IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CR-789-2007**
	:	
vs.	**:**	**CRIMINAL DIVISION**
	:	
	:	
TONY S. BARNES,	**:**	
Appellant	**:**	**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 entered on or about February 7, 2008. The relevant facts follow:

In April 2007, Harry Day was working as a confidential informant (CI) with Trooper Brett Herbst. A few months earlier Appellant, who is also known as Low Rider or Low, gave his cell phone number (447-6097) to the CI. On April 17, 2007, the CI set up a buy of an eight-ball of cocaine from Low for $180. The CI met Trooper Herbst at the Montoursville State Police barracks at approximately 3:00 p.m. The CI and his vehicle were searched. The CI placed another phone call to Appellant at 447-6097 to confirm the price and where the buy was going to take place. Appellant told the CI to meet him on Hepburn Street in the city of Williamsport near the intersection known as “confusion corner.” Trooper Herbst provided the CI with $180 in pre-recorded funds. The CI drove to Hepburn Street and parked. Appellant came over and got into the vehicle. While the CI drove the vehicle, Appellant called an individual from whom he could obtain the eight-ball of cocaine. The CI drove to the area of Elmira and Louisa Streets. Appellant got out of the vehicle and

spoke to some black males who were in front of a residence on Elmira Street. Appellant got back in the car and made another phone call. Shortly thereafter, he got out of the vehicle and, on the other side of the street, met a gentleman wearing a brown and green jacket. Appellant returned with cocaine and handed it to the CI. The CI gave Appellant the $180 in pre-recorded funds. The CI asked Appellant where he wanted to go. Appellant asked the CI to drop him off at his girlfriend's place in Pennvale.[1] On the way to Pennvale, Appellant asked the CI if he could borrow $600 so he could go to Philadelphia and buy an ounce of cocaine. The CI told Appellant he would think about it.

After the CI dropped Appellant off at Pennvale, he met with Trooper Herbst.[2] He gave him the cocaine and talked to him about what Appellant had said about borrowing $600 to buy an ounce of cocaine.

The CI called Appellant and told him he wanted collateral for the $600, preferably a handgun. Appellant offered a .32 caliber handgun. The CI wasn't sure if that was good enough, so he told Appellant he'd get back to him. When the CI called back and said the .32 caliber handgun wasn't good enough, Appellant told him he could get a 9mm Glock. The CI indicated that would be acceptable.

On April 19, 2007, the CI again went to the state police barracks. The CI agreed to wear a wire. The CI and his vehicle were searched and the CI was equipped with the wire and given $600 in pre-recorded funds. The CI then called Appellant to tell him he was getting the $600. Appellant said to meet him at 6th Avenue. The CI asked for a clip and shell in case he wanted to use the gun. Appellant was concerned about what the CI was

1 Pennvale is the name of a housing project in Williamsport.
2 The police were conducting surveillance throughout the CI's meeting and travels with Low.

going to do with the gun. The CI told him he might use it for target shooting. Appellant said he would have to get a box to put the gun and shells in.

The CI drove to 6th Avenue. Appellant got in the CI's truck with a clip for a .45 handgun. Appellant said he couldn't get a 9 millimeter, but would get a .45 instead. Appellant had the CI drive to the Lycoming Housing projects to get the gun but it wasn't there, so they drove to Appellant's girlfriend's place in Pennvale to get her 9 millimeter.

When they got to Pennvale, Appellant picked up the .45 shells and clip. The CI told Appellant to make sure his girlfriend left the clip in her gun. Appellant took the shells and clip into Pennvale and returned with a loaded, 9 millimeter Taurus Millenium. Appellant carried the gun to the CI's vehicle in his jacket/hoodie pocket. The CI could not see the gun until Appellant pulled it out of his pocket and gave it to him. The CI gave Appellant the $600 and Appellant left the vehicle. The CI unloaded the gun for safety reasons and drove back to the police barracks.

The CI turned the weapon over to the police. Lanny Reed, the Chief County Detective test fired the weapon three times and it was fully operational.

On April 20, 2007, the CI went to Faxon Bowling alley to meet a friend. Appellant pulled in and approached him before he went in. Low indicated he had the cocaine and he wanted the gun back. The CI told him he couldn't get it to him until Monday.

