IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	NO. 226-2006
	:	
LEROY WHEELING,	:	
	:	
Defendant	:	1925(a) OPINION

Date: July 9, 2007

OPINION IN SUPPORT OF THE ORDER OF DECEMBER 7, 2006 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Defendant Leroy Wheeling has appealed his sentence imposed on December 7, 2006. Wheeling's appeal should be denied. Wheeling was brought to trial within the prescribed time period under Pennsylvania Rules of Criminal Procedure Rule 600 and the Commonwealth presented sufficient evidence to establish beyond a reasonable doubt all of the charges of which Wheeling was convicted.

I. Background

A. Procedural History

1. Non-Jury Trial and Direct Appeal

On September 20, 2006, following a non-jury trial, this court found Wheeling guilty as to Count 1 Criminal Use of a Communication Facility, 18 Pa.C.S.A. § 7512, Count 2 Delivery of a Controlled Substance, 35 P.S. § 780-113(a)(30), Count 3 Possession with the Intent to Deliver a Controlled Substance, 35 P.S. § 780-113(a)(30), Count 4 Possession of a Controlled Substance, 35 P.S. 780-113(a)(16), and Count 5 Possession of Drug Paraphernalia, 35 P.S. §

780-113(a)(32). On December 7, 2006, this court sentenced Wheeling as to those charges. On January 5, 2007, Wheeling filed a notice of appeal.

On January 5, 2007, we issued an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(a) directing Wheeling to file a concise statement of matters complained of on appeal within fourteen days of the order. On January 30, 2007 Wheeling filed a Motion for Extension of Time to File 1925 Statement and Request for Transcripts. In the Motion, Wheeling requested an extension of the time within which he was required to file the statement of matters due to the fact that trial counsel, James Cleland, Esquire, had recently left the Lycoming County Public Defender's Office and present counsel was unaware of what issues should be raised on appeal due to his lack of involvement in the case. On February 7, 2007, we issued an order granting Wheeling's Motion. Wheeling was given until March 19, 2007 to file his statement of matters. We also directed that the transcript of the non-jury trial be prepared by March 2, 2007. Despite this extension, Wheeling did not file a statement of matters.

On February 26, 2007, the Superior Court of Pennsylvania dismissed Wheeling's appeal for his failure to complete and file the docketing statement required by Pennsylvania Rules of Appellate Procedure Rule 3517.

2. <u>Post Conviction Relief Act Petition</u>

Wheeling mailed to this court a *pro se* Post Conviction Relief Act ("PCRA") Petition. In a March 19, 2007 order, we directed that the Petition be filed of record and appointed James Protasio, Esquire to represent Wheeling on the Petition, since it was his first PCRA petition. On May 14, 2007, a conference regarding the Petition was held before this court. We issued an

order that same day granting the Petition and reinstating Wheeling's direct appeal rights *nunc pro tunc*. We also reassigned the case to the Lycoming County Public Defender's Office directing them to represent Wheeling on his *nunc pro tunc* direct appeal.

3. *Nunc Pro Tunc* Direct Appeal

Wheeling filed a notice of appeal on May 18, 2007. On May 18, 2007, we issued an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing Wheeling to file a concise statement of matters complained of on appeal. On May 31, 2007, Wheeling filed his statement of matters.

B. Facts of the Case

1. The Controlled Buy

a. The Arrangement

Kathy Cero had been a crack cocaine addict since the Spring of 2003. N.T., 144. Displeased with the state of her life and wanting to assuage her guilt, Cero decided to contact the Lycoming County Drug Task Force ("the DTF") in 2005 to help clear the streets of drug dealers. Id. at 125, 145. Her chance came on March 21, 2005.

On March 21, 2005, the DTF prepared to conduct a controlled buy of narcotics. N.T., 68. The target of the operation was a black male who was residing at 426 Third Avenue, Williamsport, Pennsylvania and was known by the name "Tone." Id. at 69. The plan was to have Cero make a purchase of cocaine from Tone. Id. at 66, 69, 126.

Earlier in the day, Tone had called Cero's cell phone and told her that he could get her some cocaine. N.T., 126-28. Cero knew that it was Tone because she recognized his voice, which she had heard during her prior dealings with Tone. Id. at 127, 128, 147. Cero also knew

that it was Tone on the phone because she recognized the number that came up on her cell phone screen when the call was received. The number was 660-3423. Id. at 122, 127, 147. Cero recognized this number as the same one that had appeared on her cell phone screen when Tone had called her before. Id. at 147. Cero told Tone that maybe she would be in touch with him later. Id. at 129.

