IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	
	:	
v.	:	**No.: 1339-2007**
	:	
KAREEM SMITH,	:	
Defendant	:	

OPINION AND ORDER

Before this Honorable Court is Defendant's Post Sentence Motion filed on April 15, 2008. Argument on Defendant's Motion was held on May 2, 2008. Defendant raises three issues in his motion: (1) that there was insufficient evidence to sustain the jury's verdict; (2) that the jury's verdict was against the weight of the evidence; and (3) that it was prejudicial error for the Court to admit the hearsay testimony of confidential informants. Defendant requests that the Possession with Intent to Deliver charge be dismissed or in the alternative, a new trial be granted.

Background

On July 25, 2007, Officer Jeffrey Paulhamus ("Paulhamus") of the Williamsport Bureau of Police was conducting an investigation with the Defendant as a suspect. Through his investigation, Paulhamus learned the Defendant frequented the Kiddlywink Tavern and of the specific vehicle Defendant was known to be driving, down to the color, make, and license plate of the vehicle. When Paulhamus concluded his investigation that evening, he went to the Kiddlywink in search of the Defendant.

Upon arrival at the Kiddlywink, Paulhamus observed Defendant's vehicle parked out front. Paulhamus made contact with an employee who was familiar with the Defendant and who

informed Paulhamus the Defendant was inside playing pool. Paulhamus, along with Officer Roy Snyder ("R. Snyder") and Officer Justin Snyder ("J. Snyder") entered the Bar and immediately recognized the Defendant playing pool. Paulhamus approached the Defendant and told him he was under arrest. R. Snyder did a brief pat down and sweep for weapons, whereupon he recovered a concealed firearm from a holster underneath Defendant's shirt inside his waistband. Paulhamus placed the Defendant in handcuffs and escorted him out of the bar and to the police car. At the police car, Paulhamus did a complete search incident to arrest. Paulhamus testified that he recovered a bag knotted at the top containing smaller baggies, which he suspected to be cocaine. He also noticed in a smaller bag what he suspected to be marijuana. Paulhamus testified further that Defendant had wads of loose cash in both of his front packets, as well as a money order, and two cell phones.

After his arrest, Defendant was taken to City Hall, where J. Snyder, the processing officer asked him a series of booking questions. One of the questions asked of Defendant was whether he was employed. Defendant responded that he was unemployed.

Also while Defendant was at City Hall, the suspected controlled substances were field tested. Paulhamus testified the suspected controlled substance cocaine field tested positive and the suspected controlled substance marijuana also field tested positive.

On March 3, 2008, a jury trial was held before this Court, at which the Defendant was found guilty of one count of Possession with the Intent to Deliver (cocaine) at 35 P.S. § 780-113(a)(30), one count of Possession of a Controlled Substance (cocaine) at 35 P.S. § 780-113(a)(16), one count of Possession of a Controlled Substance (marijuana) at 35 P.S. § 780-113(a)(16), and two counts of Possession of Drug Paraphernalia at 35 P.S. § 780-113(a)(32). On April 8, 2008, the Court imposed upon the Defendant a sentence of five (5) to (10) years in a

State Correctional Institution for Possession with the Intent to Deliver and for the remaining counts, guilty without further penalty.

Discussion

There was sufficient evidence to sustain the jury's verdict

The test used to determine the sufficiency of the evidence in a criminal matter is "whether the evidence, and all reasonable inferences taken from the evidence, viewed in the light most favorable to the Commonwealth, as verdict-winner, were sufficient to establish all the elements of the offense beyond a reasonable doubt." Commonwealth v. Maloney, 876 A.2d 1002, 1007 (Pa. Super. Ct. 2005) citing Commonwealth v. Lawson, 759 A.2d 1 (Pa. Super. Ct. 2000). In applying the sufficiency of the evidence test, the Court "may not weigh the evidence and substitute [it's own] judgment for that of the fact-finder." Commonwealth v. Lambert, 795 A.2d 1010, 1014 (Pa. Super. Ct. 2002). When applying "the above test, the entire record must be evaluated and all evidence actually received must be considered." Id. at 1015.

