IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	**:**	
	:	
vs.	**:**	
	:	**No. CP-13-SA-14-2011**
DEBBI J. SCHOCH,	**:**	
Defendant	**:**	

Jean A. Engler, Esquire — **Counsel for the Commonwealth**
Assistant District Attorney
Stephen P. Vlossak, Sr., Esquire — **Counsel for the Defendant**

MEMORANDUM OPINION

Serfass, J. – July 29, 2011

Here before the Court is the Defendant, Debbi J. Schoch's (hereinafter "Defendant") Appeal of her conviction of one (1) count of Retail Theft (S) pursuant to 18 Pa. C.S.A. § 3929(a)(1) following a Summary Appeal Hearing held on May 17, 2011. We file the following Memorandum Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925 and further recommend that Defendant's conviction be upheld for the reasons set forth in this Memorandum Opinion.

FACTUAL AND PROCEDURAL HISTORY

On February 10, 2011, Patrolman Tyler Meek of the Mahoning Township Police Department issued Citation No. P87763302-3 (hereinafter "Citation") against Defendant, charging her with one (1) count of violating 18 Pa. C.S.A. § 3929(a)(1), Retail Theft (S). The Citation alleges that, on February 10, 2011,

Defendant took merchandise that was for sale at the Walmart store in Lehighton, Pennsylvania, with the intent of depriving Walmart of said merchandise without paying for it. The Citation also alleges that Defendant took numerous types of food items, valued at twenty dollars and six cents ($20.06). On February 24, 2011, a guilty plea to the charge of Retail Theft (S) was entered before Magisterial District Judge Casimir Kosciolek. On March 18, 2011, Defendant filed an "Appeal from Summary Criminal Conviction" (hereinafter "Summary Appeal").

On May 17, 2011, a *de novo* hearing was held before the undersigned on Defendant's Summary Appeal in accordance with Pa. R. Crim. P. 462 (hereinafter "Hearing"). At the Hearing, Briea Moyer, an Asset Protection Associate at Walmart, testified that Defendant worked at the Lehighton Walmart as a Tire and Lube Associate. (N.T., Summary Appeal Hr'g, 05/17/11, p. 5). Ms. Moyer testified that, on January 27, 2011, she observed Defendant walk past her after Defendant had clocked out for the day. (N.T., Summary Appeal Hr'g, 05/17/11, p. 7). After following Defendant, she eventually saw Defendant pick up a children's toy, and then proceed out the lawn and garden exit without paying for the toy. (N.T., Summary Appeal Hr'g, 05/17/11, p. 9). Ms. Moyer valued this toy at one dollar ($1.00). (N.T., Summary Appeal Hr'g, 05/17/11, p. 10).

Ms. Moyer also testified that, on February 3, 2011, she

observed Defendant walk by her with a container of mashed potatoes and a container of onion rings. (N.T., Summary Appeal Hr'g, 05/17/11, p. 10). She then saw Defendant walk to the break room without proceeding to a cash register to pay for the aforementioned items. (N.T., Summary Appeal Hr'g, 05/17/11, p. 10). Ms. Moyer valued these items at one dollar and eighty-four cents ($1.84). (N.T., Summary Appeal Hr'g, 05/17/11, p. 11). Ms. Moyer conceded that she did not see Defendant select the items, and only continuously observed Defendant from the time Defendant passed by her. (N.T., Summary Appeal Hr'g, 05/17/11, pp. 10-11).

Josh Grim, the Asset Protection Coordinator at the Lehighton Walmart, testified that, on February 5, 2011, he observed Defendant select some milk from the dairy cooler, walk to the soda aisle and select four (4) bottles of A-Treat soda, and walk to a snack aisle and place some of that merchandise inside of a bag. (N.T., Summary Appeal Hr'g, 05/17/11, p. 15). Defendant then walked to a register in the automotive department to pay for a prescription. (N.T., Summary Appeal Hr'g, 05/17/11, p. 15). Defendant paid for the prescription, but not for the milk or the items inside of her bag. (N.T., Summary Appeal Hr'g, 05/17/11, p. 16). Mr. Grim also indicated that Defendant did not pay for a can of Pringles potato chips. (N.T., Summary Appeal Hr'g, 05/17/11, p. 20). The total value of the milk, soda and Pringles is six dollars and twenty-two cents ($6.22). (N.T.,

Summary Appeal Hr'g, 05/17/11, p. 20).