After receiving this phone call, Cero telephoned the DTF office and told then Corporal Thomas Ungard that she could set up a purchase of cocaine from Tone later in the day. N.T., 129, 148. Cero was told that she should try to set up the purchase. Id. at 129, 148. Cero then called Tone using the 660-3423 phone number. Id. at 123, 129-30. During the course of their conversation, Tone told Cero that he could get her some stuff. Id. at 130. He also told her that she would have to come to his house to get it. Id. at 130. Tone, however, did not tell Cero when she should come to his home. Id. at 131.

Cero arrived at the DTF office around 4:15 p.m.. N.T., 71, 73. The first thing the DTF did was search Cero and her belongings to ensure that she did not have any contraband on her. Officer Jeremy Brown had Cero shake out her clothing and turn out her pockets. Id. at 71, 73, 131. Officer Brown then searched Cero's purse for contraband. Id. at 71, 73, 131. Finally, Officer Brown searched Cero's vehicle. Id. at 72, 73, 132. After searching Cero's person, belongings, and vehicle, Officer Brown was satisfied that she did not posses any contraband. Id. at 106.

Next, Cero was given $200 in pre-recorded funds in the form of ten twenty dollar bills N.T., 93, 122, 133. Cero and the officers from the DTF then moved out to 426 Third Avenue. Cero drove her personal vehicle to 426 Third Avenue. Ibid. Officer Brown followed directly

behind Cero in an unmarked DTF vehicle. Id. at 77, 108. Other DTF officers were sent ahead to take up surveillance positions near the 426 Third Avenue Residence. Id. at 77. Brown and Cero had left the DTF office around 4:29 p.m. and arrived at 426 Third Avenue at 4:35 p.m. Id. at 78, 111.

Cero tuned up Third Avenue, while Officer Brown continued on Fourth Street. N.T., 79. He pulled into a nearby parking lot just off of Fourth Street. Ibid. When Officer Brown did this, he lost visual contact of Cero and her vehicle. Id. at 78, 79. Corporal Dustin Kreitz had taken up a surveillance position on Third Avenue one block north of the 426 Third Avenue residence. Id. at 170. Corporal Kreitz was conducting video surveillance of the 426 Third Avenue residence from this position, and could see if someone was entering or exiting the residence. Id. at 171, 172. Corporal Kreitz saw Cero park her vehicle and enter the residence at 426 Third Avenue. Id. at 172.

b. <u>The Buy</u>

Once inside, Cero saw Tone watching television. N.T., 135, 136, 155. Tone told Cero that he had to make a phone call to his connection to obtain the cocaine. Id. at 136-37, 155. After making this call, Tone told Cero that his connection would call him back. Id. at 137. When this individual failed to call him back, Tone made several other phone calls trying to find a source for the cocaine. Ibid. After about twenty-five minutes, Tone told Cero that they would have to go around the corner to obtain the cocaine. Id. at 137, 138, 156. Cero and Tone then exited the residence at 426 Third Avenue and got into her vehicle. Id. at 138.

Officer Brown was notified by the surveillance unit that Cero and Tone were leaving 426 Third Avenue and entering her vehicle. N.T., 80. Officer Brown observed Cero's vehicle

as it approached the intersection of Third Avenue and Fourth Street. Id. at 81. Cero was driving, while Tone was seated in the front passenger seat. Id. at 81, 112. Officer Brown pulled his vehicle behind Cero's and followed her to the intersection of Grace and Locust Streets. Ibid.

At around 5:11 p.m., Cero pulled her vehicle over to the left side of the road in the 300 block of Locust Street. N.T., 81, 83, 112, 157. Officer Brown drove past Cero and pulled his vehicle over to the right side of the road. Id. at 113. Cero handed Tone the $200 of pre-recorded funds, and Tone told her to wait in the car. Id. at 138, 158, 164. Officer Brown observed Tone exit the vehicle and enter a residence located at 321 Locust Street, while Cero remained in her vehicle. Id. at 82, 83, 114, 116. Within one minute of him entering the residence, Officer Brown observed Tone exit the 321 Locust Street residence and return to Cero's vehicle. Id. at 83, 116. Once Tone had re-entered the vehicle, Cero pulled back onto Locust Street and proceeded to drive Tone back to the 426 Third Avenue residence. Id. at 84, 115, 139-40. Officer Brown followed Cero back to the 426 Third Avenue residence and took up his position at the parking lot off of Fourth Street. Ibid.