The elements of a charge of Possession with the Intent to Deliver are the possession of a controlled substance and the specific intent to deliver said controlled substance to another. 35 Pa.C.S.A. § 780-113(a)(30). According to the Pennsylvania Supreme Court, the intent to deliver may be inferred from possession of a large quantity of controlled substances. Commonwealth v. Jackson, 645 A.2d 1366, 1368 (Pa. Super. 1994). However,

> if the quantity of the controlled substance is not dispositive as to the intent, the court may look to other factors. Other factors to consider . . . include the manner in which the controlled substance was packaged, the behavior of the defendant, the presence of drug paraphernalia, and large sums of cash found in possession of the defendant.

Commonwealth v. Ratsamy, 934 A.2d 1233, 1237-38 (Pa. 2007) citing Jackson, 645 A.2d at 1368. Further, "[e]xpert opinion testimony is admissible concerning whether the facts surrounding the possession of controlled substances are consistent with an intent to deliver rather than with an intent to possess it for personal use." Ratsamy, 934 A.2d 1238.

In the instant case, the Commonwealth introduced into evidence that the contraband found on the Defendant consisted of one larger plastic bag knotted at the top, containing 24 smaller marked bags of powder cocaine weighing 10.7 grams. N.T. 3/3/08 pgs. 48-49. The Commonwealth's narcotics expert, Officer Jeremy Brown ("Brown") testified that "the smaller individual bags are markings – usually markings by a dealer or a group of dealers contain a controlled substance inside of another bag, which is commonly referred to as a distribution bag where they distribute the contents of the bag with the narcotics inside that bag." Id. at 48. In response to a question regarding whether it would be unreasonable to believe that a drug user would buy a big amount of drugs if the user were to get their hands on a substantial amount of money, Brown testified,

> In my experience users that come across large amount of money have purchased significant amounts of drugs. I wouldn't necessarily say 10 grams, however, they're smart enough to purchase the drugs that are packaged differently. The way that they're packaged a dealer makes more money when they break down cocaine. They package it in individual bags and sell these. I'm assuming these are probably 20-dollar bags depending on who they're selling to and instead of say, for an example, a dealer has a few hundred dollars they're not going to spend [$]250, $300 for little bags they're going to find a dealer who's going to give them – break it off bigger get more for their money. These dealers are making more money by packaging smaller in these bags, breaking it up. . . . So a user is not going to waste their money purchasing a bunch of little bags like that they're going to go buy one bag, call the dealer say I have $250 can I get a few grams.

Id. at 54-55. Brown also testified that he has never in his experience "had contact with a user who had a relatively large amount of money, definitely that much cocaine in addition to a firearm, two cell phones, the way the money is in his pockets and so forth." Id. at 51-52.

Moreover, Brown testified that "[b] ased on the case and everything I described the Defendant did possess the cocaine with the intent to deliver. Id. at 52. Viewed in the light most favorable to the Commonwealth, the Court finds there was sufficient evidence for the jury to find the Defendant guilty of Possession with the Intent to Deliver cocaine.

The jury's verdict was not against the weight of the evidence

"The question of weight of the evidence is one reserved exclusively for the trier of fact who is free to believe all, part, or none of the evidence and free to determine the credibility of witnesses." Commonwealth v. Solano, 906 A.2d 1180, 1186 (Pa. 2006) citing Commonwealth v. Champney, 832 A.2d 403, 408 (Pa. 2003). The test to determine whether the jury's verdict was against the weight of the evidence is not whether the trial judge, based on the same facts, would have arrived at the same conclusion. Commonwealth v. Edwards, 903 A.2d 1139, 1148 (Pa. 2006) (and cases cited therein). Rather the test is "whether the jury's verdict is so contrary to the evidence so as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." Id.

Instantly, in light of the physical evidence and expert testimony, the jury's verdict does not shock the Court's sense of justice. Therefore, the Court suggests that the Defendant's contention that the jury's verdict of guilty was against the weight of the evidence is not justified.

