

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-1553-2006
:
vs. : CRIMINAL DIVISION
:
:
:
KYLE JAMES, :
Defendant : 1925(a) Opinion

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

This opinion is written in response to Defendant’s appeal from his judgment of sentence. The relevant facts follow.

In 2006, Jenny Lehman was acting as a confidential informant (CI) for the Lycoming County Drug Task Force. On August 24, 2006, the CI placed a phone call to 777-2727, the cell phone number for Wop (Rasheed Watson) to purchase drugs. When she did not get an answer, she called 777-5244 and spoke to Kim (Shakeem Taylor) and asked what she could get for \$200. He said he would sell her a ball, which is a street term for about 3.5 grams of cocaine. Kim told her to meet him at the Quik Fill in the 2700 block of West Fourth Street, which is across the street from Roosevelt Middle School in the city of Williamsport.

The Drug Task Force provided the CI with \$200 in pre-recorded funds.¹ Members of the Drug Task Force drove her to the Quik Fill and set up surveillance in the area.

¹ The front of each of the bills was photocopied, showing the serial number for each bill.

The CI went into the Quik Fill and bought a pack of cigarettes. She came outside and called Kim from the pay phone outside. Kim said he was on his way. Kim drove up in a Nissan Altima with two other individuals. Defendant was the rear driver's side passenger.

The CI entered the vehicle and sat in the rear passenger seat. She handed Kim \$180 and he handed her a plastic bag containing a white powdery substance, which subsequent testing revealed to be cocaine. The CI exited the vehicle and Kim drove away. The police followed the vehicle and conducted a felony stop a block or two away. All the occupants were taken into custody. The police found the \$180 in buy money on Defendant's person and an additional, separate wad of \$229. No money was found on Kim or the other passenger. The police arrested Defendant and charged him with conspiracy to deliver a controlled substance and delivery of a controlled substance.

The Court held a jury trial in this case on September 4-5, 2007. The jury acquitted Defendant of the delivery charge, but convicted him of conspiracy.

Defendant filed a timely notice of appeal. In his matters complained of on appeal, Defendant raises three issues: (1) the evidence was insufficient to support the jury's verdict; (2) the verdict was against the weight of the evidence; and (3) the Court erred in allowing the Commonwealth to present evidence of prior deliveries by the co-defendant to the CI when Defendant was not present for the prior deliveries.

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, 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).

In Commonwealth v. McCall, 2006 PA Super 329, 911 A.2d 992 (Pa. Super. 2006), the Pennsylvania Superior Court set forth the following elements for conspiracy:

To sustain a conviction for criminal conspiracy, the Commonwealth must establish that the defendant (1) entered into an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent and (3) an overt act was done in furtherance of the conspiracy. ‘This overt act need not be committed by the defendant; it need only be committed by a co-conspirator.’

911 A.2d at 996, quoting Commonwealth v. Hennigan, 2000 PA Super 145, 753 A.2d 245, 253 (Pa. Super. 2000). Circumstantial evidence alone may be sufficient to convict one of a crime. Davido, *supra*; Commonwealth v. May, 540 Pa. 237, 246, 656 A.2d 1335, 1340 (Pa. 1995); Commonwealth v. Gorby, 527 Pa. 98, 107, 588 A.2d 902, 906 (Pa. 1991). In fact, the McCall court noted

The essence of a criminal conspiracy is a common understanding, no matter how it came into being, that a particular criminal objective be accomplished. Therefore, a conviction for conspiracy requires proof of the existence of a shared criminal intent. An explicit or formal agreement to commit crimes can seldom, if ever, be proved and it need not be, for proof of a criminal partnership is almost invariably extracted from the circumstances that attend its activities. Thus, a conspiracy may be inferred where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation.