Once Cero and Tone arrived at 426 Third Avenue, they went inside the residence. N.T., 116, 140. Tone then handed Cero a clear plastic bag containing the cocaine, and asked her if he could have some. Id. at 90, 140, 158. Cero said yes, and she let Tone take a portion of the cocaine from the bag. Ibid. After about ten minutes, Cero left the residence at 426 Third Avenue and returned to her vehicle. Id. at 141

Officer Brown was advised by the surveillance unit that Cero was leaving the residence and returning to her vehicle. N.T., 84, 141. Cero entered her vehicle and headed back to the

DTF office. Id. at 116. Officer Brown saw her as she pulled onto Fourth Street and followed her back to the DTF office. Id. at 85, 116.

c. The De-brief

Once Cero and Officer Brown had pulled their vehicles into the parking lot of the DTF office, Officer Brown made contact with Cero and obtained the cocaine from her. N.T., 85, 86., 116 Cero gave Officer Brown a clear plastic bag containing a white powdery substance. Id. at 90, 91, 141, 142. The white powdery substance was 1.2 grams of cocaine. Id. at 91. Cero and Officer Brown then went inside the DTF office. Once there, Officer Brown searched Cero's person just like he had before the buy. Id. at 85, 116, 141-42. Then, Officer Brown went out and searched Cero's vehicle. Id. at 85, 117 Officer Brown did not find any contraband on Cero's person or inside her vehicle. Ibid. Following the searches, Officer Brown conducted a de-brief of Cero, which was audiotaped. Id. at 85-86.

Tone was not arrested on March 21, 2005. As the investigation continued, Officer Brown endeavored to discover the real name of Tone. Through the use of a computer data base, Officer Brown was able to determine that Tone was Wheeling. N.T., 92. Officer Brown also discovered that Wheeling went by several aliases – Leroy Burnett, Roy Williams, and Roy Wheeler. Id. at 93.

2. Post Controlled Buy

a. The Search for Wheeling

On July 7, 2005, Officer Brown filed a criminal complaint accusing Wheeling of the crimes that he was eventually convicted of and that stemmed from the March 21, 2005 controlled buy. Also on July 7, 2005, Officer Brown obtained an arrest warrant for Wheeling.

N.T., 4. The last known address the DTF had for Wheeling was 426 Third Avenue, Williamsport, Pennsylvania. Id. at 4, 9, 13. Officer Brown, however, knew when he obtained the arrest warrant that Wheeling was no longer at that residence, but he did not know where Wheeling was. Id. at 4.

Officer Brown had Wheeling's biographical information and the outstanding arrest warrant entered into a computer data base. N.T., 5. With this information so entered, any law enforcement agency, local or national, that stopped Wheeling and checked his identification would see that there was an outstanding arrest warrant for him. That agency would then detain Wheeling and notify the DTF. Ibid.

Officer Brown then contacted several confidential informants to see if they knew Wheeling's whereabouts. N.T., 5. None of them were able to provide Officer Brown with the requested information. Officer Brown then checked with the Lycoming County Prison to see if Wheeling was incarcerated there. Id. at 5-6. He was not. Officer Brown also checked with the welfare and social security offices to see if they could provide him with any information that might lead to Wheeling's current location. Id. at 6. The social security office told Officer Brown that they were unable to divulge any information regarding individuals receiving social security assistance. Ibid. Even so, Officer Brown provided the social security office with the biographical information he had regarding Wheeling. Ibid. To that point, all of Officer Brown's efforts failed to produce information leading to Wheeling's location.

On November 8 2005, Officer Brown applied for an extension of the arrest warrant. N.T., 6. Subsequent to that, Officer Brown received a letter from the social security office telling him that they had an individual receiving social security assistance by the name of Leroy

Burnett who had the same social security number and biographical information as Wheeling. Id. at 6-7. The social security office told Officer Brown that the most recent address they had for Leroy Burnett was 75 Cider Press Road, Lock Haven, Pennsylvania. Id. at 7, 10, 20. Officer Brown contacted the Lock Haven Police Department and requested their assistance in trying to locate Wheeling. Id. at 7. The Lock Haven Police Department was unable to locate Wheeling at the 75 Cider Press Road address. Ibid.

About a month later, Officer Brown was notified by his watch commander's office that Wheeling had called the Williamsport Bureau of Police. N.T., 7, 15, 22. The social security office had sent Wheeling a letter telling him that there was a warrant out for his arrest. Id. at 22. Officer Brown spoke with Wheeling, and he indicated to Officer Brown that he wanted to come down and clear up the matter. Id. at 7. When Wheeling arrived at Police Headquarters on January 26, 2006, Officer Brown arrested him. Ibid.

b. <u>Wheeling's Activities After the Controlled Buy</u>

At the end of April 2005, Wheeling moved from the 426 Third Avenue residence to the 75 Cider Press Road residence. N.T., 14, 19-20. When he moved, Wheeling filled out a change of address form and gave it to the United States Post Office in Williamsport. Id. at 14, 20. The change of address form also covered mail that would have been sent to his Williamsport post office box. That mail would now be forwarded to his Lock Haven post office box, P.O. Box 811 Lock Haven, PA. Id. at 22, 27-28. On the change of address form, Wheeling listed both names – Leroy Wheeling and Leroy Burnett. During his search for Wheeling, Officer Brown did not check with the Post Office to see if he had a forwarding

address despite the knowledge that Wheeling no longer resided at the 426 Third Avenue residence. Id. at 9-10.

