IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO: 98-11,522

VS :

AARON GARNETT :

OPINION IN SUPPORT OF ORDER
IN COMPLIANCE WITH RULE 1925(A)
OF THE RULES OF APPELLATE PROCEDURE

Defendant appeals this Court's Order dated March 3, 2000, wherein the Defendant was sentenced to undergo incarceration for a minimum of three (3) years and a maximum of ten (10) years. This sentence was imposed after the Defendant was found guilty of delivery of a controlled substance and related charges following a jury trial held on January 11, 2000. The following is a summary of the evidence presented at the trial.

Agent William F. Cook, of the Drug Enforcement Administration, was involved in investigations in the Williamsport area in the summer of 1998. On July 22, 1998, at approximately 4:45p.m., he and a confidential informant went to the Chatham Street area in Williamsport. He testified that the Chatham Street area is known to have a high level of crack cocaine trafficking. (N.T. 1/11/00, p. 9) As they approached the intersection of Chatham and Church Streets in the informant's vehicle, the Defendant, known to the informant as "Aaron," approached their passenger side window. Agent Cook asked the Defendant if he could purchase six for sixty, or six packages of crack for sixty dollars. (Id., p. 10) The Defendant agreed, and Agent Cook gave the Defendant sixty dollars. The Defendant went into a nearby building, and returned moments later with six pieces of clear straw with blue stripes on them, each containing

small crack rock. (Id., p. 11) The straws were taken to another location where they were field tested by Officer Ungard. The substance was additionally tested by the Wyoming Regional Laboratory, and was determined to be cocaine with the weight of .19 grams. (Id., p. 25)

Officer Thomas Ungard, Jr., a vice narcotics officer with the Williamsport Bureau of Police, testified that on the date and time of the incident, he was situated in a DEA surveillance vehicle operating a video camera. (Id., p. 30) He testified that the video depicts Agent Cook and the confidential informant "roll up" to the Defendant. It shows the Defendant make contact with the passenger side of the truck, leave and enter a residence, then return to the truck. (Id., p. 31) The video was shown for the jury.

The Defendant testified that at the time of the incident, he was living with his Aunt Marilyn Westbay at 505 Church Street.[1] He testified that he and the confidential informant in this case worked together daily disassembling refrigerators, and selling the scrap metal. (Id., p. 50) He testified that he spoke to the confidential informant when he drove up that day about whether they were going to move any refrigerators. The Defendant testified that the informant then asked whether the Defendant's cousin, Robert, was available. The Defendant stated that he went into the house to get Robert, then returned outside. He stated that he did not sell drugs that day, and stated that he had never sold drugs in his life. The Defendant did not, however, deny using cocaine, and admitted that he is an addict. He stated that he was only talking to the confidential informant and Agent Cook, who he thought was the confidential informant's nephew. (Id., p. 51)

The Defendant was arrested on August 13, 1998. He stated that when he could not identify the people the police alleged he had sold to, and when he did not agree to become a confidential informant, the officer told him they would make things difficult for him. The Defendant admitted on cross-examination that after his arrest, while he was out on supervised bail, he left the area in order to attend for drug rehabilitation. He further admitted that a warrant was issued for his arrest when he failed to appear for pre-trials,[2] but testified that he turned himself in when he heard that a warrant had been issued for him.

Consciousness of Guilt Instruction

Defendant first argues that the Court erred by giving the consciousness of guilt jury instruction. "Generally, the trial court can use a flight/concealment jury charge when a person commits a crime, knows that he is a suspect, and conceals himself, because such conduct is evidence of consciousness of guilt, which may form the basis, along with other proof, from which guilt may be inferred." Commonwealth v. Miller, 721 A.2d 1121 (Pa.Super, 1998), *citing* Commonwealth v. Bruce, 717 A.2d 1033, 1037-1038 (Pa.Super.1998).

While evidence of a defendant's failure to appear, standing alone, is not admissible to show consciousness of guilt, Commonwealth v. Barnes, 406 Pa.Super. 58, 62, 593 A.2d 868, 870 (1991); Commonwealth v. Babbs, 346 Pa.Super. 498, 504, 499 A.2d 1111, 1114 (1985), the failure to appear, when coupled with other evidence, is

[1] On cross-examination, the Defendant admitted that he had given his address at the time as 1004 Louisa Street. The Defendant tried to explain that he not only stayed with his aunt on Church Street, but also with his brother and sister-in-law on Louisa Street.

sufficient to permit an inference that the defendant fled and/or concealed his identity to avoid prosecution. Commonwealth v. Carter 409 Pa.Super. 184, 194, 597 A.2d 1156, 1160 (1991), allocatur denied, 530 Pa. 664, 610 A.2d 44 (1992),and Commonwealth v. Martinez, 413 Pa.Super. 454, 456, 458- 459, 605 A.2d 811, 812-813 (1992), allocatur denied, 533 Pa. 608. In this case, there was evidence that Defendant knew that he had been arrested, and had been released on Supervised Bail. Subsequently, Defendant left the area, and failed to appear for scheduled court appearances, and/or remain in contact with the Public Defender's Office. There was additional evidence that the Defendant gave multiple addresses to law enforcement. The Court found this evidence to be sufficient to permit an inference that the Defendant was attempting to conceal his whereabouts to avoid prosecution. The Court therefore rejects Defendant's argument.