On February 10, 2011, Mr. Grim conducted an internal interview of Defendant with Amanda Hoffert, the Asset Protection Coordinator from the Trexlertown Walmart. (N.T., Summary Appeal Hr'g, 05/17/11, p. 16). In the interview, they explained to Defendant that they had gathered information about a theft and they wanted to get her side of the story. (N.T., Summary Appeal Hr'g, 05/17/11, p. 16). They told Defendant about the incidents that occurred on January 27, 2011, February 3, 2011, and February 5, 2011. (N.T., Summary Appeal Hr'g, 05/17/11, pp. 16-17). Defendant indicated that she had some medical issues, her medication was being changed frequently, and that she couldn't really remember what happened. (N.T., Summary Appeal Hr'g, 05/17/11, p. 17). However, Defendant apologized for anything that happened and gave a written statement. (N.T., Summary Appeal Hr'g, 05/17/11, p. 17). In her statement, Defendant indicates that she is sorry for what has happened, wants to pay for her mistakes, and that she would like another chance. (Commonwealth's Exhibit 1). Following the interview, Mr. Grim contacted the store manager, who instructed him to call the police. (N.T., Summary Appeal Hr'g, 05/17/11, p. 19).

Officer Tyler Meek of the Mahoning Township Police Department, the arresting officer in this matter, testified that he took Defendant into custody on February 10, 2011 after being

dispatched to the Lehighton Walmart. (N.T., Summary Appeal Hr'g, 05/17/11, p. 25). He further testified that Defendant spontaneously told him that "she didn't mean to do it," and that "she wished she could pay the money back." (N.T., Summary Appeal Hr'g, 05/17/11, p. 26). Defendant also testified that she did not take any merchandise from Walmart on February 10, 2011. (N.T., Summary Appeal Hr'g, 05/17/11, p. 35). She admitted to providing a written statement to Walmart personnel, but denied admitting to the accusations against her through the statement. (N.T., Summary Appeal Hr'g, 05/17/11, pp. 36-44). Defendant claimed that she was very sick during the interview, that she didn't want to lose her job, and that she thought she was being interviewed in relation to a prior meeting with management that occurred on February 3, 2011. (N.T., Summary Appeal Hr'g, 05/17/11, pp. 36-44).

Following the Hearing, Defendant was found guilty of one (1) count of Retail Theft (S), and sentenced to pay the costs of prosecution and a one hundred dollar ($100) fine. A written order imposing sentence and containing the information required by Pa. R. Crim. P. 462(g) was issued on May 17, 2011. On May 27, 2011, Defendant timely filed and served a Notice of Appeal of her conviction on the charge of Retail Theft (S). On May 27, 2011, this Court issued an Order directing Defendant to file of record, and serve upon the undersigned, a Concise Statement of

the matters complained of on appeal within twenty-one (21) days of the date of the Order's entry on the docket pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). On June 17, 2011, Defendant timely filed and served "Defendant's 1925 (b) Statement" (hereinafter "Concise Statement").

ISSUES

In her Concise Statement, Defendant raises the following issues on appeal:

> **1. The evidence presented by the Commonwealth was not sufficient for the fact finder to make the decision that it had been proven beyond a reasonable doubt that the Defendant, Debbie J. Schoch, is guilty of Count 1, Retail Theft on February 10, 2011 as claimed on the citation.**
>
> **2. The amount listed on the citation was no [sic] where near the amount testified in Court as having been taken.**

However, notwithstanding the foregoing, this Court concludes that Defendant's Concise Statement essentially raises the following issues for review, which we will address *seriatim* below:

> **1. Whether Defendant's conviction for Retail Theft may be sustained where the date of the offense as listed on the Citation is inconsistent with the evidence presented at the Summary Appeal Hearing.**
>
> **2. Whether Defendant's conviction for Retail Theft may be sustained where the value of the items taken as listed in the Citation is inconsistent with the evidence of said value presented at the Summary Appeal Hearing.**

DISCUSSION

A summary appeal must be filed with the clerk of courts within thirty (30) days after the entry of the guilty plea, conviction or other final order. Pa. R. Crim. P. 460(a). A Defendant's appeal of a summary plea or conviction is heard before the Court of Common Pleas *de novo*. Pa. R. Crim. P. 462(a).

1. EVIDENCE OF THE DATES ON WHICH DEFENDANT'S CRIMINAL CONDUCT OCCURRED AS PRESENTED AT THE HEARING NEED NOT STRICTLY CONFORM TO THE DATE OF THE OFFENSE LISTED ON THE CITATION

At the Hearing, Defendant's counsel objected to the Citation on the basis that evidence did not demonstrate that any criminal conduct occurred on February 10, 2011, the date of the offense as listed on the Citation. (N.T., Summary Appeal Hr'g, 05/17/11, pp. 8, 45). Defendant's counsel also argued that Defendant did not have notice of any accusations that she engaged in criminal activity other than on February 10, 2011. (N.T., Summary Appeal Hr'g, 05/17/11, pp. 8, 45). After considering argument on Defendant's objections, the Court overruled Defendant's objections. (N.T., Summary Appeal Hr'g, 05/17/11, p. 9).