In order to ensure that he received it, Wheeling had his important mail sent to his post office box. N.T., 25. Wheeling had provided the social security office with his residence address and his post office box address. Id. at 25. Accordingly, the social security office mailed documents to Wheeling's Lock Haven post office box, including the letter telling him about the outstanding arrest warrant. Id. at 22, 25. Of note, the letter was addressed to Leroy Burnett, not Leroy Wheeling. Id. at 21.

Wheeling was on a payment plan at Magisterial District Judge James Carn's office to pay fines for traffic violations. N.T., 17, 18. The defendant in that case was listed as "Leroy Wheeling." Id. at 21. Wheeling would personally visit the office to pay his fines. He did so monthly, usually between the first and seventh of the month. Id. at 18, 21. Wheeling had been doing this since April 2005 up until he was arrested. Id. at 21. On no occasion when he paid his fines did anyone at Magisterial District Judge Carn's office tell him that there was an outstanding arrest warrant for him. Id. at 15. Similarly, no one from Magisterial District Judge Carn's office notified Officer Brown that Wheeling was at the office when he came in to pay his fines. Id. at 30. The usual practice in Magisterial District Judge offices in Lycoming County is that if someone is there to pay a fine and has an outstanding warrant, the office staff notifies the police to come and serve that warrant on the individual. Id. at 29.

c. <u>The Procedural Track of Wheeling's Case</u>

On January 26, 2006, Wheeling was preliminarily arraigned. On January 31, 2006, a preliminary hearing was scheduled, but instead Wheeling waived his preliminary hearing that

date. A case scheduling form signed by Wheeling and his counsel, indicated that he was waiving his preliminary hearing and that there was a plea agreement. The form did not indicate the specifics of the plea agreement, only that "co-op to be noted." Wheeling was scheduled to appear before this court on March 13, 2006 for arraignment. At the March 13, 2006 arraignment, we issued an order scheduling Wheeling's guilty plea for May 9, 2006. On May 9, 2006, instead of pleading guilty, Wheeling asserted his right to go to trial. Wheeling's case was scheduled for the trial term in August 2005. Wheeling was next to appear at a June 22, 2006 status conference. At that conference, the Honorable Richard A. Gray noted that there was no plea offer in the case and that the matter would be proceeding to trial. A pre-trial conference was scheduled for August 3, 2006. At the pre-trial conference, Wheeling motioned the court for a continuance of his trial. In an August 3, 2006 order, we granted the motion and continued his trial until the September 2006 trial term. That order set September 7, 2006 as the pre-trial conference date, September 12 and 14, 2006 as the dates for jury selection, and specified that the trial term would run from September 18, 2006 to October 5, 2006. On September 12, 2006, Wheeling waived his right to a jury trial, and his non-jury trial was scheduled for September 20, 2006.

II. ISSUES

Wheeling asserts two issues in his statement of matters. They are:

> (1) The defendant avers the evidence presented at trial was insufficient to support a finding of guilt.
>
> (2) The trial court erred in denying the Defendant's Motion to Dismiss for violation of Rule 600.

Wheeling's Concise Statement of Matters Complained of on Appeal.

III. DISCUSSION

Wheeling's appeal should be denied. Taking his issues in reverse order, the Commonwealth brought Wheeling to trial within the time period prescribed by Pennsylvania Rules of Criminal Procedure Rule 600. Wheeling tolled the running of the time period when he tendered a guilty plea, and the Commonwealth brought Wheeling to trial within the 365 day time period once it began to run. As to Wheeling's sufficieny of the evidence challenge, the Commonwealth presented sufficient evidence to establish beyond a reasonable doubt that Wheeling facilitated the delivery of a controlled substance through the use of his cell phone, possessed 1.2 grams of cocaine in a clear plastic bag with the intent to deliver the cocaine, and delivered that cocaine to Cero on March 21, 2005.