On Monday, April 23, 2007, the CI went to the barracks and met Trooper Herbst. Again, he was searched to make sure he did not possess any drugs. The CI and the police agreed that if Appellant had any quantity of cocaine, the CI would signal them by dropping a soda bottle out of the window of his vehicle. The CI called Appellant, who told him to meet him at Hepburn Street where they had met before. Appellant entered the vehicle

and the CI told him he had to go to friend's place near Pennvale to retrieve the gun. As they were headed there, Appellant pulled out a bag of cocaine. The CI told him to put it in the glove box, which he did. The CI then dropped a soda bottle out of his window. A couple of blocks later, the state police pulled over the CI's vehicle. When Appellant realized the police were stopping the vehicle, he took the cocaine out of the glove box and shoved it inside his pants. The police took the CI and Appellant into custody in separate vehicles. The CI called Trooper Herbst and told him that Appellant had the cocaine in his pants. Trooper Herbst retrieved the bag of cocaine from inside the waistband of Appellant's pants; it was not in a pocket.

Appellant was charged with carrying a firearm without a license and two counts each of delivering a controlled substance, possessing a controlled substance with intent to deliver it, possessing a controlled substance, and criminally using a communication facility.

A jury trial was held October 29-31, 2007. The jury found Appellant guilty of all these charges except delivering a controlled substance on April 23, 2007. The Court sentenced Appellant to incarceration in a state correctional institution for an aggregate term of 28 to 72 months, which consisted of 1 to 3 years for the delivery on April 17, 2007; 8 to 18 months for possessing a firearm without a license; and 8 to 18 months for possessing cocaine with intent to deliver it on April 23, 2007.[3]

Appellant filed a timely appeal. In his appeal, he raises three issues: (1) the evidence was insufficient to prove the offenses of delivery of a controlled substance and

3 The Court imposed concurrent sentences for the criminal use of communication facility convictions and the other drug convictions merged for sentencing purposes. The Court also imposed a mandatory $5,000 fine for the April 17 delivery.

possession of a firearm, because the defense proved entrapment and there was no evidence to disprove this defense; (2) the verdict of guilty for delivery of a controlled substance and possession of a firearm were against the weight of the evidence, because the defense proved entrapment and there was no evidence to disprove this defense; and (3) the sentence imposed by the Court was excessive.

In reviewing the sufficiency of the evidence, the court considers whether the evidence and all reasonable inferences that may be drawn from that evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt. *Commonwealth v. Davido*, 582 Pa. 52, 60, 868 A.2d 431, 435 (Pa. 2005); *Commonwealth v. Murphy*, 577 Pa. 275, 284, 844 A.2d 1228, 1233 (Pa. 2004); *Commonwealth v. Ockenhouse*, 562 Pa. 481, 490, 756 A.2d 1130, 1135 (Pa. 2000); *Commonwealth v. May*, 540 Pa. 237, 246-247, 656 A.2d 1335, 1340 (Pa. 1995). To establish the crime of delivery of a controlled substance in this case, the Commonwealth had to prove that Appellant transferred cocaine to another person. 35 P.s. §780-113(a)(30); Pa.SSJI (Crim) 16.13(a)(30)B; *Commonwealth v. Murphy*, 795 A.2d 1025, 1030-31 (Pa. Super. 2002). The evidence in this case clearly established that Appellant obtained cocaine from a man wearing a brown and green jacket in the vicinity of Elmira and Louisa streets and he handed or passed it to the CI after he got back into the CI's vehicle. In fact, Appellant admitted that on April 17 he went to Elmira Street and got drugs for the CI; in exchange the CI gave him some of the cocaine and $20. N.T., October 29, 2007, at pp.224-225.

Despite the fact that Appellant admits getting drugs for the CI, he claims his conviction is not proper because he established the defense of entrapment. The defense of

entrapment is set forth in section 313(a) of the Crimes Code, which states:

> A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting an offense by either:
>
> (1) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
>
> (2) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

18 Pa.C.S.A. §313(a). It was incumbent on Appellant to prove by a preponderance of the evidence that his conduct occurred in response to an entrapment. 18 Pa.C.S.A.§313(b).

The only evidence of entrapment came from Appellant's own testimony, in which he claimed the CI called him six or seven times that day asking him to go with him to get drugs and he only went with him and got the drugs because the CI was a friend and business partner of his, who had lost his wife and kids. N.T., at pp. 223-226. The jury, however, did not have to believe Appellant's testimony. The credibility of a witness is within the sole province of the jury who is free to believe all, part or none of any witness's testimony. *Commonwealth v. Spotz*, 552 Pa. 499, 510, 716 A.2d 580, 585 (Pa. 1998); *Commonwealth v. Gibson*, 553 Pa. 648, 664, 720 A.2d 473, 480 (Pa. 1998). Appellant's testimony that the CI somehow must have taken the weapon from Appellant's house simply was not credible, providing a basis for the jury to reject all of Appellant's testimony regarding his entrapment defense. Moreover, Appellant admitted in his testimony that the CI was not demanding; he was just asking on a friendly note and Appellant wanted to go with him and get the drugs for him. N.T., October 29, 2007, at pp. 223, 225-26, 229-32.

