IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	**No. CR-1239-2003**
	:	**(03-11,239)**
	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
ERNEST NTHUTHU,	:	
Defendant	:	**1925(a) Opinion**

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

This opinion is written in support of this Court's judgment of sentence dated March 10, 2005 and docketed March 21, 2005. The relevant facts follow.

Deborah Burkholder contacted the Lycoming County Drug Task Force about becoming a confidential informant who would make controlled buys from individuals, who had sold to her in the past. On July 28, 2003, Ms. Burkholder met with police officers from the Task Force. She was searched. She provided the police with Appellant's cell phone number so a controlled buy could be arranged. The police dialed the number on one of their cell phones and handed the phone to Ms. Burkholder. Ms. Burkholder told Appellant she wanted to get some marijuana. Appellant told her to meet him at his apartment. The police gave Ms. Burkholder $20 in pre-recorded funds to purchase marijuana from Appellant and dropped her off about a block away from Appellant's apartment. The police had her under surveillance from the point where she was dropped off until she entered Appellant's apartment building. Ms. Burkholder purchased two, dime bags of marijuana from Appellant. The police observed Ms. Burkholder leave the apartment building. She rendezvoused with

the police and turned over the two, dime bags. The police conducted filed tests on the contents of the bags; the results were positive for marijuana.

On July 31, 2003, Ms. Burkholder again purchased marijuana from Appellant. As with the controlled buy on July 28, 2003, Ms. Burkholder was searched and the police dialed Appellant's cell phone number. Ms. Burkholder told Appellant she wanted to get some marijuana. Appellant told her he was in class at the Pennsylvania College of Technology and told her to meet him in the lobby of the Bush campus center. The police gave Ms. Burkholder $40 and drove her to Second Avenue. They observed her walk from Second Avenue to the Bush campus center. Ms. Burkholder met Appellant in the lobby. Appellant pulled marijuana out of his pocket and put it near the bank machine. Ms. Burkholder told him somebody would see the marijuana, so they walked out the back door and got into Appellant's car where he gave her four baggies of marijuana. Ms. Burkholder turned the baggies over to the police. The contents of the baggies tested positive for marijuana.

The police obtained an arrest warrant for Appellant. When the police went to Appellant's residence to execute the warrant, Appellant was outside. Officer Kreitz approached and yelled either stop or police or both. Appellant looked at Officer Kreitz and then ran into his apartment. The police followed him. Several other individuals were in the living room, but Appellant wasn't present. The police came to a locked door. It was the bathroom. The police pounded on the door and ordered Appellant to come out two or three times. When he failed to come out, the police kicked in the door. Appellant's cell phone was lying on the floor and the toilet was clogged with a substance that looked and smelled like marijuana. There was residue on the toilet brush and Appellant's clothes were wet.

The police filed a criminal complaint against Appellant on or about August 11, 2003, charging him with two counts each of delivery of a controlled substance, possession with intent to deliver a controlled substance, possession of a controlled substance, criminal use of a communication facility and possession of drug paraphernalia.

The court held jury selection in this case on January 13, 2005. Appellant requested a continuance, so he could attempt to hire a private attorney. The court denied Appellant's request because the case had been in the system for over a year, Appellant failed to appear for jury selection in November 2004 and Appellant waited to literally the moment the jury was about to walk into the courtroom to indicate he wanted to retain a private attorney.

A jury trial was held February 3-4, 2005. During the course of the trial, the Commonwealth witnesses testified without objection from the defense about the bathroom scene during Appellant's arrest and the photographs the police took of that scene. When the prosecutor offered the photograph to be shown to the jury, defense counsel objected that it appeared to be a black and white copy of what originally was a color photograph and therefore it was not admissible under the best evidence rule. The court admitted the photograph, but indicated that it might not go out with the jury during deliberations.

The jury found Appellant guilty of all the charges. In an order dated March 10, 2005 and docketed March 21, 2005, the court sentenced Appellant to two to four years incarceration for the delivery on July 31, 2003. The court imposed a mandatory minimum sentence of two years pursuant to 18 Pa.C.S.A. §6317, because the delivery occurred on the campus of the Pennsylvania College of Technology. For the July 28, 2003 delivery, the court imposed a consecutive three-year term of probation. For the remaining counts, the

court either imposed a concurrent sentence or no further penalty, or the offense merged with the delivery convictions.

On March 30, 2005, Appellant filed a timely notice of appeal.

The first issue raised by Appellant is whether the lower court erred in denying Appellant's request for a continuance where present counsel was assigned to the case approximately one week prior to jury selection.