A. The Rule 600 Challenge

1. Rule 600 General Rules and Principles

Rule 600 serves two functions: (1) the protection of the accussed's speedy trial rights, and (2) the protection of society. ***Commonwealth v. Hunt***, 858 A.2d 1234, 1239 (Pa. Super. 2004), *app. denied*, 875 A.2d 1073 (Pa. Super. 2005). It provides in pertinent part:

> ***
>
> (A)(3) Trial in court cases in which a written complaint is filed against the defendant, when the defendant is at liberty on bail, shall commence no later than 365 days from the date on which the complaint is filed.
>
> ***
>
> (C) In determining the period for commencement of trial, there shall be excluded therefrom:
>
> (1) the period of time between the filing of the written complaint and the defendant's arrest, provided that the

> defendant could not be apprehended because his or her whereabouts were unknown and could not be determined by due diligence.
>
> (2) any period of time for which the defendant expressly waives Rule 600;
>
> (3) such period of delay at any stage of the proceedings as results from:
>
> (a) the unavailability of the defendant or the defendant's attorney;
>
> (b) any continuance granted at the request of the defendant or the defendant's attorney.
>
> ***
>
> (G) For defendants on bail after the expiration of 365 days, at any time before trial, the defendant or the defendant's attorney may apply to the court for an order dismissing the charges with prejudice on the ground that this rule has been violated. A copy of such motion shall be served upon the attorney for the Commonwealth who shall also have the right to be heard thereon.
>
> If the court upon hearing, shall determine that the Commonwealth exercised due diligence and that the circumstances occasioning the postponement were beyond the control of the Commonwealth, the motion to dismiss shall be denied and the case shall be listed for trial on a date certain. If, on any successive listing of the case, The Commonwealth is not prepared to proceed to trial on the date fixed, the court shall determine whether the Commonwealth exercised due diligence in attempting to be prepared to proceed to trial. If, at any time it is determined that the Commonwealth did not exercise due diligence, the court shall dismiss the charges and discharge the defendant.
>
> ***

Pa.R.Crim.P. 600(A)(3), (C), (G).

Generally, Rule 600 requires the Commonwealth to bring a defendant on bail to trial within 365 days of the date the complaint was filed. ***Hunt***, 858 A.2d at 1210. "A defendant on

bail after 365 days, but before trial, may apply to the court for an order dismissing the charges with prejudice." ***Id***. at 1240-41.

2. <u>Wheeling was Brought to Trial within the Prescribed Time Period</u>

Wheeling was brought to trial within the time period prescribed by Pennsylvania Rules of Criminal Procedure Rule 600. The tendering of a guilty plea tolls the running of the 365 day time limit of Rule 600. ***Commonwealth v. Bowes***, 839 A.2d 422, 425 (Pa. Super. 2003). A guilty plea "tender" is "any good faith offer by the defendant stating his intent to enter a plea." ***Ibid.*** Thus, Rule 600 does not require a plea to be accepted in order to toll the 365 day time limit. ***Ibid.*** Wheeling tolled the running of the 365 day time period when he tendered a guilty plea on January 31, 2006.

There is no formal written guilty plea agreement specifically stating the terms of the agreement nor is there oral testimony concerning such an agreement. There is, however, evidence that Wheeling had expressed his intention to enter a plea of guilty. The first piece of evidence is a Criminal Case Scheduling Form. On this Form, there is a check mark placed in the "Yes" blank of the Form's plea agreement status section. Wheeling signed the form, and one would reasonably conclude that he would have read the form before he signed it. As such, it would be unlikely that Wheeling would have signed the form acknowledging the existence of a plea agreement if there was no such agreement.

The second piece of evidence is the scheduling of Wheeling's formal entry of a guilty plea. At his March 13, 2006 arraignment, we issued an order scheduling the formal entry of his guilty plea for May 9, 2005. If Wheeling was not going to plead guilty, then the court would not have set aside valuable time and resource. As such, the evidence indicates that Wheeling

had expressed his intention to enter a guilty plea on January 31, 2006, this intention was memorialized in the Criminal Case Scheduling Form, and all of the parties involved in the case, Wheeling, the Commonwealth, and the court, proceeded in accordance with this intention. Accordingly, Wheeling tendered a guilty plea on January 31, 2006 and tolled the 365 day time period.

With the 365 day time period tolled, Rule 600 did not require the Commonwealth to bring Wheeling to trial until the time period begun to run anew. The withdrawal of a guilty plea is considered to be the granting of a new trial for purposes of Rule 600. Pa.R.Crim.P. 600, cmt. When a trial court grants a new trial and no appeal has been perfected, trial must commence within 365 days of the court's order granting a new trial if the defendant has been released on bail. Wheeling had been released on bail since February 10, 2006 when he executed a bail bond. On May 9, 2006, Wheeling chose not to enter a guilty plea, but instead asserted his right to a jury trial. This court memorialized that decision in a May 9, 2006 scheduling order. Since he was released on bail, the Commonwealth had until May 9, 2007 to bring Wheeling to trial. The Commonwealth brought Wheeling to trial within that time period as a non-jury trial was held in this case on September 20, 2006. Accordingly, the Commonwealth brought Wheeling to trial within the time period prescribed by Rule 600.

