

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH OF PENNSYLVANIA</b>	<b>:</b>	<b>No. 97-10,028; 97-10,829</b>
	<b>:</b>	
<b>vs.</b>	<b>:</b>	<b>CRIMINAL DIVISION</b>
	<b>:</b>	
<b>MICHAEL MURRAY,</b>	<b>:</b>	
<b>Defendant</b>	<b>:</b>	<b>PCRA Petition</b>

**OPINION AND ORDER**

This matter came before the court on the defendant's Post Conviction Relief Act (PCRA) petition. The relevant facts are as follows. In case number 97-10,829 the defendant conspired with Pedro Ledee and sold forty (40) bags of heroin totaling 1.3 grams to police informant, Ron Clarkson, on April 25, 1997 for \$800. The second case number, 97-10,828, involved all the same parties and revolved around events occurring on May 3, 1997. On May 3, 1997 the defendant sold fifty-one (51) bags of heroin to Clarkson for \$1,000. The weight of the heroin was 2.7 grams. During each transaction informant Clarkson wore a wire or tape transmitter. Further, on May 3, the police had a pre-arranged signal with informant Clarkson to indicate the purchase was made. The police, acting upon this signal, arrested the defendant shortly after the sale to the informant. This arrest revealed the defendant had sixty (60) bags of heroin on his person, weighing 2.8 grams.

As a result of these transactions, the defendant was charged with multiple counts of conspiracy, delivery of a controlled substance, possession with intent to deliver a controlled substance, possession of a controlled substance and possession of drug paraphernalia.

The cases were consolidated for a jury trial, which was held on or about June 9-11, 1998. The Commonwealth presented several witnesses, including Ron Clarkson and Pedro Ledee, and numerous items of evidence, including the heroin, buy money and audiotapes of the transactions from the wire worn by Clarkson. The defendant was represented by Emmanuel Izuogu, a private attorney of the defendant's own choosing. Attorney Izuogu and the defendant offered the defense of entrapment to all the charges. On June 11, 1998, the jury returned a verdict of guilty on all the charges.

The Court sentenced the defendant on July 31, 1998. On case number 97-10,829, the Court sentenced the defendant to incarceration in a state correctional institution for six(6) months to two (2) years for the delivery of heroin which occurred on April 25, 1997. The Court imposed a sentence of guilt without punishment on the paraphernalia counts and dismissed the remaining counts.

On case number 97-10,828, the Court imposed a two to four (2-4) year sentence for the delivery of 2.7 grams of heroin to the informant on May 3, 1997. Since the amount of heroin involved in this transaction exceeded 2.0 grams, the a mandatory two (2) year minimum sentence and a fine of \$5,000 was imposed pursuant to 18 Pa.C.S.A. Section 7508(a)(2)(i). On the conviction for possession with intent to deliver relating to the 2.8 grams of heroin found on the defendant's person when he was arrested, the Court again applied the mandatory trafficking provision in 18 Pa.C.S.A. Section 7508(a)(2)(i), because the weight of the heroin exceeded two (2) grams. However, since the Court found the defendant had been convicted of another trafficking offense by virtue of the sentence for the 2.7 grams of heroin delivered to the informant on May 3, the Court applied the

enhanced mandatory of the three (3) year incarceration, and a \$10,000 fine.<sup>1</sup> The remaining counts merged for sentencing purposes.

The Court made the two (2) mandatory sentences concurrent so the aggregate sentence imposed on the May 3 case was three to six (3-6) years state incarceration. The Court, however, ran the sentence in case number 97-10828 consecutive to the six (6) month to two (2) year sentence in case number 97-10,829. Therefore, the total aggregate incarceration for both cases was three and one-half (3 ½) to eight (8) years.