Pa. R. Crim. P. 109 provides that "[a] defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of these rules, unless

the defendant raises the defect before the conclusion of the trial in a summary case...and the defect is prejudicial to the rights of the defendant." Every citation must contain the date and time when the alleged offense was committed. Pa. R. Crim. P. 403(a)(4). Thus, in this case, the "defect" identified by Defendant appears to be that the Citation indicates that the offense occurred on February 10, 2011, when in fact the testimony presented at the Hearing shows that the Citation relates to incidents that occurred on January 27, 2011, February 3, 2011 and February 5, 2011.

We agree that the Citation in this case is defective, in that it does not contain the actual date of the commission of the offense pursuant to Pa. R. Crim. P. 403(a)(4). Thus, the issue becomes whether this defect has prejudiced the rights of Defendant in denying her sufficient notice of the charge against her, as well as an opportunity to defend herself against said charge.

"Due process requires that notice be given to the accused of the charges pending against him." Goldberg v. Commonwealth of Pennsylvania, State Bd. of Pharmacy, 410 A.2d 413, 415 (Pa. Cmwlth. 1980). "To be adequate, the notice must at least contain a sufficient listing and explanation of any charges so that the accused may know against what he must defend." Id. In this regard, a citation need only include a summary of the facts

alleged, which establish the gravamen of the offense, and not "a blow-by-blow description of events." Commonwealth v. Stahl, 442 A.2d 1166, 1169 (Pa. Super. 1982). Due process is satisfied so long as the accused is made aware of the charges so that he or she may have an adequate opportunity to prepare a defense. Goldberg, 410 A.2d at 416. Where a summary citation is defective, prejudice to the defendant will not result "where the content of the citation, taken as a whole, prevented surprise as to the nature of summary offenses of which [the] defendant was found guilty at trial,...or the omission does not involve a basic element of the offense charged." Commonwealth v. Borriello, 696 A.2d 1215, 1217 (Pa. Cmwlth. 1997).

In this case, Defendant was provided with adequate notice of the nature of the offense of which she was found guilty. The evidence demonstrated that Defendant was told about the incidents of theft that occurred on January 27, 2011, February 3, 2011 and February 5, 2011 during the interview with Walmart personnel which occurred on February 10, 2011. (N.T., Summary Appeal Hr'g, 05/17/11, pp. 16-17). She was also told by Walmart personnel that they wanted to get her side of the story. (N.T., Summary Appeal Hr'g, 05/17/11, p. 16). Thus, Defendant was placed on notice that she was a suspect in the aforementioned incidents. This case is similar to the situation in Commonwealth v. Feineigle, 690 A.2d 748 (Pa. Cmwlth. 1997), where the Court

determined that the defendant was provided adequate notice of the nature of the unlawful acts with which he was charged, where the fire marshal verbally informed the defendant of his violations and sent him a certified warning letter prior to issuing the citation.

Therefore, although the Citation erroneously indicated that the alleged criminal conduct committed by Defendant occurred on February 10, 2011, the allegations contained in the Citation should not have been a surprise to Defendant in light of the interview that occurred on February 10, 2011. Accordingly, we conclude that the Citation provided Defendant with adequate notice of the charge against her and provided her with an adequate opportunity to present a defense. Additionally, the date of the commission of the offense of Retail Theft (S) is not an essential element of that offense[1]. As a result, Defendant has not suffered any prejudice because the Citation was defective as to the date of the offense.

Similarly, Defendant has not suffered any prejudice because the date of the offense as listed on the Citation does not conform with the evidence presented at the Hearing. Unless a

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[1] **"The essential, operative elements of the offense are...the taking, carrying away, or transference of, merchandise displayed, held, stored, or offered for sale by a retail mercantile establishment without paying the full retail value thereof, with the intention of depriving the merchant of the possession, use, or benefit of such merchandise."** Commonwealth v. Coleman, **433 A.2d 36, 39 (Pa. Super. 1981).**

particular date is of the essence of an offense, the Commonwealth is not required to prove an offense was committed on the date alleged in the indictment. Commonwealth v. Devlin, 333 A.2d 888, 890 (Pa. 1975). The Commonwealth must prove, however, that the offense was committed on another reasonably certain date within the prescribed statutory period. Id.