B. <u>Sufficiency of the Evidence Challenge</u>

1. <u>Standard of Review</u>

A claim challenging the sufficiency of the evidence is a question of law. ***Commonwealth v. Sullivan***, 820 A.2d 795, 805 (Pa. Super. 2003), *app. denied*, 833 A.2d 143

(Pa. 2003). When reviewing a challenge to the sufficiency of the evidence, the following standard of review is employed:

> 'The standard we apply when reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence.'

Commonwealth v. Gray, 867 A.2d 560, 567 (Pa. Super. 2005), *app. denied*, 879 A.2d 781 (Pa. 2005) (quoting ***Commonwealth v. Nahavandian***, 849 A.2d 1221, 1229-30 (Pa. Super. 2004)). Direct and circumstantial evidence receive equal weight when assessing the sufficiency of the evidence. ***Commonwealth v. Grekis***, 601 A.2d 1275, 1280 (Pa. Super. 1992). Whether it is direct, circumstantial, or a combination of both, what is required of the evidence is that it taken as a whole links the accused to the crime beyond a reasonable doubt. ***Commonwealth v. Robinson***, 864 A.2d 460, 478 (Pa. 2004), *cert. denied*, 126 S. Ct. 559 (2005).

2. <u>Delivery of a Controlled Substance</u>

The Controlled Substance, Drug, Device and Cosmetic Act ("the Drug Act") defines the offense of delivery of a controlled substance as follows:

> Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with the intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113(a)(30). The Drug Act defines ""deliver" or "delivery" as: "the actual, constructive, or attempted transfer from one person to another of a controlled substance, other drug, device or cosmetic whether or not there is an agency relationship." 35 P.S. § 780-102(b). "Thus, for a defendant to be liable as a principal for the delivery of a controlled substance there must be evidence that he knowingly made an actual, constructive, or attempted transfer of a controlled substance to another person without the legal authority to do so." ***Commonwealth v. Murphy***, 844 A.2d 1228, 1234 (Pa. 2004). The Drug Act does not define "transfer," but, according to its commonly accepted meaning, it means "'to convey or remove from one … person to another; pass or hand over from one to another.'" ***Commonwealth v. Murphy***, 797 A.2d 1025, 1030 (Pa. Super. 2002), *aff'd*, 844 A.2d 1228 (Pa. 2002) (quoting ***Commonwealth v. Cameron***, 372 A.2d 904, 907 (Pa. Super. 1977)).

"A defendant actually transfers drugs whenever he physically conveys drugs to another person." ***Murphy***, 844 A.2d at 1234. The Drug Act does not require that a defendant transfer the controlled substance to a law enforcement officer; it only requires that the transfer be between two people. ***Commonwealth v. Metzger***, 392 A.2d 20, 22 (Pa. Super. 1977). Nor does the Drug Act require that a sale took place or that the defendant made a profit from the transfer in order to establish the offense of delivery of a controlled substance. ***Ibid***. (sale not required); ***Commonwealth v. Morrow***, 650 A.2d 907, 912 (Pa. Super. 1994), *app. denied*, 659 A.2d 986 (Pa. 1995) (profit not required).

The Commonwealth presented sufficient evidence through the testimony of Cero, whom this court found to be a credible witness, to establish beyond a reasonable doubt that on March 21, 2005 Wheeling delivered a controlled substance. Earlier that day, Wheeling had called Cero and told her that he could get her cocaine. When Cero arrived at the 426 Third Avenue residence to take Wheeling up on his offer, Wheeling made several phone calls to his cocaine connections so that he could obtain the cocaine for Cero. When these phone calls proved fruitless, Wheeling had Cero drive him to a possible cocaine connection at a residence in the 300 block of Locust Street. Once there, Wheeling got the $200 from Cero and entered the residence. Within a minute of him entering the residence, Wheeling exited and returned to Cero's vehicle. Cero then drove Wheeling back to the 426 Third Avenue residence. Once they were inside the residence, Wheeling physically handed to Cero a clear plastic bag containing 1.2 grams of cocaine. After handing the bag to Cero, Wheeling asked her for some of the cocaine.

This evidence established beyond a reasonable doubt that Wheeling knowingly transferred cocaine to Cero. Wheeling knew that the clear plastic bag he handed to Cero contained cocaine. Wheeling had told Cero that he could get her cocaine and Wheeling made a concerted effort to make good on that statement. When Wheeling finally obtained the cocaine and gave it to Cero, he asked her for some of it. If Wheeling knew that the white powder was not cocaine, then his request would seem odd since a counterfeit substance would be of little value. Accordingly, the Commonwealth presented sufficient evidence to establish beyond a reasonable doubt that Wheeling committed the offense of delivery of a controlled substance.