The defendant's trial counsel did not file a Motion to Reconsider Sentence or an appeal of the verdict and sentence. Ultimately, the defendant filed a PCRA petition contesting the verdict and sentence. The defendant hired Attorney Eric Linhardt to represent him. After a preliminary conference with counsel on the PCRA petition, the Court entered an Order dated March 1, 2001. This Order denied some aspects of the defendant's PCRA petition, but scheduled an evidentiary hearing on the defendant's claim that trial counsel gave him ineffective assistance of counsel when his counsel failed to file an appeal or reconsideration of sentence as requested by the defendant. In the Order of March 1, the Court also gave the defendant a chance to submit a sworn affidavit on his

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<sup>1</sup>The Court notes there is an obvious mistake in the typed sentencing Order of July 31, 1998 regarding case number 97-10,828. The typed Order reflects the three (3) year mandatory to be for conspiracy. As previously discussed, the three (3) years mandatory was for possession with intent to deliver heroin. The Court cannot say at this time whether the court reporter typed this portion of the Order incorrectly or whether the Court at the time of sentencing simply mis-spoke, and actually said conspiracy when it meant to say possession with intent to deliver. However, in reviewing the sentencing transcript of January 31, 1998, it is abundantly clear that the Court was applying the three (3) year mandatory sentence to the possession with intent to deliver count. See Sentencing Transcript, pp. 15, 31.

claim that his trial counsel was ineffective for failing to present evidence at sentencing that the defendant did not possess two (2) grams or more of heroin with intent to deliver. On March 30, 2001, the defendant filed an affidavit claiming he did not possess with intent to deliver two (2) or more grams of heroin on May 3, 1997.

An evidentiary hearing on these two issues was held on April 27, 2001. The defendant was the only witness to testify.

The Court finds the defendant's first issue regarding ineffective assistance of counsel for failure to file an appeal to be meritorious. The defendant testified at the hearing on April 27 that he had extensive discussions with Attorney Izuogu about an appeal and reconsideration of sentence, and that Mr. Izuogu assured him he would file the motion and the appeal. These contentions seem borne out by the record of the sentencing transcript which states that Attorney Izuogu, in fact, argued to the Court for bail pending an appeal to be filed on behalf of the defendant. See Sentencing Transcript, pp. 37-40. In fact, the Court indicated to Mr. Izuogu that it was confident he would follow up by filing an appeal as discussed. Id. at p.40. Obviously, Mr. Izuogu did not file an appeal or reconsideration of sentence. There was no evidence presented by the Commonwealth from Mr. Izuogu to explain why he did not file the appeal or reconsideration motion. Thus, the Court accepts the defendant's testimony on this issue and will restore his appeal rights.

In regard to the defendant's claim of ineffective assistance of counsel on the basis that his trial counsel did not offer evidence at sentencing that the defendant did not possess 2 grams or more of heroin with intent to deliver, the Court finds such to be without merit.

First, the Court is mindful that the jury decided the issue of whether the

defendant possessed the heroin found on his person with intent to deliver on his person on May 3, 1997 by convicting him of possession with intent to deliver as opposed to just simple possession. The defendant claimed that the heroin not sold to the informant on May 3, 1997 was “for personal use.” At trial and at the PCRA hearing, the defendant testified he had a significant heroin problem on May 3, 1997. The defendant also testified at trial that the six (6) bundles (sixty bags) of heroin found on his person on May 3, 1997 were for his own use.<sup>2</sup> The jury heard this claim but, in light of the surrounding testimony, found the defendant possessed the remaining six (6) bundles of heroin with intent to deliver. Thus, it appears to the Court that the defendant is presenting the exact same claim he made at trial, which was rejected by the jury. Therefore, the Court does not believe it should find differently on the same evidence. Commonwealth v. Mayes, 647 A.2d 212 (Pa.Super. 1994), appeal dismissed, 655 A.2d 986. In Mayes, the Superior Court considered a similar issues and stated: “The sentencing court is not allowed to rewrite the script. At sentencing, the trial court cannot reassess facts determined prior to a finding of guilt of possession with intent to deliver a controlled substance.” Id. at p. 215.

