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No. 185

The People &c.,
Respondent,
v.
Harold Jones,
Appellant.

David J. Klem, for appellant.
David P. Stromes, for respondent.

SMITH, J.:

Defendant was charged with criminal possession of a weapon in the second degree for possessing a loaded firearm. The alleged possession occurred in his home, but defendant had previously been convicted of a crime. He claims that under Penal Law § 265.03 (3) he is entitled, despite his prior conviction, to

rely on the so-called "home or business" exception in the definition of second degree weapon possession. We reject that argument and hold that defendant's indictment for second degree possession was proper.

I

Defendant was charged in two indictments with a variety of crimes, but only a single count is now before us. That count was based on evidence before the grand jury that a loaded gun was found in a bathroom; the bathroom, it is now conceded, was part of defendant's home. The indictment alleges simply that defendant committed criminal possession of a weapon in the second degree in violation of Penal Law § 265.03 (3) in that he "possessed a loaded firearm." With the indictment, the People filed a special information, alleging that defendant had previously been convicted of criminal possession of a controlled substance in the first degree.

Supreme Court, concluding that possession of the weapon in defendant's home did not constitute second degree possession, reduced the charge to third degree possession. On the People's appeal, the Appellate Division reversed and reinstated the second degree charge (People v Jones, 103 AD3d 411 [1st Dept 2013]). A Judge of this court granted leave to appeal (21 NY3d 944 [2013]), and we now affirm.

II

Before reaching the merits of the appeal, we must

consider a jurisdictional issue. Defendant says that the People's appeal to the Appellate Division was untimely, and that therefore the Appellate Division could not consider it. He says that the appeal was not taken "within 30 days after service upon [the People] of a copy" of Supreme Court's order reducing the second degree count to third degree possession (CPL 460.10 [1] [a]).

Defendant's theory is that the 30-day time to appeal began running when, according to defendant's brief, Supreme Court "provided copies" of its order "to the parties in open court." In fact, the record does not show that the court did any such thing. At the transcript page defendant cites, the court only says that there is "a decision on file." But even if the factual premise of defendant's argument were correct, his argument would have no merit. We have interpreted CPL 460.10 (1)(A) "to require prevailing party service" -- not just the handing out of an order by the court -- "to commence the time for filing a notice of appeal" (People v Washington, 86 NY2d 853, 854 [1995]). Here, it is undisputed that defendant, the prevailing party at Supreme Court, never served the order on the People.

III

On the merits, this appeal requires us to interpret the "home or business" exception to the third-degree weapon possession statute, Penal Law § 265.03 (3). Under that statute:

> "A person is guilty of criminal possession of a weapon in the second degree when:

...

> " (3) such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one . . . of section 265.02 of this article, constitute a violation of this subdivision if such possession takes place in such person's home or place of business."

Section 265.02 (1), to which the above quoted language refers, defines criminal possession of a weapon in the third degree. Under Penal Law § 265.02 (1), a person is guilty of third degree criminal possession when he or she "commits the crime of criminal possession of a weapon in the fourth degree . . . and has been previously convicted of any crime." The Appellate Division read the reference in section 265.03 (3) to section 265.02 (1) as creating an exception to the home or business exception -- i.e., to make that exception inapplicable when the defendant has a previous criminal conviction. We agree with this reading of the statute.

The language of the statute, fairly read, supports the Appellate Division's holding. The home or business exception is qualified by the words "except as provided in subdivision one . . . of section 265.02" and section 265.02 (1) applies to a person who "has been previously convicted of any crime." Thus such a person may not rely on the home or business exception in a prosecution under Penal Law § 265.03 (3).

Defendant would have us read the "except as provided" phrase of section 265.03 (3) not as excluding certain cases from

the home or business exception, but as stating the fact that those cases are covered by the third degree statute, Penal Law § 265.02 (1). Thus defendant would paraphrase the statute as saying: "possession in the home or place of business is not second degree possession, but it is third degree possession, as Penal Law § 265.02 (1) says." This argument alters the plain meaning of the statutory words: it reads the word "except" out of Penal Law § 265.03 (3). The argument also makes the statute a strange one. Why should the law defining second degree possession include a remark about what the third degree statute says? It is not the normal function of a Penal Law section to provide information about what other sections contain.