A person commits the offense of Retail Theft if he or she "takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use or benefit of such merchandise without paying the full retail value thereof." 18 Pa. C.S.A. § 3929(a)(1). In this case, the evidence presented by the Commonwealth demonstrates beyond a reasonable doubt that valuable merchandise was intentionally taken from Walmart on January 27, 2011, February 3, 2011 and February 5, 2011 by Defendant without providing payment for said merchandise[2]. (N.T.,

[2] The intent to deprive is an essential element of the crime of Retail Theft. Commonwealth v. Martin, 446 A.2d 965, 969 (Pa. Super. 1982). Pursuant to 18 Pa. C.S.A. § 3929(c), the defendant's intent to deprive the merchant of possession of goods is presumed where the defendant intentionally conceals unpurchased property on his or her person. This presumption has been upheld as constitutional. See Id. at 968. The intent requirement is satisfied in this case by the statutory presumption because the evidence demonstrated that Defendant paid for her prescription, and not for the items concealed in her bag, on February 5, 2011. This requirement is also satisfied because the evidence demonstrated that she did not provide payment for the toy before exiting Walmart on January 27, 2011, or provide payment for the items in her possession on February 3, 2011. See Commonwealth v. McConnell, 436 A.2d 1201

Summary Appeal Hr'g, 05/17/11, *in toto*).

Under Devlin, the Commonwealth does not need to prove that Defendant committed an offense on February 10, 2011, the date listed in the Citation, for Defendant to be lawfully convicted of the offense of Retail Theft (S) because the date of the commission of that offense is not an essential element of the offense. Thus, the Commonwealth has clearly met its burden to prove beyond a reasonable doubt that Defendant committed the offense of Retail Theft (S) on a date which is reasonably certain and within the prescribed statutory period[3]. As a result, Defendant has not suffered any prejudice because the date of the offense as listed on the Citation does not conform with the evidence presented at the Hearing.

2. EVIDENCE OF THE VALUE OF THE ITEMS TAKEN BY DEFENDANT AS PRESENTED AT THE HEARING NEED NOT STRICTLY CONFORM WITH THE VALUE OF THE ITEMS AS LISTED ON THE CITATION

In her Concise Statement, Defendant argues that the evidence presented was insufficient to prove her guilt beyond a reasonable doubt because the value of the items taken as listed on the Citation is inconsistent with the value of the items as presented at the Hearing. However, a variance between the indictment and the proof presented at trial is not fatal "unless

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(Pa. Super. 1981)(holding that the actions of the defendant in placing a blanket under his arm and exiting the store without paying for the blanket constituted sufficient evidence of his intent to commit retail theft).

[3] Pursuant to 42 Pa. C.S.A. § 5552(b), a prosecution for retail theft must be commenced within five (5) years after the commission of the offense.

it could mislead the defendant at trial, involves an element of surprise prejudicial to the defendant's efforts to prepare his defense, precludes the defendant from anticipating the prosecution's proof, or impairs a substantial right." Commonwealth v. Pope, 317 A.2d 887, 890 (Pa. 1974).

In this case, the Citation alleges that Defendant took numerous types of food items, valued at twenty dollars and six cents ($20.06). However, the testimony presented at the Hearing demonstrates that the value of the items taken by Defendant was nine dollars and six cents ($9.06). (N.T., Summary Appeal Hr'g, 05/17/11, pp. 10, 11, 20). This variance between the value of the items taken as described in the Citation and the testimony presented at the Hearing could not have prejudiced Defendant in any way, given that Defendant was charged with Retail Theft as a summary offense, and the evidence presented at the Hearing supports her conviction for that offense.

Since the offense of Retail Theft is graded as a summary offense where it is the defendant's first offense and the value of the merchandise taken is less than one hundred fifty dollars ($150)[4], Defendant and her counsel would have prepared for trial with this threshold in mind. Thus, proof of any amount within that threshold presented by the Commonwealth at the Hearing, whether or not it was specifically stated in the Citation, could

not have misled Defendant, provided an element of surprise prejudicial to her ability to prepare a defense, prevented her from anticipating the prosecution's proof, or impaired any of her rights. In other words, based upon the Citation, Defendant would have expected the Commonwealth to attempt to prove that she committed the summary offense of Retail Theft at the Hearing. As the Commonwealth has fulfilled this legitimate expectation, Defendant cannot claim to have been harmed by a variance between the Citation and the evidence presented by the Commonwealth where such evidence nevertheless supports her conviction for the offense charged beyond a reasonable doubt.

Thus, based upon the foregoing, the criteria set forth in Pope have not been satisfied in this case, and as a result Defendant has not been prejudiced by the variance between the contents of the Citation and the proof presented by the Commonwealth at the Hearing.

CONCLUSION

For the foregoing reasons, this Court respectfully recommends that Defendant's conviction on the charge of Retail Theft (S) be upheld.

BY THE COURT:

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Steven R. Serfass, J.

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[4] See 18 Pa. C.S.A. § 3929(b).