The grant or refusal of a request for continuance is vested in the sound discretion of the trial court and will not be reversed absent a showing of an abuse of that discretion. Commonwealth v. Robinson, 864 A.2d 460, 509 (Pa. 2004); Commonwealth v. Busanet, 572 Pa. 535, 562, 817 A.2d 1060, 1076 (Pa. 2002). An abuse of discretion is not merely an error of judgment; rather discretion is abused when "the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence of record." Busanet, supra (citations omitted).

The court does not believe it abused its discretion in denying Appellant's request for continuance. Charges were filed in this case on August 11, 2003. William Miele, the Chief Public Defender entered his appearance to represent appellant in November 2003. The court granted a defense request for continuance in May 2004. The case was scheduled for jury selection on November 10, 2004, but Appellant failed to appear and a bench warrant was issued. Although the bench warrant was resolved in November 2004, the next available pretrial and jury selection dates were January 6 and January 13, 2005, respectively. Sometime around the date of the pretrial conference Mr. Miele assigned this case to Charles Brace. On January 13, 2005, as the jury panel was being lined up to be brought into the

courtroom for the jury selection in this case, Appellant requested a continuance to hire a private attorney. When asked why he waited until the morning of jury selection to decide to hire a private attorney, Appellant claimed he had to talk it over with his wife. Mr. Brace then posited that his recent assignment to the case might be the reason that Appellant was looking to hire outside counsel.

Appellant had over a year to discuss hiring a private attorney with his wife. By the date of jury selection, the case had been in the system for 17 months. Although Mr. Brace may have been recently assigned to the case as of the date of jury selection, the trial was not held until February 3-4, 2005, giving Mr. Brace three to four weeks to prepare. Given the age of the case, and the amount of time between jury selection and the commencement of trial within which Mr. Brace had to prepare, and the fact that Appellant did not make the request until the jury literally was about to walk into the courtroom, the court's denial of the continuance request was reasonable and appropriate.

The next issue raised by Appellant is whether the lower court properly admitted into evidence a poor quality photograph taken of Appellant's bathroom (specifically the toilet) at the time of his arrest. Appellant did not object to the admission of the photograph on the basis that it was of poor quality. The only objection made to the photograph was that it was a black and white copy and not an original. N.T., February 3, 2005, at pp. 129-130. Therefore, any issue regarding the quality of the photograph was waived.[1]

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1 The court also notes that generally a duplicate is admissible to the same extent as an original. See Pa.R.E. 1003; Commonwealth v. Fisher, 764 A.2d 82, 89 (Pa. Super. 2000). The original also is not required if it is not obtainable or it is lost or destroyed, unless the proponent lost or destroyed it in bad faith. Pa.R.E. 1004; Commonwealth v. Dent, 837 A.2d

Appellant also questions whether the imposition of the mandatory minimum sentence is unconstitutional under the substantive due process clauses of the United States and Pennsylvania Constitutions. The court imposed a mandatory minimum sentence under 18 Pa.C.S.A. §6317, because the delivery occurred on the campus of the Pennsylvania College of Technology. The Pennsylvania Superior Court has found the imposition of a mandatory minimum under section 6317 constitutional. Commonwealth v. Graham, 799 A.2d 831 (Pa. Super. 2002); The Superior Court has also held that a court's imposition of a mandatory minimum sentence does not violate the principles announced in Apprendi v. New Jersey, 530 U.S. 466 (2000). Commonwealth v. Ryerson, 817 A.2d 510, 516-517 (Pa.Super. 2003)(finding defendant did not have a right to a jury determination of the number of live marijuana plants he possessed).

Appellant's final issue is whether the convictions for criminal use of a communication facility, delivery of a controlled substance, possession with intent to delivery a controlled substance and possession of drug paraphernalia were against the weight of the evidence. In order to preserve a weight of the evidence claim, it must be raised with the trial judge in a motion for a new trial either orally on the record before sentencing, by written motion before sentencing or in a post-sentence motion. Pa.R.Cr.P. 607(A); see also Commonwealth v. Ferguson, 866 A.2d 403, 409 (Pa. Super. 2004); Commonwealth v. Wright, 846 A.2d 730, 737 (Pa. Super. 2004). Since this issue was not raised with the trial judge, it is waived.

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571 (Pa. Super. 2003). Here, it was a digital photograph and after the police printed the black and white copy, the disk or memory card was reused. Thus, neither a color original nor a color copy of the photograph could be obtained.

DATE: _____ By The Court,

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Kenneth D. Brown, P. J.

cc: District Attorney
Charles Brace, Esquire (APD)
Work File
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)