                                                                                                                                                                                       |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                                                                                                                   |
| PROCEDURAL POSTURE    | Defendants appealed convictions arising from two separate Metro robberies and related offenses, challenging joinder and severance, jury instructions, evidentiary rulings, sufficiency of the evidence, merger, and sentencing.                                                         |
| STANDARD OF REVIEW    | Abuse of discretion for joinder, severance, evidentiary, and defense-presentation rulings; plain-error review for the unpreserved aiding-and-abetting instruction claim; sufficiency of the evidence in the light most favorable to the government; sentencing for abuse of discretion. |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                                                                                                                          |
| PARTIES               | Alazajuan M. Gray, Clifton Smith v. United States                                                                                                                                                                                                                                       |

#### TOPICS

criminal procedure

evidence

appellate procedure

standard of review

sentencing

## PRACTICE AREAS

criminal procedure

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## QUESTIONS PRESENTED

1. Whether the September 21 and September 28 robbery charges were properly joined under Superior Court Criminal Rule 8(b).
2. Whether the trial court abused its discretion under Rule 14 by denying severance of the robbery charges.
3. Whether Gray was prejudiced by trying the contempt or offenses-during-release charge with the other offenses.
4. Whether the aiding-and-abetting instruction sufficiently required Smith to have actual knowledge that Gray was armed.
5. Whether restrictions on expert testimony concerning eyewitness identification constituted reversible error.
6. Whether restrictions on defense testimony and photographic evidence denied appellants a meaningful defense.
7. Whether testimony recounting McIntosh's statements to police was inadmissible hearsay.
8. Whether sufficient evidence supported Gray's September 28 robbery and carrying-a-dangerous-weapon convictions and Smith's obstruction conviction.
9. Whether Gray's offenses-during-release convictions should merge or instead operate as sentencing enhancements.
10. Whether Smith's gun-offender registration, sentencing, and youth-offender arguments warranted relief.

## HOLDINGS

1. The trial court abused its discretion by denying severance because evidence of the September 21 robbery was not mutually admissible to prove the September 28 robbery and was likely to be amalgamated by the jury into a single inculpatory mass.
2. The severance error was harmless with respect to the appellants' September 21 armed-robbery convictions.
3. The trial court did not abuse its discretion by trying Gray's contempt charge with the other offenses.
4. The jury instructions sufficiently conveyed that Smith, as an aider and abettor, had to know that Gray was armed; no plain error occurred.
5. The restrictions on Dr. Penrod's expert testimony did not constitute reversible error or an abuse of discretion.
6. The trial court did not abuse its discretion by excluding the photograph comparing Gray and his brother or by limiting Smith's testimony about the timing of charges.
7. The admission of Officer Jackson's testimony about McIntosh's statements did not warrant reversal.

8. The evidence was legally sufficient to permit a reasonable jury to identify Gray as Smith's accomplice in the September 28 robbery, although the dissent would have found it insufficient.
9. The evidence was sufficient to support Gray's conviction for carrying a dangerous weapon because a switchblade is dangerous by design and Gray admitted possessing it.
10. The evidence was sufficient to show that Smith harassed McIntosh with intent to hinder, delay, prevent, or dissuade him from reporting a crime, and the jury instructions and indictment did not require reversal.
11. D.C. Code § 23-1328 creates sentencing enhancements rather than separate offenses; Gray's offenses-during-release convictions had to be vacated, and the required enhancements had to be reflected in the sentences for the underlying offenses.
12. The trial court properly ordered gun-offender registration, did not improperly consider Smith's prior record, considered but declined youth-offender sentencing, and did not abuse its sentencing discretion.

## KEY QUOTATIONS

*"There was no common modus operandi."* (147 A.3d at 798)

*"The details of the McIntosh robbery strongly suggested criminal propensity, rather than being fairly probative of identity."* (147 A.3d at 801)

*"Because the evidence of the September 21 robbery should not have been admitted as identity or context evidence, and that error was unfairly prejudicial to appellants, we vacate their convictions for the September 28 robbery, and Smith's related conviction for receiving stolen property, and remand those charges for further proceedings."* (147 A.3d at 801)

*"Rather, it requires that an enhanced sentence be imposed for any offense committed while on release."* (147 A.3d at 808)

## FACTUAL BACKGROUND

On September 21, 2012, Gray and Smith, according to the government's evidence, robbed Gerald McIntosh on a Metro train after Gray displayed a firearm and Smith directed him to take McIntosh's property. On September 28, McIntosh encountered the appellants again at a Metro station, where Smith assaulted him after asking whether he was reporting them; shortly before that encounter, Katherine Takai was robbed of her cellphone by three men on a Metro train, and the phone was later found near the location where Smith was arrested. The September 21 and September 28 incidents involved different victims, different methods, and substantially different evidence.