Based on the foregoing, the Court finds the evidence was sufficient to support

the jury's verdict for delivery of a controlled substance.

To establish the possession of a firearm without a license charge in this case, the Commonwealth had to prove: (1) Appellant carried a firearm; (2) Appellant was not licensed to carry the firearm; and (3) the firearm was concealed on Appellant's person outside his home or place of business. *Commonwealth v. Bavusa*, 750 A.2d 855, 857 (Pa. Super. 2000), affirmed 574 Pa. 620, 832 A.2d 1042 (Pa. 2003); see also 18 Pa.C.S.A. §6106; Pa.SSJI (Crim) 15.6106. A firearm includes any pistol or revolver with a barrel less than 15 inches or any overall length of less than 26 inches, which is operable or, if inoperable, the defendant had under his control the means to convert the object into one capable of firing a shot. 18 Pa.C.S.A. §6102; PaSSJI (Crim) 15.6106. Appellant carried a 9mm Taurus Millennium concealed in his jacket pocket from his girlfriend's apartment in Pennvale to the CI's vehicle. N.T., October 29, 2007, at pp. 133-134. This firearm was introduced into evidence as Commonwealth's Exhibit 6. *Id.* at pp. 37-38, 209. It was readily apparent to anyone who observed the weapon that the barrel was less than 15 inches and the total length was less than 26 inches. Chief County Detective Lanny Reed test-fired the weapon three times. The parties stipulated that Appellant was not licensed to carry the firearm. *Id.* at p.218. Therefore, the Commonwealth proved all the elements for possessing a firearm without a license.

Appellant again contends he presented evidence of an entrapment defense that the Commonwealth did not rebut. The Court cannot agree. With regard to the weapon, Appellant did not claim that the CI made false representations that led him to believe his possession of the weapon was not unlawful nor did he testify to persuasions or inducements that caused him to provide the weapon to the CI when he otherwise would not have. Instead,

Appellant claimed he did not deliver the gun to the CI on April 19, but the CI somehow must have taken the gun out of his house. The Court does not believe this evidence would satisfy Appellant's burden of proof to show entrapment by a preponderance of the evidence. Furthermore, even if it did, the jury had good reason not to credit this defense since (1) the CI and his vehicle were searched before he met with Appellant on April 19 and no weapons were found; (2) the CI wore a body wire on April 19 and the recording from that wire was played for the jury; and (3) after meeting with Appellant, the CI turned over a 9mm Taurus Millennium to the police. The CI's testimony also did not establish an entrapment defense. Although the CI requested collateral for the $600 and preferred a handgun, Appellant was perfectly willing to provide the CI with a handgun. Appellant did not raise any concerns until the CI requested a clip and shells.

Appellant next asserts the verdict was against the weight of the evidence. This issue was not properly raised in the trial court; therefore it is waived.[4] Pa.R.Cr.P. 607(A) and comment; *Commonwealth v. Gillard*, 850 A.2d 1273, 1277 (Pa.Super. 2004); *Commonwealth v. Washington*, 825 A.2d 1264, 1265-1266 (Pa.Super. 2003).

Even if this issue had been properly preserved, the court does not believe it would entitle Appellant to relief. An allegation that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial court. *Commonwealth v. Sullivan*,

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4 The Court received a document from Appellant on January 24, 2007 entitled "Motion to challenges the weight of evidence." It was an incoherent rambling about suppression motions, omnibus motions, lying witnesses and constructive possession. Since Appellant was represented by counsel, the Court entered an order directing the Prothonotary to docket the document and send a copy to defense counsel and the district attorney but the Court did not take any action on the filing in accordance with Rule 576 and the comment thereto.

The Court notes this case did not involve suppression or omnibus motions or constructive possession. The only item raised that would relate to the weight of the evidence was Appellant's claim that the CI lied. Credibility, however, is within the sole province of the jury. Furthermore, the CI's testimony generally was supported by the recordings from the body wire. Therefore, even if the document were considered a proper challenge to the weight of the evidence, the Court would have denied it.

820 A.2d 795, 805-806 (Pa.Super. 2003). A new trial is awarded only when the evidence is so tenuous, vague and uncertain that the verdict shocks the conscience of the court. *Id*. at 806. The issue is not whether there was evidence to support the verdict, but rather whether, notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or give them equal weight with all the facts is to deny justice. *Id*.