3. Possession of a Controlled Substance

The Drug Act defines the offense of possession of a controlled substance as follows:

> Knowingly or intentionally possessing a controlled or counterfeit substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, unless the substance was obtained directly from, or pursuant to, a valid prescription order or order of a practitioner, or except as otherwise authorized by this act.

35 P.S. § 780-113(a)(16). One of the elements the Commonwealth must prove beyond a reasonable doubt to establish possession of a controlled substance is that the defendant intentionally or knowingly possessed a controlled substance. ***Commonwealth v. Macolino***, 469 A.2d 132, 134 (Pa. 1983). Possession can be proven by showing actual possession, that is the controlled substance was on the defendant's person, or by showing constructive possession. ***Ibid***.

The Commonwealth presented sufficient evidence, again through the credible testimony of Cero, to establish beyond a reasonable doubt that on March 21, 2005 Wheeling possessed a controlled substance. Cero had made contact with Wheeling earlier in the day to arrange a purchase of cocaine from him. When she arrived at his 426 Third Avenue residence, it was apparent that Wheeling did not have the cocaine on hand since he had to make a number of phone calls to his connections. When those phone calls did not produce the desired results, Wheeling told Cero that they would have to go to a nearby residence to obtain the cocaine. Wheeling and Cero then drove to this residence, and Wheeling went inside with the $200 Cero had given him. Wheeling returned to the vehicle shortly thereafter, and he and Cero returned to the 426 Third Avenue residence. Once there, Wheeling produced a clear plastic bag containing 1.2 grams of cocaine, which he handed to Cero. Prior to handing the bag to Cero, Wheeling

was in actual physical control of the cocaine and thus possessed it. Wheeling was also in physical control of the cocaine when he obtained it at the Locust Street residence and transported it back to the 426 Third Avenue residence. As such, the Commonwealth presented sufficient evidence to establish beyond a reasonable doubt that Wheeling committed the offense of possession of a controlled substance.

4. <u>Possession with the Intent to Deliver a Controlled Substance</u>

The Drug Act defines the offense of possession with the intent to deliver a controlled substance as follows:

> Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with the intent to deliver, a counterfeit controlled substance.

35 P.S. § 780-113(a)(30). In order to convict a defendant of possession with intent to deliver, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a controlled substance and he did so with the intent to deliver it. ***Commonwealth v. Bricker***, 882 A.2d 1008, 1015 (Pa. Super. 2005); ***Commonwealth v. Kirkland***, 831 A.2d 607, 611 (Pa. Super. 2003), *app. denied*, 847 A.2d 1280 (Pa. 2004).

All of the relevant surrounding facts and circumstances must be considered when determining whether a defendant possessed the controlled substance with the intent to deliver. ***Commonwealth v. Ratsamy***, 885 A.2d 1005, 1007 (Pa. Super. 2005), *app. granted in part*, 912 A.2d 1292 (Pa. 2006). The Commonwealth may prove intent to deliver through wholly circumstantial evidence. ***Bricker***, 830 A.2d at 1014. The relevant facts include the quantity of controlled substance possessed, the manner of packaging, the absence of paraphernalia for use,

the behavior of the defendant, the presence of large amounts of cash, and expert opinion testimony. ***Commonwealth v. Heater***, 889 A.2d 1126, 1131 (Pa. Super. 2006), *app. denied*, 2007 Pa. LEXIS 1255 (6/15/07); ***Kirkland***, 831 A.2d at 611.

The Commonwealth has presented sufficient evidence, by Cero's credible testimony, to establish beyond a reasonable doubt that on March 21, 2005 Wheeling possessed a controlled substance with the intent to deliver it. Wheeling's intent that day was to acquire cocaine and deliver it to Cero. Wheeling contacted Cero and arranged for the delivery of cocaine from him to her. In order to accomplish this, Wheeling made several phone calls to his sources attempting to acquire the cocaine, and when they proved unsuccessful personally went to a connection at a Locust Street residence to obtain the cocaine for Cero. When Wheeling got the cocaine from his Locust Street connection and transported it back to the 426 Third Avenue residence, he had every intention of delivering it to Cero. It was to be the culmination of everything he had done that day. Once he and Cero were safely back at 426 Third Avenue residence, Wheeling handed Cero a plastic bag containing 1.2 grams of cocaine. Wheeling had had fulfilled his offer to Cero and delivered to her cocaine. Accordingly, the Commonwealth presented sufficient evidence to establish beyond a reasonable doubt that Wheeling committed the offense of possessing a controlled substance with the intent to deliver it.