911 A.2d at 996-97, quoting Commonwealth v. Johnson, 719 A.2d 778, 784-85 (Pa. Super. 1998)(en banc).

The Court finds the Commonwealth presented sufficient circumstantial evidence to establish the conspiracy charge. Wop gave the CI both his and Kim’s cell phone

numbers to call to buy drugs. Through the CI, the police set up controlled buys of cocaine using these cell phone numbers. On August 24, 2006, the CI tried Wop's number but did not get an answer. She reached Kim and he told her to meet him at the Quik Fill. The police recorded the serial numbers of the buy money transaction by photocopying each bill. Then they transported the CI to the Quik Fill and set up surveillance in the area. The CI purchased cocaine from Kim. When Kim drove away, the police who were involved with surveillance followed him and stopped the vehicle a few blocks away, within minutes of the delivery to the CI. Defendant was found in possession of the \$180 in buy money; no money was found on Kim, the person who sold the cocaine to the CI. Officer Kenneth Mains testified that in his experience handling drug cases sometimes individuals do not sell by themselves; sometimes they have one person carry the narcotic and another person carry all the money so if one person gets caught they are not losing both the narcotic and the money. Officer Mains also testified that they will share cell phones that way whoever has the phone and gets a call can deliver the drugs. Based on this evidence, the jury found Defendant was the money man in a conspiracy with Kim to deliver cocaine.

Defendant also claims the verdict was against the weight of the evidence. Defendant, however, did not raise this issue in a motion for a new trial or other post-trial motion; therefore, this issue is waived. Pa.R.Cr.P. 607; Commonwealth v. Barnhart, 2007 PA Super 293, 933 A.2d 1061, 1066 (Pa. Super. 2007); Commonwealth v. Robinson, 2003 PA Super 61, 817 A.2d 1153, 1162 (Pa. Super. 2003). Even if this issue were not waived, the Court does not believe the verdict was against the weight of the evidence. 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, 820 A.2d 795, 805-06 (Pa. Super. 2003). A new

trial is awarded only when the jury's verdict is so contrary to the evidence 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. 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.

Defendant has failed to specify why he believes the verdict is against the weight of the evidence; however, the Court surmises that Defendant has this belief because at trial he called Kim as a witness for the defense and he testified that: he asked Defendant to go for a ride with him; Defendant did not know he was going to meet the CI for a drug transaction; and he gave the buy money to Defendant to give to his family for bail money or to hire an attorney after he saw the flashing lights of the police because he realized he was going to be arrested. The jury, though, did not have to believe Kim'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). It did not surprise the Court or shock its sense of justice that the jury apparently rejected Kim's credibility since he was an admitted drug dealer and it did not make sense for Kim to be taking two people with him when he went to the Quik Fill to sell drugs to the CI if those people were not involved in some way. Why would a drug dealer want witnesses to his criminal acts? Kim's testimony was not that his passengers asked him for a ride, but that he asked them if they wanted to go for a ride.

Defendant's final issue is the trial court erred by allowing unfairly prejudicial

evidence of prior deliveries between Kim and the CI and Wop and the CI to be admitted as substantive evidence of Defendant's guilt even though Defendant was never present for the prior deliveries. Immediately prior to trial, the Commonwealth filed a motion in limine seeking to introduce evidence of the prior two deliveries to prove the conspiracy charge. This motion was argued before the jury was brought into the courtroom for the trial. See N.T., September 4-5, 2007, at pp. 3-9. It was conceded Defendant was not present for the prior deliveries.

Admission of evidence is a matter within the sound discretion of the trial court, and will not be reversed absent a showing that the trial court clearly abused its discretion. Commonwealth v. Cooper, 941 A.2d 655, 667 (Pa. 2007). Not merely an error in judgment, an abuse of discretion occurs when 'the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence on record.' Id. (citations omitted).

Although this was a close question, the Court found evidence of the prior deliveries was relevant to the conspiracy charge and to negate the defense of mere presence. All the deliveries occurred at the Quik Fill and all were set up by call either 777-2727 or 777-5244. Each time Wop or Kim made a delivery to the CI, they brought someone else with them. N.T., September 4-5, 2007, at pp. 446-50. Was this a mere coincidence? It is highly unlikely. As queried in our discussion of the weight of the evidence, why would a drug dealer want witnesses or spectators to his crimes if they were not involved? Defendant wasn't merely present; he was found in possession of the buy money.

The Court also does not believe that the introduction of this evidence caused undue prejudice to Defendant because the Court instructed the jury that the only purpose for

which they could consider this evidence was whether it was circumstantial evidence of Defendant's involvement in a conspiracy on August 24, 2006; Defendant was not charged with any crime for the dates of May 31 and June 28 and no evidence indicated Defendant was involved in the crimes on those days. N.T., September 4-5, 2007, at 207-209.

DATE: _____

By The Court,

Kenneth D. Brown, P. J.

cc: Mary Kilgus, Esquire (ADA)
Jeana Longo, Esquire (APD)
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original & 1)