The verdict did not shock the Court's conscience. Contrary to Appellant's misguided beliefs, it is of no moment whether he was the CI's supplier or he was simply an intermediary. In either event he handed or passed cocaine to the CI, which established beyond a reasonable doubt the delivery charge; it does not matter whether Appellant got paid or not. With respect to the firearm charge, it was Appellant's testimony that the CI stole the gun that was utterly incredible, especially since Appellant admitted on cross-examination that on the audio tapes you can clearly hear him and the CI talking about the gun, and Appellant ultimately giving him the gun. N.T., October 30, at pp. 239-240.

Appellant's final contention is that the sentence was excessive. The Court sentenced Defendant on three separate charges that occurred on three separate dates. The Court imposed an aggregate sentence of 28 to 72 months, which consisted of 12 to 36 months for delivering cocaine on April 17, 2007, 8 to 18 months for possessing of a firearm without a license on April 19, 2007, and 8 to 18 months for possession of cocaine with the intent to deliver it on April 23, 2007.

Appellant delivered 2.8 grams of cocaine on April 17, 2007. The offense gravity score for this conviction was 7 and Appellant's prior record score was 0, resulting in a standard guideline range of 6-14 months for Appellant's minimum sentence. However, section 7508 of the Crimes Code (18 Pa.C.S.A. §7508) provides for a 1-year mandatory

minimum sentence and a minimum fine of $5,000 when the amount of cocaine is more than 2.5 grams but less than 10 grams, if requested by the Commonwealth. The Commonwealth requested the mandatory. Thus, the Court was required to impose the $5,000 fine and 12 month minimum sentence for Appellant's delivery of cocaine on April 17. The maximum sentence could be anywhere between 2 years (double the minimum sentence) and 10 years (the statutory maximum for a drug delivery). See 42 Pa.C.S.A. §9756(b); 35 P.S. §780-113(f)(1.1). In light of Appellant's lack of prior convictions, the Court imposed a maximum of 3 years, which was the lower end of the range of possible maximum sentences.

The firearm charge was a felony of the third degree. The offense gravity score for this offense was 9, because the weapon was loaded when Appellant possessed it concealed on his person. The standard range minimum sentence under the guidelines was 12 to 24 months for this offense. The mitigated range was 6 to 12 months. The statutory maximum for this offense was 7 years. 18 Pa.C.S. 1103. The Court imposed a minimum sentence of 8 months that was in the mitigated range, because the police through the CI specifically requested that the gun be loaded and the Court did not know that Appellant would have provided a loaded gun as collateral were it not for the fact it was strongly requested by them. N.T., February 7, 2008, at p. 57. With an 8 month minimum sentence, the range for the maximum would be 16 months to 7 years. The maximum imposed by the Court was 18 months. The Court imposed a consecutive sentence because it was a separate offense on a separate date and the weapon increased the seriousness of Appellant's overall conduct.

Possession with intent to deliver is an ungraded felony with a statutory maximum of 10 years, just like delivery. Appellant possessed 1.9 grams of cocaine with the

intent to deliver it. The offense gravity score for this offense was a 6. Since Appellant's prior record score was 0, the standard minimum guideline range was 3 to 12 months. The Court imposed a minimum sentence of 8 months and a maximum of 18 months. With a minimum sentence of 8 months, the maximum could be anywhere between 16 months and 10 years.

None of the sentences imposed by the Court were beyond the standard guideline range. The Court appropriately considered all factors in this case before imposing sentence. The Court balanced Appellant's age, lack of prior record, and employment skills against the nature and seriousness of the offenses, the fact the offenses occurred on separate dates, this wasn't just a partying situation as claimed by Appellant and the jury found on at least some of his testimony that Appellant was not telling the truth. N.T., February 7, 2008, at pp. 56-58. It was within the Court's discretion to sentence consecutively. 42 Pa.C.S.A. §9721; *Commonwealth v. Pass*, 914 A.2d 442, 446-47 (Pa.Super. 2006); *Commonwealth v. Marts*, 889 A.2d 608, 612 (Pa.Super. 2005). The Court did not make every sentence consecutive, but imposed a consecutive sentence for each separate date/incident. Based on the foregoing, the Court does not believe Appellant's sentence was excessive.

DATE: _____ By The Court,

_____
Kenneth D. Brown, P. J.

cc: Robert Cronin, Esquire (APD)
A. Melissa Rosenkilde, Esquire (ADA)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)