Missing Witness Instruction

Defendant next argues that the Court erred in refusing to give a missing witness instruction when the Commonwealth failed to call the confidential informant as a witness. A missing witness instruction may be warranted where a witness is: (1) available to only one of the parties to a trial, and (2), and it appears this witness has special information material to the issue, and (3), the witnesses testimony would not be merely cumulative, then if that party does not present the testimony of the witness, the jury may draw an inference that such testimony, had it been presented, would have been unfavorable to that party. Commonwealth v. Echevarria, 394 Pa.Super 261, 575 A.2d 620 (1990), *citing* Commonwealth v. Manigault, 501 Pa. 506, 462 A.2d 239

[2] The Defendant argued that he did not get notice to show up at the pre-trial. The Defendant attributed his lack of notice to the fact that his attorney had left the Public Defender's Office. (Id., p. 72)

(1983). In the instant case, the confidential informant was available to the defense. The Defendant knew the confidential informant and referred to him by his first and last name at trial. The Defendant additionally testified that he saw the confidential informant on a daily basis during this time frame. The Court would therefore find that the informant was just as available to Defendant as he was to the Commonwealth. When Defendant fails to subpoena a witness who is known and available to him, even if that witness has special information material to the issue which would not be cumulative, he is not entitled to the "missing witness" charge. The Court therefore rejects this argument.

Application of Mandatory School Zone

Defendant next argues that the Court erred by determining that the school zone mandatory applied in this case. Under 18 Pa.C.S.A. § 6317, a person 18 years of age or older who is convicted of a violation of Section 13(a)(14) or (30) of The Controlled Substance, Drug, Device and Cosmetic Act, shall, if the delivery or possession with intent to deliver of the controlled substance occurred within 1,000 feet of the real property on which is located a public, private or parochial school or a college or university or within 250 feet of the real property on which is located a recreation center or playground or on a school bus, be sentenced to a minimum sentence of at least two years of total confinement. In the instant case, Defendant does not contest that the transaction occurred within 250 feet of the area of a playground. Defendant argues, however, that the “playground” was in a state of disrepair, and not fit for children.

Defendant argues that it is, therefore, not an area the legislature intended to protect. The Court does not agree.

The General Assembly, in clarifying the proper approach to be used in the determination of legislative intent, stipulated that:

> (a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.
> (b) When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.
> (c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:
> (1) The occasion and necessity for the statute.
> (2) The circumstances under which it was enacted.
> (3) The mischief to be remedied.
> (4) The object to be attained.
> (5) The former law, if any, including other statutes upon the same or similar subjects.
> (6) The consequences of a particular interpretation.
> (7) The contemporaneous legislative history.
> (8) Legislative and administrative interpretations of such statute.
> 1 Pa.C.S.A. § 1921.
> Commonwealth v. Campbell, 2000 WL 1201553 (Pa.Super 2000).

We are to give the words of a statute their plain and ordinary meaning. Campbell, supra, *citing* Commonwealth v. Neckerauer, 421 Pa. Super. 255, 617 A.2d 1281 (1992). Furthermore, we may not add provisions that the General Assembly has omitted unless the phrase is necessary to the construction of the statute. Campbell, supra, *citing* Commonwealth v. Reeb, 406 Pa. Super. 28, 593 A.2d 853, 856 (1991). See Commonwealth v. Rieck Investment Corp., 419 Pa. 52, 213 A.2d 277, 282 (1965) ("it is

not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include")

Applying these principles to the instant case, the Court finds that the statute in this case is clear and free of ambiguity. The Court additionally finds the playground at issue fits the definition of a playground under the ordinary meaning. The legislature did not distinguish between maintained playgrounds and those in disrepair. It is not for the courts to add the requirement that the playground be in a particular condition. Additionally, the Court cannot believe that the legislature intended to protect only those playgrounds that had the luxury of being well maintained. The Court therefore rejects Defendant's argument.

Sentence

Defendant last argues that the Court abused its discretion when imposing a three (3) year minimum sentence. Defendant argues that the sentence was outside the Guideline range of nine (9) to sixteen (16) months. This Court was not, however, bound by the Guidelines in this case, as the Court determined that the delivery occurred within a school zone as is described under 18 Pa.C.S.A. § 6317. That Section provides that defendant violating that Section shall be sentenced to a minimum of *at least* two years of total confinement. . .. Subsection (c) of that Section further provides that . . . "Nothing in this Section shall prevent the sentencing court from imposing a sentence greater than that provided in this Section. . . ." Additionally, the Court had the discretion to sentence the Defendant to a minimum of five years, since the statutory maximum is

ten years. In the instant case, for the reasons stated on the record, (N.T. 3/9/00, at pp.13-15) the Court was persuaded to impose a three year minimum sentence.

Dated: October 6, 2000

By The Court,

Nancy L. Butts, Judge

xc: Nicole Spring, Esquire
Kenneth Osokow, Esquire
Honorable Nancy L. Butts
Law Clerk
Gary Weber, Esquire
Judges