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Court Applies Public Transportation Sentencing Law in Flash Mob Case

BY RICHARD Q. HARK
AND ELSPETH DOSKEY

Special to the Legal

The Summer 2011 flash mobs in Philadelphia were followed by a public outcry for police, prosecutors and the judicial system to swiftly and decisively detain and prosecute the individuals who sought to destroy the public security of downtown Philadelphia. Publicly, the city enforced a more restrictive summer curfew.

A highly visible police presence still remains in areas that might incubate a repetition of summer's events. The lack of Philadelphia Police manpower and finances precludes monitoring social media websites to potentially curtail future mob organizing.

As partners in ensuring public safety, the judiciary and the District Attorney's Office can do their part by utilizing all legislative tools available to them in sending the message to the community's parents that senseless teen mob violence will not be tolerated and will be dealt with harshly. The prosecution utilized one such tool, 42 Pa. C.S.A. § 9713(a), in *Commonwealth v. Poland*.

On July 29, the same day as two Philadelphia flash mob incidents, the Superior Court issued its *Poland* opinion, affirming the district attorney's use of Section 9713 in a flash mob case and Section 9713's legislative mandate of harsh punishment for individuals who commit "crimes of violence" in public areas.



HARK

RICHARD Q. HARK is partner of Hark & Hark, a regional law firm specializing in all aspects of federal and state criminal defense.

ELSPETH DOSKEY is an associate at the same firm concentrating on federal criminal defense matters.



DOSKEY

Specifically, Section 9713 of the Judicial Code requires a mandatory minimum sentence of five years' incarceration for any crime of violence that "occurs in or near public transportation." In *Poland*, the Superior Court made it clear that if the prosecution exercises its discretion and seeks judicial imposition of a five-to-ten-year custodial sentence pursuant to Section 9713(a) and it meets its burden of proof by a preponderance of the evidence at a sentencing hearing, there is no judicial discretion to decline Section 9713(a)'s application. *Poland* also expanded the physical area where the legislature intended Section 9713(a)'s mandatory sentencing scheme to apply.

According to the opinion, 18-year-old Stanley Poland was one of a "dozen or more individuals" who

were present in the Gallery at Market East at Eighth and Market streets on the evening of April 2, 2008. At some point, and apparently without provocation, the group attacked a woman walking through the mall. Once she was knocked to the ground, she was "punched and kicked by one half of the members of the group while the other half cheered them on. The assailants then fled to a nearby subway train," the court said.

Stanley Poland was arrested and charged with robbery, aggravated assault, conspiracy to commit robbery and conspiracy to commit aggravated assault. At a jury trial, the Superior Court opinion said, there was conflicting evidence offered about whether Poland "was one of the assailants, was one who encouraged the assailants, or had tried to stop one of the assailants." Ultimately, the jury convicted Poland only of conspiracy to commit aggravated assault and acquitted him of all other charges.

The prosecution sought the mandatory minimum provided in Section 9713(a) because conspiracy to commit aggravated assault is considered a "crime of violence" for purposes of sentencing under that subsection.

Section 9713 states: "A crime shall be deemed to have occurred in or near public transportation if it is committed in whole or in part in a vehicle, station, terminal, waiting area or other facility used by a person, firm, corporation, municipality, municipal authority or port authority in rendering passenger

transportation services to the public or a segment of the public or if it is committed in whole or in part on steps, passageways or other areas leading to or from or in the immediate vicinity of such a public transportation vehicle, station, terminal, waiting area or other facility.”

The trial court held Section 9713 inapplicable and refused to apply the mandatory minimum because the actual assault occurred in “a public corridor in the Gallery, an area that contains shops and other businesses” and is separated from SEPTA’s terminal by glass double doors. Instead, the trial court sentenced Poland to 11.5-23 months’ house arrest. The Superior Court overturned the trial court’s determination, vacated the sentence, and remanded for sentencing in accordance with § 9713.

According to the Superior Court, the mandatory minimum applied because the “assault in this case took place in a passageway leading to and from a SEPTA station, in the immediate vicinity of the SEPTA station, while the victim was on her way to catch the SEPTA train home.”

In a footnote, the court clarified: “We acknowledge that there were other establishments in the immediate vicinity of the location where [the victim] was assaulted, and that the passageway led to and from places other than the SEPTA station. However, the language of Section 9713 does not limit its application to passageways that lead exclusively to public transportation facilities, or to areas in the immediate vicinity of facilities that have absolutely no other possible destinations around them.”

The Superior Court’s specific emphasis on the “immediate vicinity” language is a departure from prior cases where the Superior Court relied solely on the crime’s occurrence in a passageway leading to public transportation. (See *Commonwealth v. Grundy*, a 1989 opinion in which the court declined to review the appellant’s claim of unconstitutional vagueness in the term

“immediate vicinity” as his conduct occurred in a “passageway leading to and from a public transportation facility.”)

Poland’s judicially expanded scope of Section 9713 creates several severe implications for anyone convicted of a crime of violence, as part of a flash mob or not, on or near public transportation.

The Superior Court’s reliance on both the “passageway” and “immediate vicinity” prongs expands the statute’s scope to much of the city because nearly every block in Center City has a bus stop or subway entrance. When combined with previous caselaw that also classifies taxi cabs as public transportation — see the 1989 Superior Court case *Commonwealth v. Sanders* — it seems likely that any crime of violence committed in Philadelphia could have a mandatory penalty.

Poland’s judicially expanded scope of Section 9713 creates several severe implications for anyone convicted of a crime of violence, as part of a flash mob or not, on or near public transportation. First, Section 9713 requires only post-conviction notice. Therefore, an offer to plead guilty to an aggravated assault charge with a sentence that is higher than the standard sentencing guideline range but below the mandatory minimum should be seriously considered. If the offer is rejected and a guilty verdict is secured, the prosecution can then seek application of Section 9713. What may have been a plea to probation or a county jail sentence could now become a sentence of at least five years in

state prison. Properly identifying this issue and discussing this possibility with one’s client must be part of any representation.

Secondly, older teens that are charged as adults could easily face five years of state incarceration for merely participating in a violent flash mob. Unlike some mandatory sentencing provisions, Section 9713 is applicable to inchoate crimes (conspiracy and attempt allegations). This means that mere attendance in a flash mob may trigger application of Section 9713(a) even if your client, as in *Poland*, does not raise his or her hand in violence. Additionally, post-incident police investigations may look to social media, Facebook and MySpace, to ascertain who suggested when and where to show up, which conduct became the predicate act for the mob formation. *Poland* now dictates that merely engaging in the conspiracy via social media could result in conviction, application of Section 9713, and a state sentence in situations where the defendant may not have even been present during the violence.

Moving forward, counsel must be cognizant of the lurking threat Section 9713 poses to their clients. *Poland* expanded the sphere of Section 9713 and directs trial courts to apply the mandatory minimum sentence, when requested and established, to nearly all locations in Philadelphia. The District Attorney’s Office is primed to make an example of any flash mob participant. The appellate court has now instructed trial judges to cooperate in this effort. Defense counsel must be on guard against Section 9713’s extremely harsh outcomes. Regardless of a defendant’s lack of prior contacts with the system, any plea offer must be evaluated with *Poland* and Section 9713(a) in mind. •