## PROCEDURAL HISTORY

The Superior Court of the District of Columbia tried the robbery and related charges together. The jury convicted both appellants of armed robbery based on the September 21 robbery and unarmed robbery based on the September 28 robbery, along with other offenses; Gray was also convicted of offenses during release and carrying a dangerous weapon, and Smith was convicted of receiving stolen property and obstruction of justice. The Court of Appeals held that the September 28 robbery charges should have been severed, vacated the affected

convictions, directed correction of Gray's offenses-during-release judgments and sentence enhancements, and affirmed the remaining judgments.

#### DISPOSITION

reversed\_and\_remanded

#### REMAND INSTRUCTIONS

Vacate both appellants' convictions for the September 28 unarmed robbery of Takai and Smith's related receiving-stolen-property conviction; if the government elects to retry those charges, conduct further proceedings consistent with the opinion. Vacate Gray's offenses-during-release convictions and reform the judgment to reflect the required offenses-during-release enhancements to Gray's armed-robbery and carrying-a-dangerous-weapon sentences. Affirm the judgments in all other respects.

#### CASES CITED

- *Settles v. United States*, 522 A.2d 348, 352 (D.C. 1987)
- *King v. United States*, 74 A.3d 678, 684 (D.C. 2013)
- *Zafiro v. United States*, 506 U.S. 534, 538 (1993)
- *Bailey v. United States*, 10 A.3d 637, 643 (D.C. 2010)
- *Easton v. United States*, 533 A.2d 904, 906-09 (D.C. 1987)
- *Bittle v. United States*, 410 A.2d 1383, 1387 (D.C. 1980)
- *Drew v. United States*, 331 F.2d 85, 90 (D.C. Cir. 1964)
- *Tornero v. United States*, 94 A.3d 1, 13 (D.C. 2014)
- *Johnson v. United States*, 683 A.2d 1087, 1098 (D.C. 1996) (en banc)
- *Jones v. United States*, 27 A.3d 1130, 1147 (D.C. 2011)
- *Robinson v. United States*, 100 A.3d 95, 106 (D.C. 2014)
- *United States v. Olano*, 507 U.S. 725, 726, 736 (1993)
- *Hager v. United States*, 856 A.2d 1143, 1147 (D.C. 2004)
- *Johnson v. United States*, 398 A.2d 354, 367 (D.C. 1979)
- *Winfield v. United States*, 676 A.2d 1 (D.C. 1996) (en banc)
- *Johnson v. United States*, 960 A.2d 281, 293, 295 (D.C. 2008)
- (Thomas) *Johnson v. United States*, 820 A.2d 551, 559 n.4 (D.C. 2003)
- *Terry v. United States*, 114 A.3d 608, 616 (D.C. 2015)
- *Gathy v. United States*, 754 A.2d 912, 917 (D.C. 2000)
- *Wright v. United States*, 926 A.2d 1151, 1155 (D.C. 2007)
- *Reed v. United States*, 584 A.2d 585, 588 (D.C. 1990)
- *Wynn v. United States*, 80 A.3d 211, 218 (D.C. 2013)
- *Wilson v. United States*, 785 A.2d 321, 327 n.8 (D.C. 2001)

- Atkinson v. United States, 121 A.3d 780, 786 (D.C. 2015)
- Payne v. United States, 932 A.2d 1095, 1100 (D.C. 2007)
- Durham v. United States, 743 A.2d 196, 200 n.5 (D.C. 1999)
- Eady v. United States, 44 A.3d 257, 261 (D.C. 2012)
- Tansimore v. United States, 355 A.2d 799, 803 (D.C. 1976)
- Sanders v. United States, 809 A.2d 584, 606 (D.C. 2002)
- Byrd v. United States, 598 A.2d 386, 389 (D.C. 1991) (en banc)
- Washington v. United States, 122 A.3d 927, 929 n.2 (D.C. 2015)
- Brown v. United States, 474 A.2d 161, 163 (D.C. 1984)
- Morris v. United States, 436 A.2d 377, 378 (D.C. 1981)
- Powers v. United States, 588 A.2d 1166, 1169 (D.C. 1991)
- Veney v. United States, 681 A.2d 429, 433 (D.C. 1996)

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