5. <u>Possession of Drug Paraphernalia</u>

The Drug Act defines the offense of possession of drug paraphernalia as follows:

> The use of, or possession with the intent to use, drug paraphernalia for the purpose of planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packing, repacking, storing, containing, concealing, injecting, ingesting, inhaling or

> otherwise introducing into the human body a controlled substance in violation of this act.

35 P.S. § 780-113(a)(32). The Drug Act defines "drug paraphernalia" to include, among other items: "Capsules, balloons, envelopes and other containers used, intended for use or designed for use in packaging small quantities of controlled substances." 35 P.S. § 780-102(b). Thus, ordinary packaging material can be drug paraphernalia. ***Commonwealth v. Torres***, 617 A.2d 812, 815 (Pa. Super. 1992), *app. denied*, 629 A.2d 1379 (Pa. 1993).

Many items, however, have uses that are entirely unrelated to illegal drug activity. Therefore, the Commonwealth must establish that the item possessed was used or intended to be used with a controlled substance for the item to be drug paraphernalia. ***Torres***, 617 A.2d at 815. In determining whether an item is drug paraphernalia, the following factors should be considered:

> (1) statements by the owner or by anyone in control of the item;
>
> (2) prior convictions related to controlled substances of the owner or anyone in control of the object;
>
> (3) the proximity of the object in time and space to a violation of the Drug Act;
>
> (4) the proximity of the object to a controlled substance;
>
> (5) the existence of any controlled substance residue on the object;
>
> (6) the existence and scope of any legitimate uses of the object in the community; and
>
> (7) expert testimony concerning the object's use.

Ibid, *see also*, 35 P.S. § 780-102(b).

The Commonwealth presented sufficient evidence, by Cero's credible testimony, to establish beyond a reasonable doubt that on March 21, 2005 Wheeling possessed drug paraphernalia. Wheeling obtained from the Locust Street residence 1.2 grams of cocaine and delivered it to Cero. The cocaine was contained within a clear plastic bag. The clear plastic bag was drug paraphernalia. It was intended as such since its sole purpose on this occasion was to serve as a vessel to transport the cocaine from the supplier to the buyer. In this manner, the clear plastic bag served as packaging material for the cocaine and was used to facilitate the drug delivery. Accordingly, the Commonwealth presented sufficient evidence to establish beyond a reasonable doubt that Wheeling committed the offense of possession of drug paraphernalia.

6. <u>Criminal Use of a Communication Facility</u>

The Pennsylvania Crimes Code defines the offense of criminal use of a communication facility as follows:

> A person commits a felony of the third degree if that person uses a communication facility to commit, cause or facilitate the commission or the attempt thereof of any crime which constitutes a felony under this title or under the act of April 14, 1972 (P.L. 233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act. Every instance where the communication facility is utilized constitutes a separate offense under this section.

18 Pa.C.S.A. § 7512(a). In order to convict a defendant for the criminal use of a communication facility, the Commonwealth must prove beyond a reasonable doubt that:

> (1) the defendant intentionally, knowingly, or recklessly used a communication facility; and in so doing
>
> (2) the defendant intentionally, knowingly, or recklessly facilitated the commission or attempted commission of an underlying felony.

Commonwealth v. Moss, 852 A.2d 374, 381 (Pa. Super. 2004). Facilitation is "'any use of a communication facility that makes easier the commission of the underlying felony.'" ***Id***. at 382 (quoting ***United States v. Davis***, 929 F.2d 544, 559 (10th Cir. 1991)).

The Commonwealth presented sufficient evidence, by Cero's credible testimony, to establish beyond a reasonable doubt that on March 21, 2005 Wheeling criminally used a communication facility. On that date he used his cell phone to help him arrange the delivery of cocaine to Cero. Wheeling offered Cero his services in procuring cocaine for her early on March 21, 2005 when he called her and told her that he could get her cocaine. Later in the day, Cero called Wheeling's cell phone and accepted his offer. It was during this phone call that Wheeling told Cero that she would have to come to his residence to get the cocaine. Wheeling's cell phone was integral in arranging the delivery of the cocaine to Cero. Without it, Wheeling could not have made the offer to deliver cocaine to Cero, Cero could not have communicated to Wheeling her acceptance of that offer, and Wheeling could not have arranged for the logistics of the delivery. As such, not only did Wheeling's use of his cell phone make the delivery of cocaine easier, without it the delivery would have been impossible. Accordingly, the Commonwealth presented sufficient evidence to establish beyond a reasonable doubt that Wheeling committed the offense of criminal use of a communication facility.

IV. CONCLUSION

Accordingly, Wheeling's appeal should be denied and the order of December 7, 2006 should be affirmed.

BY THE COURT,

William S. Kieser, Judge

cc: Melody L. Hanisek, Esquire
DA
Judges
Christian Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)