Even if the court were not bound by the jury’s verdict to find that the entire 2.8 grams of heroin was possessed with intent to deliver, the Court would reach the same result. For the defendant to prevail on this issue, the Court would have to accept the premise that the defendant possessed some of the six (6) bundles of heroin with intent to

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<sup>2</sup>The Court does not have a transcript of the trial in this case because a transcript was not prepared since no appeal was filed. Thus, the Court is relying upon its handwritten notes made at trial in recalling evidence. Although the defendant asserted entrapment as a defense to all charges, the Court’s notes show that when asked at trial, he claimed that remaining six (6) bundles of heroin found on his person were for himself and were not possessed by him with intent to deliver.

deliver on May 3, 1997, but that the amount was less than 2.0 grams. It is obviously in the defendant's self-interest to now assert that some of the heroin was for his own personal use to negate the applicability of the three (3) year mandatory sentence. In any case, as previously stated, the defendant testified that all the heroin in question was for his own personal use. The Court has reviewed the defendant's PCRA testimony, along with its notes of the trial testimony and the transcripts of the tapes of the two transcripts on April 25, 1997 and May 3, 1997. All the defendant's conversations were taped with the informant who wore a body wire on the two dates in question. The tapes were played for the jury and were marked Commonwealth Exhibit 6 and 12 at trial.

On the April 25, 1997 transaction, the defendant's co-conspirator Pedro Ledee describes the defendant to the informant Ron Clarkson as a straight-up businessman. Transcript of the tape from April 25, 1997, p. 8. When the defendant met informant, the informant agreed to be a steady customer and the defendant agreed to supply him with heroin. Id. at pp. 15, 16. In fact, the defendant assured the informant he would have more heroin than he knew what to do with. Id. at p. 6. After the defendant leaves the scene, Pedro Ledee talks with informant Clarkson about the defendant's business of owning drug recovery houses, and he refers to the defendant as being clean from drugs for sixteen (16) years.

In the tape of the transcript of May 3, 1997, the defendant advises the informant that he (the informant) is better off not using the heroin himself. Transcript of the tape from May 3, 1997, at pp. 4-5. The defendant talks of getting heroin for sale once a week. Id. at p. 8. The defendant indicates what he is doing is strictly about making money. Id. at p. 15. When the defendant discusses how he hooked up with his co-conspirator,

Pedro Ledee, he talks about an incident where he had a bottle of liquid morphine that he didn't know what to do with it and he was told Pedro could move it for him. Id. at pp. 15-16. In discussing the future with the informant, the defendant talks about establishing a carrier in the area where they can sell heroin to others. Id. at p. 23. Finally, on the tape it appears the defendant sells the informant whatever amount of heroin the informant requests. Id. at p. 26.

In reviewing its notes of the trial and the defendant's testimony at the PCRA hearing, the Court is not satisfied that the amount of heroin possessed by the Defendant with the intent to deliver when he was arrested on May 3, 1997 was less than 2.0 grams. Rather, it appears the defendant, while perhaps a user of heroin, was prepared to sell or deliver all the heroin he possessed on May 3, 1997. The defendant's own testimony at the PCRA hearing indicated it would have taken him a week to use the six bundles of heroin if he kept it for his own use.<sup>3</sup>

Accordingly, the Court does not believe the defendant received ineffective assistance of counsel in regard to proving at sentencing that he possessed less than 2.0 grams of heroin with intent to deliver on May 3, 1997.

The following Order is entered:

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<sup>3</sup>To the Court's recollection, the defendant also testified at the PCRA hearing that after the transaction on May 3, 1997 where he sold informant Clarkson five (5) bundles of heroin, the defendant decided he would not provide additional bundles of heroin to him. The defendant explained that Clarkson told him some of the heroin was going to minors in the Jersey Shore area and the defendant did not want to see heroin distributed to minors. However, the transcript of the May 3, 1997 transaction with Clarkson contains no such reference to minors that the Court can discern.

## **ORDER**

**AND NOW**, this \_\_\_\_\_ day of December 2001, the Court GRANTS the defendant's PCRA Petition on the issue of ineffective assistance of counsel for failing to appeal the verdict and judgment of sentence.

The defendant may file an appeal to the Pennsylvania Superior Court within thirty (30) days of the date of this Order.

The Court DENIES the defendant's Petition on the claim of ineffective assistance of counsel for not presenting proof at sentencing that the defendant possessed less than 2.0 grams of heroin with intent to deliver.

The Court DENIES the defendant's request for bail pending appeal as it did at the time of sentencing.



BY THE COURT,

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Kenneth D. Brown, J.

cc: Kenneth Osokow, Esq. (ADA)  
Eric Linhardt, Esq.  
Work File  
Gary Weber, Esq., (Lycoming Reporter)