IN THE COURT OF COMMON PLEAS, LYCOMING COUNTY, PENNSLYVANIA

COMMONWEALTH OF PENNSYLVANIA	:	No. CR-1096-2007
	:	
VS.	:	
	:	
MALIKI CHAPMAN	:	

OPINION
Issued Pursuant to Pa.R.A.P. 1925(a)

The Defendant has appealed this Court's Sentencing Order of September 25, 2007, which was the result of a jury finding the Defendant guilty of violating Title 35 Section 13(a)(30), making it a felony to deliver a controlled substance and Title 18 Section 7512(a), making it a felony to use a communication facility to commit, cause or facilitate the commission or the attempt thereof of a felony under the controlled substance, drug, device and cosmetic act.[1]

In Defendant's Concise Statement of Matters Complained of on Appeal, he asserts that the guilty verdict was not supported by sufficient evidence, was against the weight of the evidence, Defendant was denied due process as a result of the non-disclosure of material evidence and that the trial court erred by admitting hearsay evidence as proof of Defendant's guilt when the actual witness was not called to testify at trial.

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

[1] Appeal not filed in timely fashion however court reinstated Defendant's appeal rights on July 16, 2008

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 Defendant is charged with violation of Title 35 Section 13(a)(30), making it a felony to deliver a controlled substance. The term delivery, as used in this section, is defined 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. 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. *See* Commonwealth v. Metzger, 247 Pa. Super. 226, 372 A.2d 20, 22 (Pa. Super. 1977) ("the offensive conduct is simply the 'actual, constructive or attempted transfer from one person to another' of the prohibited substance"). A defendant actually transfers drugs whenever he physically conveys drugs to another person. *See* Commonwealth v. Cameron, 247 Pa. Super. 435, 372 A.2d 904, 907 (Pa. Super. 1977). At midmorning on March 29, 2006, Williamsport Police Officer Kenneth Mains was involved in what is called a "controlled buy". Officer Mains testified that a controlled buy is a term used when an undercover officer solicits an individual to purchase drugs from another person. Surveillance is set up in the area. A search of the

confidential informant is done in order to make sure there are no controlled substances already on his person. The informant is then surveilled as he purchases controlled substances from another individual. The confidential informant then returns the narcotics to the surveilling police officer who then logs the purchase into evidence. (Testimony of Officer Mains, p. 21, line 7 – p. 22, line 8). In setting up the controlled buy, Officer Mains dialed a number given to him by a confidential informant. (Id. at p. 27, lines 1-4). Officer Mains then handed the phone to the confidential informant. The confidential informant then told the person on the other end of the line that he "needed a teenager, which is drug reference to a sixteenth of an ounce of cocaine". (Id. at p. 27, lines 16-22). Officer Mains then advised the surveillance team to go to the 800 block of Norton Alley to set up surveillance. Officer Mains then thoroughly searched the confidential informant, finding no controlled substances on his person. (Id. at p. 28, line 2 – p. 29, line 19). Officer Mains then followed the confidential informant to the purchase point, where he lost sight of the informant after he exited his vehicle. Officer Mains then regained sight of the informant as he entered his vehicle. After a thorough search of the informant, "three loose rocks of crack cocaine" were discovered on his person and the money with which the informant was to buy the narcotics was gone. (Id. at p. 32, line15 – p. 33, line 11). After viewing the videotape of the controlled buy, Officer Mains determined that the seller of the three rocks of cocaine was Defendant Maliki Chapman. In open court, Officer Mains then identified Maliki Chapman as the Defendant. (Id. at p. 36, lines 15-24).

Williamsport Officer Jeremy Brown also testified regarding the videotape. Officer Brown testified that he himself performed the videotaping of the controlled buy

and that after the buy was concluded, the videotape was marked with an incident number and placed in evidence. (Testimony of Officer Brown, p. 51, lines 21-25). He testified that some portions of the videotape seem to shut off or go blank because the police are trying to conserve battery power and the length of tape. He further testified that the police are constantly trying to avoid being identified by passersby and therefore sometimes must put down the camera or shut it off. (Id. at pp. 54-55, lines 14-22). Officer Brown further testified that he only ever took his eyes off the Defendant at times when Officer Mains had his eyes on him. (Id. at pp. 55-56, lines 24-1). Officer Brown testified that he watched the Confidential Informant make contact with the Defendant and that the informant did not have contact with anyone other than the Defendant and the police before, during or after the narcotics purchase. Officer Brown testified that he did not witness anything pass between the Confidential Informant and the Defendant. (Id. at pp. 56-57, lines 16-22). Despite the lack of eyewitness testimony to the actual passing of narcotics, when the officers' testimony and videotape evidence is taken together, it is clear to this Court that the jury's verdict of guilty was supported by sufficient evidence and not against the weight of the evidence.

Defendant is also charged with violation of Section 7512(a) of the Crimes Code, which states that "[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[.]" Defendant elicited testimony from Officer Mains regarding the fact that the phone that was found on the Defendant was not determined by police to be the same phone that was dialed by the Confidential Informant prior to setting up the controlled buy. However, Officer Mains

testified that telephones are used by defendants in controlled buys and are not always registered to the person who is using them. He further stated that, "…I've never had one that was registered in the defendant's name. It's usually somebody else's name and they pass the telephone around from person to person." **Furthermore, Officer Mains testified that the number that was dialed to set up the controlled buy was 974-3334. Officer Miller then testified that in the process of booking the Defendant, he was asked what his phone number was and the Defendant told him it was 974-3334.** Clearly, the testimony supports the guilty verdict pursuant to 75 Pa. C.S. 7512(a).