The Court did not violate Pa. R. Evid. 404(b) or Defendant's Sixth Amendment right to confrontation

Defense Counsel asserts Brown's rebuttal testimony at trial was hearsay in violation of Defendant's Sixth Amendment right to confrontation, overly prejudicial, and lacked probative

value other than to show propensity in violation of Pa. R. Evid. 404(b). In opposition, the Commonwealth argues the evidence was not in violation of the Sixth Amendment or Pa. R. Evid. 404(b) as the evidence was not introduced in its case in chief, but only introduced after Defendant took the stand and testified as to his good character and denied any criminal activity extending beyond this case.

Brown's testimony on rebuttal was not in violation of Defendant's Sixth Amendment rights or Pa. R. Evid. 404(b). "[E]vidence of a pertinent trait of character of the accused is admissible when offered by the accused, or by the prosecution to rebut the same." Pa. R. Evid. 404(a)(1). "The only way in which character . . . can be proved is by evidence of reputation. This excludes evidence of specific acts or blameless life and rules out opinion evidence as to the character of the accused for the trait in question based on the witness' knowledge and observation." Commonwealth v. Scott, 436 A.2d 607, 610 (Pa. 1981).

The following is the testimony at issue in this case:

Q: Officer Brown, did you know the Defendant before this case?

A: Yes, ma'am.

Q: How did you know him?

A: Through other investigations.

Q: What kind of investigations?

A: Narcotics investigation and a shooting investigation.

Q: What about that shooting?

A: It was a shooting that took place on Memorial Ave a couple years ago in which the Defendant was shot as well as another individual.

Q: Were there drugs involved in that?

A: Yes, but I don't remember the extent of the drugs being involved, yes.

Q: And you testified earlier that you worked undercover and did drug investigations in over a thousand cases. Did you ever come in contact with the Defendant?

A: I don't recall specifically coming in contact with the Defendant, however, I did come in contact with confidential informants that provided me with information about the Defendant, yes.

Q: And what about that information did you get out of your investigation?

A: That the Defendant was dealing cocaine, specifically at the time it was out of a couple different bars, one being the Kiddlywink, particularly the pool table, that the individual would – him, in addition to others, would deal out of the Kiddlywink and that one of the methods of dealing was placing the cocaine in one of the pockets of the pool table after provided the money.

N.T. 3/3/08 pgs. 85-87.

After review of the transcript the Court finds that Brown's rebuttal testimony was not in violation of Defendant's Sixth Amendment right to confrontation or a violation of Pa. R. Evid. 404(b). Defendant took the stand in his case and offered evidence of his own good character. Defendant claimed he is a drug user, but that he never sold drugs, and was never involved in any investigations involving drugs. Id. at 73-74, 77. Brown was called by the Commonwealth on rebuttal to produce evidence about the reputation of the Defendant in the community to rebut the Defendant's testimony that he was law-abiding. Brown's testimony that he learned from confidential informants that "the Defendant was dealing cocaine[,] . . ." is evidence of a pertinent trait of character to rebut the Defendant's own testimony. The Court finds that Brown's testimony was not a violation of Defendant's Sixth Amendment right or a violation of Pa. R. Evid. 404(b).

Conclusion

Based upon the foregoing, the Court finds no reason upon which to grant Defendant's Post-Sentence Motion. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4)(a), Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty days (30) of the date of this Order to the Pennsylvania Superior Court; "(b) the right to assistance of counsel in the preparation of the appeal; (c) the rights, if the defendant is indigent, to appeal in forma pauperis and to proceed with assigned counsel as provided in Rule 122; and (d) the qualified right to bail under Rule 521(B)."

ORDER

AND NOW, this ___ day of August 2008, based on the foregoing Opinion, it is hereby ORDERED AND DIRECTED that Defendant's Post Sentence Motion is DENIED.

By The Court,

Nancy L. Butts, Judge

cc: PD (JL)
DA (MK)
Hon. Nancy L. Butts
Trisha D. Hoover, Esq. (Law Clerk)
Gary Weber, Esq. (LLA)