Defendant argues that his reading of the statute is less strange when the history of Penal Law § 265.03 (3) is considered. Until 2006, possession of a loaded firearm outside of one's home or place of business was third degree possession only, and the predecessor statute to Penal Law § 265.03 (3) was a subdivision of Penal Law § 265.02 (see former Penal Law § 265.02 [4], repealed by L. 2006, ch. 742). At that time, subdivisions 1 and 4 of Penal Law § 265.02 said that a person commits the third degree offense when:

> " (1) Such a person commits the crime of criminal possession of a weapon in the fourth degree . . . and has been previously convicted of any crime; or . . . .
>
> " (4) Such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one . . .

> constitute a violation of this section if such possession takes place in such person's home or place of business;. . . ."

Thus, until 2006, Penal Law § 265.02 (1) governed the case where a defendant convicted of a prior crime possessed a firearm (loaded or unloaded) in his home or place of business. The "except as provided" phrase in subdivision 4 was necessary to make clear that the home or business exception did not apply to subdivision 1.

When former Penal Law § 265.02 (4) was repealed and replaced by section 265.03 (3), the Legislature tracked the language of the former statute. It retained the "except as provided" phrase, altering it to refer to "subdivision one . . . of section 265.02." On defendant's theory, the phrase was no longer necessary, because the two subdivisions were now in different sections, but the Legislature, in mechanically transposing language, overlooked this. Defendant says that the Legislature did not intend to change the meaning of the "except as provided" phrase, which he says still means, as it did before the 2006 legislation, that Penal Law § 265.02 (1) governs cases like the one before us.

Defendant's speculation -- essentially, that the 2006 Legislature blundered -- is contradicted by legislative history showing that the Legislature knew precisely what it was doing. Two weeks after enacting Penal Law § 265.03 (3), the 2006 Legislature amended it to correct an error. The Senate sponsor

of the corrective legislation provided a memorandum in its support, in which he described the purpose of section 265.03 (3). The new subdivision was, he said, "intended to increase the penalty for criminal possession of a loaded firearm under the circumstances where . . . [a] person possesses a loaded firearm in his home or place of business and has previously been convicted of a crime" (Bill Jacket, L 2006, ch. 745 at ___). Thus a memorandum by a knowledgeable legislator virtually contemporaneous with the enactment of Penal Law § 265.03 (3) describes it as meaning what it says. We hold that interpretation to be correct.

IV

Defendant also argues that, regardless of the meaning of the home or business exception, the indictment here is insufficient because it does not allege defendant's prior criminal conviction. It is improper, defendant says, to allege that conviction separately, in a special information. The Appellate Division held the special information proper under CPL 200.60, which says that a previous conviction shall not be included in an indictment, but in a special information, where that previous conviction "raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter."

We see no need to decide the CPL 200.60 question, because in our view defendant's previous conviction was not an "element of the offense charged" -- criminal possession of a

weapon in the second degree -- and so did not have to be alleged at all (see CPL 200.50 [7] [a]). No doubt, in a more typical second degree possession case, where the home or business exception is factually inapplicable -- i.e., where the alleged possession took place somewhere else -- the inapplicability of the exception is an element of the offense, and either the indictment or a special information must allege the fact that makes it inapplicable. But where the defendant has a previous conviction, the exception never comes into play, its inapplicability is not an element of the offense, and the indictment need not allude to it.

Accordingly, the order of the Appellate Division should be affirmed.

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Order affirmed. Opinion by Judge Smith. Chief Judge Lippman and Judges Graffeo, Read, Pigott and Rivera concur. Judge Abdus-Salaam took no part.

Decided November 19, 2013