Defendant next argues that he was denied due process as a result of the non-disclosure of material evidence. This argument however fails to state what material evidence he is referring to. This Court presumes that Defendant is referring to paragraph 13 of his Amended PCRA Petition, which states: "13. The Petitioner also avers that he should be granted a mistrial due to the fact that the Commonwealth failed to disclose Brady material, specifically, the fact that the investigators assigned to the case were under investigation for their own criminal activity and thus he should have been permitted to appeal his conviction." The Supreme Court in Brady established that, "…the suppression by the prosecution of evidence favorable to an accused…violated due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83 (1963). However, "the rationale underlying *Brady* is not to supply a defendant with all the evidence in the government's possession which might conceivably assist the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence *only* known to the government." (emphasis in original) Commonwealth v.

Santiago, 654 A.2d 1062, 439 Pa. Super. 447, 460 (1994). The law is clear, therefore, that a "prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused, that, if suppressed, would deprive the defendant of a fair trial." Santiago, supra at 460. Finally, "to establish a *Brady* violation a defendant must show (1) that the prosecution suppressed evidence, (2) that the evidence suppressed was favorable to the defendant or exculpatory, and (3) that the evidence suppressed was material to the issues at trial." Santiago, supra at 461. Nothing in Defendant's amended PCRA petition or his statement of matters complained of articulates whether the investigators in question were ever disciplined for their alleged criminal activity. If the investigators were not disciplined, the charges were dropped or they were not found guilty of the alleged crimes, this Court fails to see how bare allegations of investigator misconduct not pertaining to the case at bar would be material to the issues at trial. If the investigators were disciplined, this information would be of public record, thereby failing to satisfy the underlying rational of *Brady* which is the disclosure of evidence known **only** to the government.

Furthermore, after-discovered evidence is the basis for a new trial only if it: (1) has been discovered after the trial and could not have been obtained at, or prior to, the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) *will not be used solely for impeaching credibility of a witness*; (4) is of such nature and character that a different verdict will likely result if a new trial is granted." (emphasis added) Commonwealth v. Brosnick, 530 Pa. 158, 162, 607 A.2d 725, 727 (1992). This Court can see no other reason for the Defendant to wish to introduce evidence of investigatory misconduct other than to impeach the

investigator's credibility. Therefore, this Court finds the argument that Defendant was denied due process as a result of the non-disclosure of material evidence to be without merit.

Finally, Defendant argues that this Court erred by admitting hearsay evidence as proof of Defendant's guilt when the actual witness was not called to testify at trial. Again, Defendant fails to state with particularity the evidence in question or the identity of the witness in question. It is this Court's belief that Defendant is referring to testimony by one or more Officers that they knew that they could set up a "controlled buy" with Defendant because of statements made to them by the confidential informant. The Officers' statements however do not constitute hearsay. Hearsay is an "out-of-court utterance offered to prove the truth of the matter asserted." Commonwealth v. Coleman, 458 Pa. 112, 326 A.2d 387 (1974). In the case at bar, the statements in question were not offered to prove the Defendant was a drug dealer, rather, they were offered to show the circumstances upon which the controlled buy was predicated. This court overruled Defendant's objection to the use of the term "usual place" by Officer Mains because the phrase was merely a part of the Prosecutions foundation building for the purposes of the circumstances predicating the controlled buy and not being offered for the truth of the matter it asserts. Further, upon request of Defense counsel, this court sustained objection to Officer Mains stating that the Confidential Informant told him that he purchased narcotics from the Defendant before. This court further provided a cautionary instruction to the jury as is follows: "Folks, with regard to the officer's comment about what the Confidential Informant told him, you may not consider that evidence for the truthfulness of that assertion or that information and therefore the comments regarding what the

Confidential Informant said are stricken." (Trial Transcript, pp. 25-26, lines 25-6). The presumption in our law is that the jury follows instructions. Commonwealth v. Stoltzfus, 462 Pa. 43, 55, 337 A.2d 873, 879 (1975). On a third occasion, this Court overruled but noted Defendant's objection to the statement of Corporal Dustin Kreitz that, "…the objective was to have the Confidential Informant purchase cocaine off an individual that they knew who sold cocaine." This statement was in reply to the Prosecution's question, "And do you recall the nature of that controlled buy?" This Court stated at the time of the objection, "I don't think there was any clear inference that the defendant specifically was a target." This statement coupled with an already in effect cautionary instruction, compels this Court to conclude that the jury did not consider the officers' testimony regarding what the Confidential Informant told him in rendering its verdict. This Court further finds that the term "usual place" was not hearsay because it was not offered to prove the truth of the matter it asserts and was merely introduced to build a foundation for the officer's testimony and explain the course of police conduct. *See* Commonwealth v. Sneed, 526 A.2d 749, 754, 514 Pa. 597, 606 (Court held that third-party out of court statement, relayed by police at trial, to be non-hearsay as it was merely offered to show how officer came to be at the crime scene on the night in question). *But See* Commonwealth v. Yates, 613 A.2d 542, 531 Pa. 373 (1992)(Where hearsay was direct evidence putting defendant at the scene dealing).

Accordingly, the evidence clearly supports the Defendant's conviction and the appeal should be dismissed.

BY THE COURT

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Richard A. Gray, J.

cc: Jean Longo, Public Defender
Mary Kilgus, Assistant District Attorney